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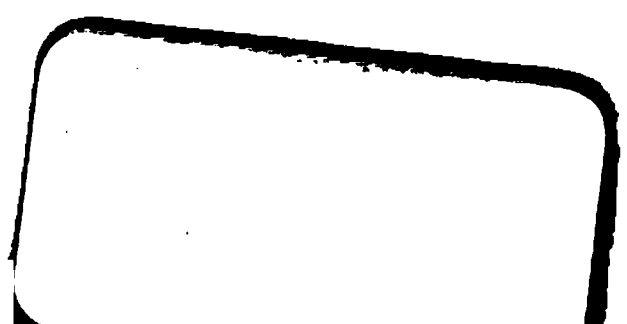
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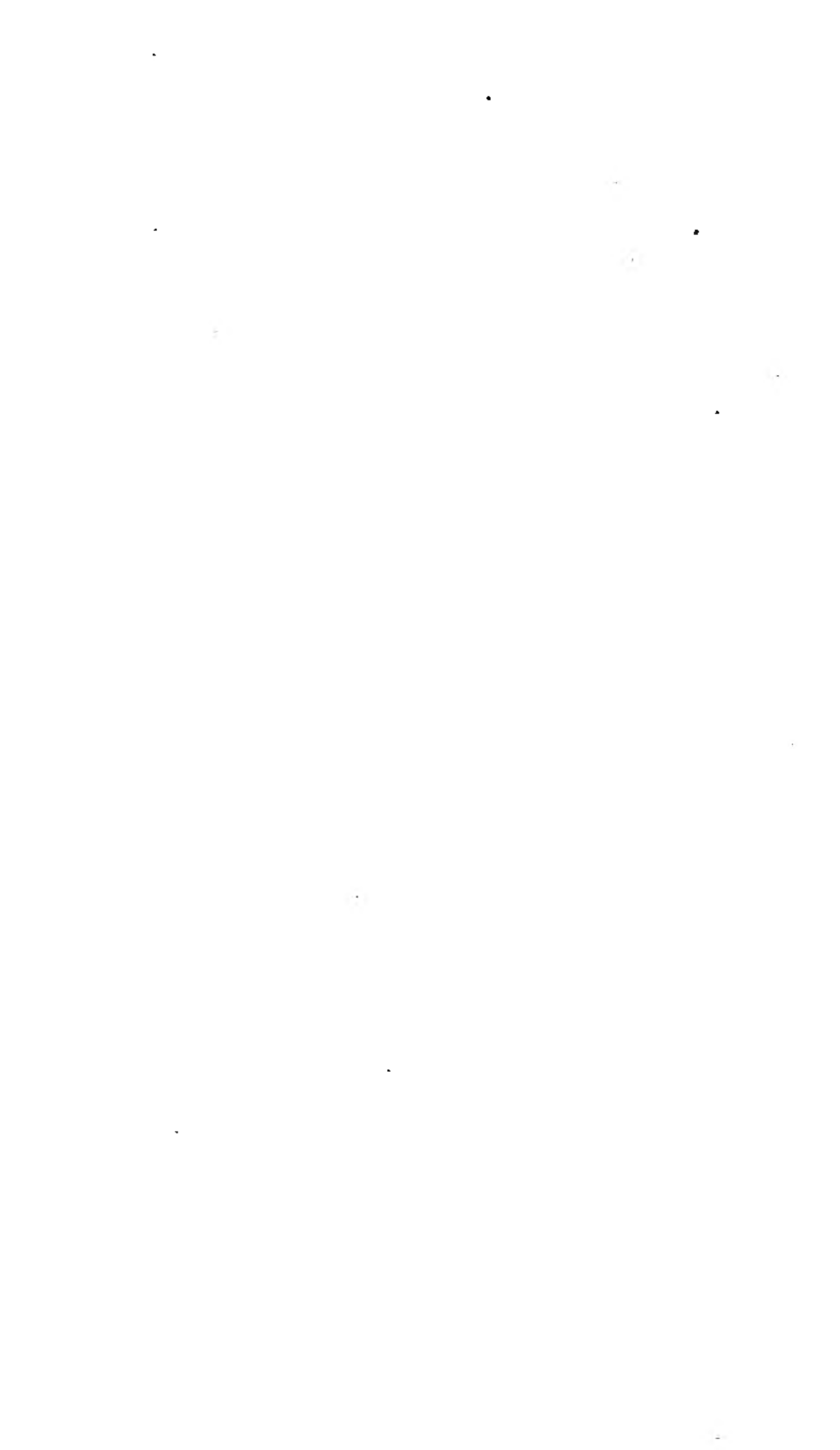
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1912 SESSION CASES.

CASES

DECIDED IN

THE COURT OF SESSION.

AND ALSO IN THE

COURT OF JUSTICIARY

AND

HOUSE OF LORDS,

FROM JULY 23, 1911, TO JULY 26, 1912.

REPORTED BY

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OF THE
COURT OF SESSION
DURING THE PERIOD OF THESE REPORTS.

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The Lord KINNEAR.

Lord JOHNSTON.

Lord MACKENZIE.

SECOND DIVISION.

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Lord SALVESEN.

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* Lord Ardwall died on 21st November 1911.

† Lord Hunter took his seat on 12th December 1911.

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HOUSE OF LORDS.

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WHO DELIVERED JUDGMENTS IN SCOTCH APPEALS DURING THE
PERIOD OF THESE REPORTS.

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EARL OF HALSBURY, Lords MACNAGHTEN,
ASHBOURNE, ALVERSTONE (C.J.), ATKINSON, GORELL,
SHAW OF DUNFERMLINE, and ROBSON.

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ERRATA.

P. 141, line 2 from foot, *for* "December" *read* "January."

P. 314, footnote ², *for* "109" *read* "190," and footnote ⁵, *for* "422" *read* "442."

P. 315, footnote ¹, *for* "109" *read* "190."

P. 1053, lines 4 and 8 from foot, the citation of *Allan's* case should be 21 R. 866.

P. 1082, line 14 from foot, *for* "*Burke*¹" *read* "*Burke*.³"

P. 1089, footnote, line 19 from foot, *for* "68" *read* "78."

P. 1091, line 22 from foot, *for* "75" *read* "78."

P. 1155, footnote, last line of Lord Ordinary's opinion, *for* "3 R." *read* "8 R."

CASES

DECIDED IN

THE HOUSE OF LORDS.

1911-1912.

DANIEL MORGAN, (Claimant) Appellant.—*Lord-Adv. Ure—Fenton.* No. 1.
 WILLIAM DIXON, LIMITED, (Respondents) Respondents.—
D.-F. Dickson—Beveridge. Nov. 18, 1911.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), First Schedule Morgan v.
 (4)—*Medical examination of workman on behalf of employer—Workman's* William
demand for presence of his own doctor. Dixon,
 Limited.

Held that a workman has not an absolute right to insist on his own doctor being present when he is being examined, in terms of paragraph (4) of the First Schedule to the Workmen's Compensation Act, 1906, by a medical practitioner on behalf of the employers; the question whether such a demand is reasonable or unreasonable, and, accordingly, whether the workman's insistence on it does or does not amount to a refusal to submit himself to examination, being a question of fact for the decision of the arbitrator in each particular case.

Diss. Lord Shaw of Dunfermline, on the ground that in ordinary circumstances the workman has a right to demand the presence of his own medical attendant, and that, if the employers object, the burden is on them of showing exceptional circumstances which make the workman's demand unreasonable.

(In the Court of Session, Dec. 24, 1910—1911 S. C. 403.)

This was an appeal by way of stated case in an arbitration under the Workmen's Compensation Act, 1906.

The question of law was:—"Whether, apart from any special circumstances in a particular case, a workman is entitled to have his own doctor present throughout the examination by the medical practitioner on behalf of the employers, in terms of section 4 of the First Schedule of the Workmen's Compensation Act, 1906, and whether the workman's refusal to submit himself for examination unless his doctor is allowed to be present amounts to 'refusal' or 'obstruction' in terms of said section."

The Second Division answered the first branch of the question in the negative, and found, in answer to the second branch, that the workman's refusal to submit himself for examination unless his doctor was allowed to be present amounted, in the circumstances of the stated case, to refusal in terms of the section.

The claimant, Morgan, appealed.

The appeal was heard on 13th November 1911.¹

¹ The following case, which was not referred to in the argument in the Court of Session, was cited in the House of Lords:—Powell v. Main Colliery Co., [1900] A. C. 366, at p. 371.

Nov. 13, 1911.

Morgan v.
William
Dixon,
Limited.

LORD CHANCELLOR.—The question which is raised in this case is stated by the arbitrator in a way which may be a little embarrassing, but we must deal with it as it is stated. The fourth clause of the First Schedule of the Workmen's Compensation Act * confers upon the employer a right to have a workman, who has given notice of an accident, examined medically, and there is a duty on the part of the workman to submit himself to be examined; but the statute is silent, and the rules are partially, and I may say mainly, silent as to the time, the place, and the conditions of this examination. Under those circumstances practically the common rule of law applies and imposes upon both parties the duty of acting reasonably in obeying the statute.

Now it seems to me that the question whether or not one side or the other has acted reasonably in a particular case is a question of fact in that particular case. If I were an arbitrator I should say as a question of fact that in most cases—perhaps in nearly every case—it is quite reasonable on the part of a workman to desire the presence of his own doctor. That may be sometimes unreasonable because of inconvenience or expense or for other reasons which can be established, and which one cannot forecast. I should have been disposed to say if there were no special circumstances, if there were no proof of inconvenience or expense, why should not the doctor of the workman be present? I see no harm that he can do; and I can conceive that he might be very useful. But it is not the function of a Court of law, or of this House as a Court of law, to take upon itself the decision of questions of fact which by the statute are left to the arbitrator or to the Sheriff or County Court Judge as the case may be. It is a matter for the arbitrator to decide, who has been entrusted with the duty by law, and not for me to decide, who have not been entrusted with the duty of finding facts. Now, that being so, what are the questions of law which we are asked to determine? The first is whether, apart from special circumstances in a particular case, a workman is entitled to have his own doctor present throughout the examination by the medical practitioner on behalf of the employer. This question was raised by the appellant's own argument; it was the only contention which he did put forward before the arbitrator; it has been put as a question of law to your Lordships. In my opinion the proper answer is that we cannot say as a matter of law that the workman is so entitled—there is no absolute right of the kind claimed. It is a question for the Sheriff or the arbitrator in each case to determine whether the condition imposed by the workman is a reasonable or an unreasonable condition.

The second question seems to me practically to amount to the same as the first, and to be dependent on the appellant's contention before the Sheriff. It really is the same question, and it also is a matter of fact which must be decided in each case, the principle of law being that both sides should act reasonably. In short, if these are to be treated as questions of law, I cannot answer in the affirmative either the one or the other of them. I cannot answer the first in the affirmative, and the second question seems to me to be the same as the first. Accordingly I am of opinion that the

* The clause is quoted in Lord Shaw's opinion, *infra* p. 5.

appeal must be dismissed. I desire to observe that the question raised and decided by the Sheriff was not whether the condition was reasonable (which, I think, was the right question), but whether there existed a right in law, in the absence of special circumstances, as was contended by the workman before the arbitrator. Nov. 13, 1911.
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LORD ATKINSON.—I concur. I think the parties came here to establish an absolute legal right in every workman to require that the medical examination by his employer's medical man should take place in the presence of his own medical man. I concur with my noble and learned friend on the woolsack that the law gives him no such abstract right, and that, therefore, that being the point raised, the appeal should be dismissed.

In my view the question whether there is a refusal or not under the Act to submit to examination is a question of fact, and any reasonable requirement that may be put forward by the workman, such as, for instance, having his own medical man present, ought not and would not by any reasonable arbitrator be held to amount to a refusal to submit to examination. I further think that it cannot be held that the request to have the workman's medical man present upon all occasions can be considered as *prima facie* reasonable. On the contrary I think, having regard to the wording of the statute, the burden of proving that the request is reasonable is thrown not upon the employer, but upon the workman who makes it. I concur with my noble and learned friend in thinking that in many cases,—indeed it would appear to me in most cases,—in the absence of any inconvenience or difficulty in getting the attendance of the person required, it is a most reasonable thing that the medical attendant of the workman should be present at the examination. I concur therefore that, your Lordships having no jurisdiction to decide issues of fact, and the appeal having been brought forward to establish this abstract legal right, it should be dismissed.

LORD GORELL.—I concur in the result of the judgments which have been pronounced.

I think that the question that was really contested in this case is made plain by reading one paragraph from the stated case, and that is this: "Parties were heard upon this minute, and it was conceded in argument by the appellant that there were no special circumstances in his case which called for the presence of his medical attendant at the examination, his contention" (and this is the real point of the matter) "being that it is the right of the workman in every case, without alleging any special reason, to have his medical attendant present at the examination, and to refuse to submit himself for examination unless and until his employers consented thereto."

I think that that paragraph states what was the real contest between the parties, which is expressed in a somewhat different way when you come to the statement of what is the question, at the end of the case, the question being stated as a question of law for the opinion of the Court. I think that what was really raised by that statement and contention was the right of the workman, independently entirely of the question whether it was reasonable or unreasonable (which it may have been), to have his medical

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man present at every examination in every case as it is here stated. That is a proposition which cannot, in my opinion, be maintained as matter of law, and I concur with what has fallen from the noble and learned Lords who have preceded me. It leaves out of consideration altogether what in these cases is practically a question of fact, whether it is reasonable or not for the workman to have his medical attendant present at the examination made on behalf of the employer. This contention is stated as amounting to a right wholly independent of whether there is any reason or not for another doctor being present—that is to say; that the workman shall have the right to have his own doctor present. I agree with what has fallen from my noble and learned friend Lord Atkinson. I think the burden is on the workman to show that there is some reason for the attendance of a further medical man, because, as I ventured to suggest in the course of the argument, *prima facie* under the statute the employer has the right to have the examination in order to see what his position is; the workman on the other hand, has to submit to it, and if he raises any objection by reason of his desire to have another medical man present, he raises a condition on his part, and I think it is for him to give the reason for raising such a condition.

For these reasons I concur in the view that this appeal should be dismissed.

LORD SHAW OF DUNFERMLINE.—Differing as I do so radically from your Lordships, I should naturally have desired time for further consideration as to the form of my judgment. But in the circumstances, my mind is so clear as to my own course that I cannot but hold it to be my duty to dissent, although I do so with diffidence. I am glad to be supported in the view which I entertain by the unanimous decision of the Court of Appeal, consisting of the Master of the Rolls and Farwell and Kennedy, L.JJ., in the case of *Devitt*.¹ Your Lordships have not referred to that decision, but in the Court below² the learned Lord Justice-Clerk referred to it thus: “There may have been many circumstances in that case as to which no inquiry or investigation was made, but which might have made the suggestion of the workman a perfectly reasonable and proper suggestion. It might have been most dangerous to the man himself to proceed without the practitioner being present who knew him and knew the state of his health and constitution, and who, if anything was being done in the course of the examination, could suggest that something ought to be done or something ought not to be done, as the case might be. That is not the kind of case we have here.” We were assured by the learned Lord Advocate, who had perused the papers in the case, and it was not denied, that this was a misapprehension on the part of the learned Judge, that there were no such special circumstances in *Devitt’s* case,¹ and that the case there presented stood entirely as the present case stands. And there can be little doubt accordingly that the helpfulness and value of the case of *Devitt*¹ was to some extent mitigated by his misapprehension. In my opinion the case of

¹ *Devitt v. Owners of Steamship “Bainbridge,”* [1909] 2 K. B. 802.

² 1911 S. C. 403, at p. 405.

*Devitt*¹ was rightly decided, and I desire to express my concurrence with the judgment of the learned Master of the Rolls. Nov. 13, 1911.

I have not heard from any one of your Lordships anything in the nature of an abstract consideration which would make the proposing of this condition unreasonable on the part of the workman. When section 4 of Schedule I. of the Act of 1906 was enacted it provided that "Where a workman has given notice of an accident, he shall, if so required by the employer, submit himself for examination by a duly qualified medical practitioner provided and paid by the employer, and, if he refuses to submit himself to such examination, or in any way obstructs the same, his right to compensation . . . shall be suspended." What has happened in this case is that the workman, being so requested by the employer to submit to an examination, has consented to that examination subject to his own medical man being present. Anything more unreasonable to my mind than the proposition that that is an out-and-out refusal does not occur to me at present, nor does it occur to me how that can be characterised as an obstruction. I do not find it in any way inconsistent with the statute that unless a refusal or obstruction shall be established the workman's reasonable rights should be respected equally with those of the employer. In this case it is said that the adjecting of this condition amounted to a refusal unless the workman was able to allege a reason in advance for having his desire gratified that his own doctor should be with him while his master's doctor was examining him. In the course of the argument I put the ordinary case: How can an injured workman allege such a reason in advance? He may have sustained injuries—in many cases he does sustain injuries—which produce not only direct but indirect effects, the latter especially being obscure.

It is of the utmost advantage to both parties that medical men representing adverse sides in what might turn out to be a contention should at the same place, at the same time, and under the same circumstances be parties to the one examination. It is, however, now, I presume, declared by law that, unless it is so found in advance as matter of fact that that is a reasonable thing, this House is to be debarred from saying that in point of law that is the workman's right. I put the proposition in point of law thus: that the right of the employer on the one hand to compel the submission of a workman to a medical examination has its correlative in the right of the workman to be protected and to have his interests seen to while that examination is conducted. I agree with my noble and learned friend on the woolsack that there is a right on the one side and an obligation on the other, *et e converso*, and I further agree that it is the duty of both parties to have these rights and obligations reasonably respected and performed. But under those circumstances what has been asked by the workman here? He has been asked to submit to an examination, and on the contrary side he says,—“I shall do so, but observe, please, my right, which is that my doctor shall be there.” I submit the view to your Lordships, which, I regret, has not been accepted, that in so proposing the workman's right the workman has done that which put the legal situation thus—that it was for the employer, denying the right upon the side of the

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Dixon,
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Dunfermline.

¹ 2 K. B. 802.

Nov. 13, 1911. workman, to establish that his denial was a reasonable one. As I construe the case, and speaking for myself, it is not the fact that an abstract right of an absolute and universal character is sought to be established. What is sought to be established here is laid down in the proposition by the learned Sheriff. It is to this effect: "Whether, apart from special circumstances in a particular case, a workman is entitled to have his own doctor present." I have no hesitation, for my part, in saying that that proposition ought to be answered in the affirmative. I think it is the right of a workman, who has to submit his person for examination, to have his doctor present, apart from any special circumstances in a particular case which would negate and nullify such a right. In those circumstances I should have no hesitation in deciding the case in a contrary sense to that which has been proposed from the woolsack.

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Lord Shaw of
Dunfermline.

Now, what are the facts of this case? There are none; there are no special facts found by the learned Sheriff at all. He has decided solely in the abstract that, special circumstances being absent, this right does not exist, or rather he has decided that apart from special circumstances the workman has no such right. As I say, there is no fact here to specialise this case at all and make the workman stand deprived of the right correlative to the examination to which I have referred. I bear in mind further, that in the ordinary case, which is the case we are dealing with here—a case admitted to be apart from specialty—no conceivable harm can be done either to the workman or to the medical adviser of the employer by having a second doctor on the spot. There is to be no charge to the employer, for it is to be done at the workman's own cost; and for my own part my recollection bears me out in saying that my experience of that great profession would be that ninety-five per cent of doctors would prefer another doctor being present so far as their own satisfaction and the ease of the situation and the settlement of the truth were concerned. But in the present case there is a special use attached to the presence of another medical man. Section 4 of the Schedule is not a section applicable to proceedings *in foro*. It is a section applicable to this situation where only notice of accident has been given, and where it must be the desire of both parties that an amicable and reasonable arrangement be come to. How desirable it is in those circumstances that this situation should be eased in the particular matter, that both doctors should agree as to what is wrong and what would be a suitable remedy. All the demand the workman has made here is that that agreement should be facilitated by the presence of his medical man. I cannot think that in its nature to be unreasonable. There are no facts proved or proceeded upon in this case to make it unreasonable or to suggest that it was unreasonable, and unless it is found in fact to be unreasonable owing to special circumstances, I do not think this House should be debarred from holding that the workman had that right.

As I have observed, I do not think the decision come to in the Courts below was a decision in fact. I do not think the Sheriff had addressed himself to it as a question of fact. He has treated the question as one of absolute right (conditioned in the sense I have explained), a right which he concludes not from fact, but from a construction of the Act of Parlia-

ment. In my view that is a matter of law. My whole view may be summed up in this proposition, that in the general case, in my humble opinion, it cannot be reckoned as a refusal if a workman makes the presence of his own medical man a condition of his willingness to submit to examination by the medical adviser of his employer. I cannot agree that the fact of the adjection of such a condition is *ipso jure* a refusal or obstruction. I hold it is nothing else than a reasonable thing, not displaced from its reasonableness by any fact proved. Accordingly, I respectfully dissent from the judgment proposed.

Nov. 13, 1911.
Morgan v.
William
Dixon,
Limited.

Lord Shaw of
Dunfermline.

LORD CHANCELLOR.—According to my own opinion it is a question of fact whether or not the presence or absence of the workman's doctor is reasonable in the particular case, and your Lordships are not judges of fact. That is all I intended to convey.

ORDERED that the appeal be dismissed with costs.

DEACON & CO.—SIMPSON & MARWICK, W.S.—BEVERIDGE, GREIG, & CO.—
W. & J. BURNES, W.S.

GEORGE ROSIE, Respondent.—*Atkin, K.C.—Constable, K.C.—*
J. G. Jameson.

No. 2.

Poor ALEXANDER MACKAY, (Claimant) Appellant.—*Anderson, K.C.—*
Hendry.

Nov. 13, 1911.

Rosie v.
Mackay.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), sec. 16—
Accident happening before commencement of Act—Application of Act—
Right of appeal to House of Lords—"Proceedings consequential" on medical
reference.

The Workmen's Compensation Act, 1906 (which provides for an appeal to the House of Lords that did not exist under the Act of 1897), enacts, sec. 16, that the Act shall not apply to cases where the accident happened before its commencement, "except so far as it relates to references to medical referees and proceedings consequential thereon."

In an arbitration with regard to an accident which had happened before the commencement of the Act of 1906, the arbitrator made a remit, under paragraph (15) of the Second Schedule to that Act, to a medical referee to examine and report, and thereafter pronounced an interlocutor which was appealed to the Court of Session.

An appeal having been taken from the judgment of the Court of Session to the House of Lords, *held* that the judgment of the Court of Session was not a "proceeding consequential" on the medical reference and accordingly that the provisions of the Act of 1897, and not those of the Act of 1906, applied, and excluded the appeal.

(In the Court of Session, June 14, 1910—1910 S. C. 714.)

Ld. Chancellor
(Loreburn).

The claimant, Alexander Mackay, appealed *in forma pauperis* to the House of Lords. An objection to the competency of the appeal was taken by the respondent, George Rosie, and the question was reserved by the Appeal Committee for argument before the House of Lords.

Ld. Atkinson.
Lord Gorell.
Lord Shaw of
Dunfermline.

The question was argued before the House on 13th November 1911.

Argued for the respondent;—The appeal was incompetent. The accident happened before the commencement of the Act of 1906, and accordingly the arbitration fell to be regulated by the Act of

Nov. 18, 1911.

Rosie v.
Mackay.

1897 (under which, admittedly, there was no appeal), except as regarded "references to medical referees, and proceedings consequential thereon," to which the Act of 1906 was applied by section 16 thereof. Here there had been no "reference" in the sense of section 16. The only "reference" in the purview of that section was the reference provided for in paragraph (15) of the First Schedule, which was a new, and in a sense an independent, procedure introduced by the Act of 1906. Section 16 did not apply to remits under paragraph (15) of the Second Schedule (the paragraph under which the Sheriff had proceeded), which provided only for an incidental remit for report, and not for a reference, and was in effect just a re-enactment of paragraph (13) of the Second Schedule to the Act of 1897. Further, even if the case was a case of a reference to a medical referee in the sense of section 16, it was absurd to maintain that the subsequent proceedings in the Court of Session, and this appeal to the House of Lords, were "proceedings consequential" on the reference. They were in fact consequential on the original application for review.

Argued for the appellant;—The appeal was competent. Section 16 of the Act of 1906 substituted the provisions of that Act for those of the Act of 1897 in all matters connected with medical references, and its effect was simply that, where the arbitrator had recourse to the machinery of a medical reference, he converted the process under the 1897 Act into a process under the 1906 Act, with the consequence that an appeal was competent to the House of Lords. The word "reference" had not the limited meaning which the respondent sought to give to it, but included a remit for a report under paragraph (15) of the Second Schedule. That was clearly the view of the framers of the Statutory Rules and Orders, 1907. "Proceedings consequential" on the reference was an expression wide enough to cover the interlocutors of the Sheriff-substitute and the Second Division. In fact if the words did not cover these interlocutors it was exceedingly difficult to give them any meaning, as the reference was a proceeding complete in itself.

LORD CHANCELLOR.—We were promised an interesting discussion upon a point of law under the Act of 1897 which I am afraid we shall be debarred from the pleasure of hearing, because I think there is no jurisdiction in this House to entertain this appeal.

This was an arbitration under the Workmen's Compensation Act, 1897, in respect of an accident which happened before the Act of 1906 came into operation. Under the old Act of 1897 there was no appeal to the House of Lords at all, and therefore, if it had not been for the particular interval of time at which this question has arisen, there could have been no pretence for saying that there was an appeal to this House—that has been decided. But then comes the Act of 1906. Now, the effect of the Act of 1906 is that an appeal to this House is given in cases which come within that Act. But there is also something further in the Act of 1906. The Act of 1906 in effect provides that "so far as it relates to references to medical referees and proceedings consequential thereon," the Act of 1906 is to apply at once; that is to say, to apply to accidents happening before the month of July 1907, at which the Act came into effect.

In this arbitration a point did arise in regard to a reference to a medical

referee; it was referred to a medical referee, who made his report and that report was acted upon by the Sheriff; and it is now said that because there was a reference under the Act of 1906 in the case of an arbitration which arose under the Act of 1897, the effect is to draw to that arbitration the power of appeal to this House which did not exist in respect of the arbitration as it originally was commenced.

I cannot entertain the view that that is right. In my opinion accidents which happened before the Act of 1906 came into effect were governed, and are governed, by the Act of 1897 in regard to all their incidents excepting "so far as relates to references to medical referees and to proceedings consequential thereon." I cannot think that "proceedings consequential thereon"—proceedings following upon a reference—include a judgment of the Court of Session; and accordingly, in my opinion, the contention that the power of appeal is constructively attached to a pending arbitration by virtue of those words in the statute of 1906, cannot be supported, and the jurisdiction of this House does not exist. Accordingly, this appeal will have to be dismissed, and I move your Lordships accordingly.

LORD ATKINSON.—I agree.

LORD GORELL.—I concur.

LORD SHAW OF DUNFERMLINE.—I also concur.

ORDERED that the appeal be dismissed.

SMILES & CO.—SIMPSON & MARWICK, W.S.—E. J. MARSH—JOHN S. MORTON, W.S.

THE CALEDONIAN RAILWAY COMPANY, (Complainers) Respondents.—

Clyde, K.C.—Morison, K.C.—Hon. W. Watson.

HUGH SYMINGTON AND OTHERS, (Respondents) Appellants.—

Sol.-Gen. Hunter—Sir Robert B. Finlay, K.C.—Gentles.

No. 3.

Nov. 16, 1911.

Caledonian
Railway Co.
v. Symington.

Compulsory Powers—Railway—Mines and Minerals—"Freestone"—Whether freestone a mineral a question of fact—Sufficiency of averments that freestone a mineral—Railways Clauses Consolidation (Scotland) Act, 1845 (8 and 9 Vict. cap. 33), sec. 70.

Whether "freestone" is or is not a mineral within the meaning of sec. 70 of the Railways Clauses Consolidation (Scotland) Act, 1845, is always a question of fact to be determined in view of the particular circumstances of each case.

In defence to a suspension and interdict brought by a railway company to restrain a quarrymaster from working "freestone" under the property of the railway, in respect that the "freestone" was not a mineral within the meaning of sec. 70, and therefore was not excepted from the conveyance of the lands to the railway company, the respondent averred that the "freestone" was a mineral in respect (1) that it did not form the substratum of the soil, and was not the common rock of the district; (2) that it was of exceptional quality and fineness, and of great commercial value; and (3) that at the time when the land was purchased by the railway company it was universally regarded as a mineral, and was so regarded by the railway company and by those from whom they purchased the land.

Held (rev. judgment of Second Division) that the respondents' averments were relevant, and proof allowed.

Nov. 16, 1911. I therefore think that there ought to be proof in this case, and that the judgment of the Court below ought to be reversed.

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LORD ATKINSON.—I concur.

LORD GORELL.—I take the same view. I concur in the judgment proposed.

LORD SHAW OF DUNFERMLINE.—In this case the Lord Ordinary allowed a proof. It is pled by one of the parties that the stone in question formed an exception to the general rock of the district. That exception must be established by evidence, and the onus of doing so rests upon the person proposing the exception. In the pleadings of parties under the law of Scotland there is a wholesome rule to the effect that a proof will not be ordered or evidence taken upon a vacuous generality. The whole question in this case is whether this pleading can be so characterised. If so, a party would be prejudiced by the lack of sufficient notice of the other party's case.

I cannot, in view of the passages that have been cited from answer 11, hold that this is a mere generality in pleading. I think the specification is sufficient to entitle the Lord Ordinary to have allowed the proof, and I think the burden of proof should be where I have ventured to put it. I am accordingly of opinion that the appeal should be sustained and a proof allowed, the appellants to lead therein, as was provided by the interlocutor of the Lord Ordinary, Lord Cullen, on 6th December 1910. That interlocutor appears to me to have been in all points correct, and should be restored.

ORDERED that the interlocutor appealed from be reversed; that the Lord Ordinary's interlocutor be restored; and that the respondents do pay to the appellants their costs here and below.

GRAHAMES, CURREY, & SPENS—HOPE, TODD, & KIRK, W.S.—BALFOUR ALLAN & NORTH—DOVE, LOCKHART, & SMART, S.S.C.

No. 4.

THE WALKER TRUSTEES, Pursuers (Respondents).—*Clyde, K.C.*—*Macphail, K.C.*—*C. H. Brown.*

Dec. 1, 1911.

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THE LORD ADVOCATE (as representing the Lords Commissioners of His Majesty's Treasury), Defender (Appellant).—*Lord-Adv. Ure—Sol.-Gen. Sir John Simon—S. A. T. Rowlatt—J. C. Pitman.*

SIR CHARLES CAYZER, BART., AND OTHERS, Defenders (Appellants).—*Lord-Adv. Ure—Sol.-Gen. Sir John Simon—S. A. T. Rowlatt—J. C. Pitman.*

Heritable Office—Principal Usher in Scotland—Emoluments—Fees from Peers of the United Kingdom—Treaty of Union, 1706, Art. 20—Act of Union, 1707 (6 Anne, cap. xi.)—Statute—Usage.

The Treaty of Union, 1706, ratified by the Act of Union, 1707, provided:—"XX. That all heritable offices, superiorities, heritable jurisdictions, offices for life, and jurisdictions for life be reserved to the owners thereof as rights of property in the same manner as they are now enjoyed by the laws of Scotland notwithstanding of this Treaty."

At the time of the Union the holder of the office of principal Usher

within the kingdom of Scotland was, under a royal charter dated 21st Dec. 1, 1911. January 1686, ratified by Act dated 15th June 1686, entitled to fees from all Scotsmen receiving honours from the King as sovereign of Scotland, and from Englishmen in Scotland who received such honours. Walker Trustees v. Lord Advocate.

In an action of declarator brought in 1908 by the holders of the office, *held* (rev. judgment of the Second Division) that, inasmuch as Article XX. of the Act of Union did not enlarge the rights of the office but merely reserved these rights unchanged, its holders were not entitled to fees from recipients of honours whose titles were not purely Scottish titles but were titles of the United Kingdom of Great Britain and Ireland; and that, as Article XX. was unambiguous in its terms, no consideration could be given to the fact that from 1766 to 1904 the holders of the office had claimed and received such fees.

(In the Court of Session 7th July 1910—1910 S. C. 1037.)

The Lord Advocate and others, defenders, appealed to the House of Lords.

The case was heard on 10th and 11th July 1911.

At delivering judgment on 1st December 1911,—

EARL OF HALSBURY.—I have had the opportunity of reading my noble and learned friend Lord Atkinson's judgment. I agree with it, and I do not think I can usefully add anything to his reasons.

LORD ATKINSON.—This is an appeal against a judgment of the Second Division of the Court of Session whereby it was declared that the respondents, a body of trustees incorporated by a private Act styled the Walker Trust Act, 1877, and admittedly the proprietors and holders of the heritable office of His Majesty's sole and principal Usher within the Kingdom of Scotland, are, as such, entitled to recover certain fees and dues, claimed to appertain to this office, from the recipients from the Crown of the following honours, titles, and dignities of the United Kingdom, namely, upon the creation of a Duke, £21, 13s. 4d.; of a Marquis, £18, 6s. 8d.; of an Earl, £15; of a Viscount, £10; of a Baron, £6, 13s. 4d.; of a Knight-Baronet, £5; and of a Knight, £3, 6s. 8d.

The action out of which the appeal has arisen was instituted by the Walker Trustees to try their right to recover these fees on the conferring by the Crown of honours, titles, and dignities of this character. The defenders, other than the Lord Advocate, who represents the Crown and the Lords Commissioners of His Majesty's Treasury, are all persons resident in Scotland whose titles are titles of the United Kingdom of Great Britain and Ireland. Two of them, namely, Sir Charles Cayzer, Bart., and Sir Arthur Bignold, are Englishmen, and three, namely, Lord Leith of Fyvie, Sir John Wilson, Bart., and Sir Henry Cook, are Scotsmen. The last-named appellant and Sir Arthur Bignold were created knights by accolade at Buckingham Palace in the year 1904. The titles and honours of all the others were conferred about the same date by patents under the Great Seal of the United Kingdom. The right of the respondents to recover these fees is the sole question for decision.

This office of Usher or White Rod, as he is styled, is a very ancient one. It existed for centuries before the Union of the Crowns of England and Scotland on the accession of James VI. of Scotland to the English Throne

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Dec. 1, 1911. as James I. of England in the year 1603. It admittedly was, and has
 Walker never ceased to be, a Scottish office. Its duties, such as they were, were
 Trustees v. performed in Scotland, and did not, and could not, before the year 1707,
 Lord Advo- affect or concern the holders of English or Irish peerages, dignities, or
 cate. honours as such, who were not members of either of the Houses of the
 Ld. Atkinson. Scottish Parliament, did not attend either general councils or feasts at the
 Scottish Court, and were not resident in that kingdom.

The earliest document referred to in evidence dealing with the office is a grant of 1393, confirmed by a statute of the Parliament of Scotland, of the Barony of Langton to Alexander Cockburn of Langton, in consideration of certain services to be rendered by him, including those of Usher of Parliaments, General Councils, and Feasts. It is stated in the appellants' case, and apparently not disputed, that charters were granted by the Scottish Sovereign in the years 1510, 1542, and 1595 respectively, consolidating this Barony of Langton, and annexing to it, as a dependency, the office of Usher or White Rod, with all its rights and privileges. It is further stated, and not apparently disputed, that the taking of fees by the holder of this office is first mentioned in a charter, dated in the year 1642, which, however, is not printed in the record. About five years later, on 2nd January 1647, Charles I., describing himself as the King of Great Britain, France, and Ireland, by charter under the Great Seal of Scotland, granted to Sir William Cockburn and Robert Cunynghame, therein described, this office, with the privileges and advantages belonging to it, to hold during their lives; and after their decease to the heirs-male and assignees of the said Sir William.

This charter contains a grant, the meaning of which was so much discussed, in the words following:—"Una cum omnibus feodis casualitatibus aliisque devoriis subscriptis solvendis per comites vicecomites Barones Majores Equites baronettos aliosque Equites quovis tempore affuturo creandos aut honores titulos et dignitates recepturos per nos nostrosve commissionarios per literas patentes aut quovis alio modo ab omnibus Scotis solvendis infra nostra dominia et similiter ab omnibus Anglis qui honores et dignitates infra dictum hoc regnum nostrum Scotiae a nobis recipiant, viz." Then follows a list of the fees.

The next charter necessary to consider is that dated 5th June 1674. It grants this office to Sir Archibald Cockburn, son of Sir Wiliam, the former grantee, the said Cunynghame having renounced. It contains a clause differing in no respect from that above quoted from the previous patent, save that after the word "recepturos" the words "per quondam clarissimum nostrum patrem" have been introduced, and the word "nos" omitted after the preposition "per."

Now, the first question one has to ask oneself is, what were the honours and dignities with which King Charles I. and King Charles II. respectively were dealing in these patents? At that period of time each of these monarchs could, as the Sovereign of England, confer English honours and dignities by patent under the Great Seal of England, as Sovereign of Ireland confer Irish honours and dignities under the Great Seal of Ireland, and as Sovereign of Scotland confer Scotch honours and dignities under the Great Seal of Scotland.

If either of these kings sought, in respect of their grants of English or Irish honours or dignities, to exact fees from the grantees, the exaction should be authorised by an Act of the Legislature binding upon the subject who received the grant, i.e., either a native of the particular country, or a person living or sojourning in it, and therefore under the protection of and subject to its laws.—(See Coke's Institutes, part 2, vol. ii., p. 533; Comyn's Digest, title Prerogative, vol. vii., p. 65.)

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Whether the law is the same in Scotland as in England on this point, it is unnecessary to discuss, inasmuch as an Act of the Scottish Parliament of 6th September 1681, ratified and confirmed the charter of 5th June 1674, granted to Sir Archibald Cockburn. This statute recites at length the charter of 2nd January 1647, to Sir William Cockburn and Robert Cunyng-hame, and translates into English the clause in that patent, the meaning of which is in controversy, in the following passage:—"All and Sundry the fees, duties, casualties, and profits belonging to the said office within the kingdom of Scotland according to the custom thereof, viz., All and Sundry casualties, fees, and compositions accrescing and belonging to the said office of Principal Usher to His Majesty, and these who exercise the same within the said kingdom of Scotland, and which were in use to be paid to the said Usher for infeftments of lands passing the Great Seal within the said kingdom either by resignations, confirmations, or new gifts, with all fees, casualties, and other duties under written, payable by earls, viscounts, lords, knight-baronets and other knights to be made in all time coming, or who should receive honours, titles, or dignities from His Majesty's said father or His Majesty's Commissioners by patents or any other manner of way. To be paid by all Scotsmen within His Majesty's dominions, and also by all Englishmen who shall receive any honours or dignities from His Majesty within the said kingdom of Scotland."

I have modernised the spelling of the passage. It then sets out that in "corroboration" of all rights and securities granted to Sir Archibald Cockburn and his predecessors, His Majesty granted and confirmed to him, his heirs and assigns, amongst other things, "all fees, casualties, and other duties above written payable by dukes, marquesses, earls, viscounts, lords, knight-baronets, and other knights, made or to be made, and who shall receive any honours, titles, and dignities by patent or any other way, and payable by all Scotsmen who shall receive . . . dignities within any of His Majesty's dominions, and by all Englishmen who have already obtained and who hereafter shall obtain honours or dignities from His Majesty and his successors within the said kingdom of Scotland." By this patent a salary of £250 sterling per annum was granted to Sir Archibald Cockburn and his assigns, holders of this office, to be paid out of the "first and readiest of the rents duties and casualties payable to His Majesty within the said kingdom of Scotland." This is, if I may so call it, the first stage in the documentary history of the office of "White Rod." No mention is made of the Great Seals of England or Ireland, nor is any English or Irish statute referred to dealing with any of those charters or the fees granted by them. And it would certainly appear to me to be impossible to read over these ancient documents without coming to the conclusion that the honours, titles, and dignities dealt with

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by them are Scottish honours, titles, and dignities,—that is, honours, titles, and dignities each of the several monarchs as Sovereign of the kingdom of Scotland had power to grant, and to those honours, titles, and dignities alone. It was, as I understood, contended by Mr Clyde, in his ingenious argument, that, owing to the presence of the words “payable by all Scotsmen within our dominions,” the patent applies to honours, titles, and dignities conferred upon Scotsmen by the King, as Sovereign of England, under the Great Seal of England, or as Sovereign of Ireland, under the Great Seal of Ireland, and further that there would be nothing illegal or unconstitutional in the Scottish Parliament passing an Act requiring a Scotsman in whatever part of the three kingdoms he might receive one of those honours, titles, or dignities, or be domiciled, to pay to this Scottish official a fee upon receiving it, inasmuch as he, being a Scottish subject, wherever he might be, owed allegiance to his Scottish Sovereign and submission to the Scottish Parliament.

Mr Clyde may possibly be right upon this point, though legislation of such a kind as he suggests would be somewhat unjust and altogether anomalous. I cannot, however, adopt the construction for which he contends. I think the words “to be paid by all Scotsmen within His Majesty’s dominions” were introduced in order to make those fees recoverable from the Scottish grantee by reason of his nationality in whichever of the three kingdoms he might be resident, or might receive the honour, whereas the English recipient of Scottish honours and dignities could only be reached by a Scottish statute or by a judgment of a Scottish Court if he came within that kingdom. These provisions touching the payment of these fees do not alter the conclusion to which I have come as to the nature of the honours, titles, and dignities dealt with. That this was the view of the Crown and of the Scottish Legislature some few years before the Union is, I think, suggested by the wording of the charter of resignation in favour of Alexander Cockburn junior of Langton, dated 21st January 1686, and in the Scottish statute confirming it, passed on 15th June in the same year. The words in the charter dealing with those fees run thus:—“*Una cum omnibus feodis casualitatibus aliisque censibus subscriptis solvendis per duces Marchiones Comites Vicecomites dominos milites Baronettos aliosque equites creatos et creandos ac honores titulos et dignitates a nobis vel successoribus nostris aut commissionariis nostris per literas aut quovis alio modo recepturas ac solvendis per omnes Scoticas (sic) dignitates intra quaecunque nostrorum dominiorum recipientes ac per omnes Anglos qui hactenus assiquiti sunt vel in posterum honores et dignitates a nobis vel successoribus nostris in dicto Regno nostro assequeuntur.*” And the confirming statute, though it contains, near the end of it, a general clause of ratification of the patent, recites the charter intended to be ratified as granting all “new gifts with all casualties, fees, and other rents under written payable by dukes, marquesses, earls, viscounts, lords, knights-baronets, and other knights created, or to be created, and receiving honours, titles, and dignities from His Majesty and his successors within the said kingdom of Scotland.”

It certainly appears to me, therefore, that the rights of the Usher of the White Rod were at the time of the Union simply these:—(1) He was entitled to receive the stipulated fees from the recipients of honours con-

ferred by the King as Sovereign of Scotland ; (2) he could recover those fees from a Scotsman in whatever part of the King's dominions he, the grantee, might be when he received the honour, dignity, or title ; and (3) he could recover the like fees from all Englishmen whenever they received those honours in Scotland, and could, therefore, be reached by the tribunals of that country.

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The next question is, Did the Treaty and Act of Union alter the White Rod's position, enlarge, or curtail his rights ? In my view articles 20 and 23 of the Treaty left his rights precisely as they were, though, no doubt, they made less lucrative the enjoyment of them. The 20th article runs as follows :—"That all heritable offices, superiorities, heritable jurisdictions, offices for life, and jurisdictions for life be reserved to the owners thereof as rights of property in the same manner as they are now enjoyed by the laws of Scotland, notwithstanding of this Treaty."

It left to this officer all the rights of property he then enjoyed by the law of Scotland by virtue of his office. The operation of this and the 23rd article may, so far as he is concerned, be harsh and oppressive in this, that, as peers of Scotland could not thenceforth be created, he lost the fees which but for the Treaty he would have received. This is undoubtedly so, but while such a consideration might possibly give the trustees a strong claim upon the bounty of the Crown, it cannot affect the question of the proper construction of the Treaty and the ancient documents of earlier date. That is a pure question of law, and is, moreover, the only question for the decision of your Lordships. The Lord Ordinary, the Judges in the Second Division, and, indeed, counsel in argument, have each and all failed, I think, to point out what is the alleged ambiguity in this article of the Treaty—or, indeed, in the earlier documents—which the usage or practice obtaining from 1766 downwards touching the payment through the Treasury of these fees by all recipients of honours, titles, and dignities of the United Kingdom was admitted in evidence to explain or to remove, and have also failed to show how it aided in determining the subject-matter to which any one of these documents applies, or in fixing the limits of the rights they confer.

As against a plain statutory law no usage can prevail—see Lord Brougham, *Magistrates of Dunbar v. Duchess of Roxburghe*¹ ; Lord Campbell, C.J., *Gorham v. The Bishop of Exeter*.² In *Herbert v. Purchas*³ Lord Hatherley is reported to have said : "It is quite true that neither contrary practice nor disuse can repeal the positive enactment of a statute, but contemporaneous and continuous usage is of the greatest efficacy in law in determining the true construction of obscurely framed documents." In *The Trustees of Clyde Navigation v. Laird & Sons*⁴ Lord Watson says : "When there are ambiguous expressions in an Act passed one or two centuries ago, it may be legitimate to refer to the construction put upon these expressions throughout a long course of years, by the unanimous consent of all parties interested, as evidencing what must presumably have been the intention of the Legislature at that remote period." And in a recent case in your Lordships' House,

¹ (1835) 3 Cl. & F. 335, 358.

² (1850) 15 Q. B. 52, at p. 73.

³ (1871) L. R., 3 P. C. 605, at p. 650.

⁴ (1883) 10 R. (H. L.) 77, at p. 83, 8 App. Cas. 658, at p. 673.

Dec. 1, 1911. *Winstanley v. North Manchester Overseers*,¹ it was held that a rector of a parish was rateable under the 43 Eliz. cap. 2, in respect of the burial fees he received as occupier of the parish burial ground, notwithstanding the fact that for over three centuries the practice had been not to rate him.

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It may be doubted in the present case, however, whether the persons who paid these fees knew anything whatever of the right by virtue of which they were demanded, or whether the payment could be described, to use the language of Lord Watson, as having been made with the consent of all parties interested; but however that may be, the payment of the fees for even 150 years from the year 1766, though undoubted, is, I think, irrelevant, and cannot affect the meaning of the documents your Lordships have to construe, inasmuch as their language is plain and unambiguous. So that the question for decision, in my view, narrows itself down to this: Is an honour or other title or dignity of the United Kingdom, conferred since 1707, a Scottish title, dignity, or honour within the meaning of the foregoing charters and patents of the Scottish King and statutes of the Scottish Parliament?

Ld. Atkinson.

I concur with Lord Low, and, as I understand, with the other learned Judges in the Second Division, in thinking that a post-Union title or dignity or honour is a wholly different thing from the title, dignity, or honour conferred before the Union by the King of Scotland in the exercise of his Royal prerogative as Sovereign of that kingdom.

Where I differ from him and them is in the conclusion that the 20th article of the Treaty of Union is ambiguous in its language, and that because of that the usage of the last 150 years can be relied upon to secure to this officer fees in respect of the honours, titles, and dignities created since its date which are not Scottish honours, titles, or dignities in the sense I have indicated. In my view, the Treaty of Union left the office as it was, with the rights which under the law of Scotland the holder of it theretofore enjoyed in respect to the creation of Scottish honours, titles, and dignities properly so called, and nothing more.

The order of knighthood is not in any sense a local title. It is an order of chivalry recognisable in every part of the King's dominions, and differs in that respect altogether from an earldom conferred by the King as Sovereign of the Kingdom of Scotland—(See *Sir John Douglas's Case*, Y. B. 20 E. IV. 6, cited in *Calvin's Case*, 7 Coke's Rep. 15b, 16a).

In my opinion, therefore, the interlocutors appealed from are erroneous and should be reversed, and this appeal be allowed with costs.

LORD KINNEAR.—I agree entirely with all that has been said by my noble and learned friend opposite, and I therefore think it unnecessary to detain your Lordships by stating my own reasons, which are entirely in accordance with his.

LORD GORELL.—I have had the opportunity of reading and considering the judgment of my noble and learned friend Lord Atkinson, and I fully concur with it.

¹ [1910] A. C. 7.

ORDERED that the interlocutors appealed against be reversed, and that the respondents pay the appellants their costs here and below.

JOHN KENNEDY, W.S.—GEORGE J. WOOD, W.S.—SOLICITOR TO THE TREASURY—
THOMAS CARMICHAEL, S.S.C.

Dec. 1, 1911.
Walker
Trustees v.
Lord Advocate.

PRICE & PIERCE, LIMITED, (Claimants) Appellants.—*Buckmaster, K.C.* No. 5.
—*MacRobert.*

THE GOVERNOR AND COMPANY OF THE BANK OF SCOTLAND, (Claimants) Dec. 1, 1911.

Respondents.—*Clyde, K.C.*—*Hon. W. Watson.*

G. L. FRASER, (Claimant) Respondent.—*Sandeman, K.C.*

Price & Pierce,
Limited, v.
Bank of
Scotland.

Right in Security—Pledge—Transfer of Property—Delivery-Order—Appropriation of Goods—Sale—Reduction—Holder for value and in good faith.

A, by means of fraudulent misrepresentations as to his solvency, induced the owner of a cargo of timber to sell it to him. He accepted bills for the price, and in return received the bill of lading blank endorsed. The timber, on delivery, was stored with a firm of timber measurers subject to A's orders. A borrowed money from certain lenders (one of whom was aware that A was in great financial difficulties), and in security therefor he granted to the lenders delivery-orders for certain parcels of the timber. Shortly afterwards A became bankrupt. The sale, on the ground of A's fraud, was subsequently reduced at the instance of the unpaid vendor, who claimed the whole of the timber as being still his property. Claims were also made by the holders of the delivery-orders to the portions of timber covered by these orders.

The First Division *held* (1) that the holders of the delivery-orders had obtained them for value and in good faith; (2) that the timber transferred by the delivery-orders had been sufficiently identified and appropriated to the transferees; and (3) that consequently the holders of the delivery-orders had acquired a valid title to the timber good against the unpaid vendor.

In an appeal the House *affirmed* that judgment, with a variation as to a small portion of the timber, consisting of 300 logs, which the House held, on the evidence, had not been sufficiently identified and appropriated to the transferees.

(In the Court of Session, 15th June 1910—1910 S. C. 1095.)

The claimants Price & Pierce, Limited, appealed to the House of Lords.

The claimants T. & R. Duncanson acquiesced in the judgment of the Court of Session repelling their claim, and lodged no appeal.

After hearing counsel for the parties the House delivered judgment on 1st December 1911.

In their judgment their Lordships dealt solely with the effect of the evidence as to the dates when the various parcels of logs were identified and appropriated to the transferees. With regard to the parcels of 1166 and 416 logs, they concurred with the judgment appealed against, but with regard to two parcels of 200 and 100 logs, contained in a delivery-order in favour of the Bank of Scotland, they stated their reasons for adopting the judgment of the Lord Ordinary, who held that the Bank had failed to prove that these logs were

Ld. Chancellor
(Loreburn).
Lord Alver-
stone.
Ld. Atkinson.
Lord Shaw of
Dunfermline.

Dec. 1, 1911. ascertained or identified prior to the notour bankruptcy of Buchanan & French.

Price & Pierce,
Limited, v.
Bank of
Scotland.

ORDERED that the interlocutor appealed against be varied in regard to the goods contained in the delivery-order consisting of 200 and 100 logs, and that the interlocutor of the Lord Ordinary be restored.

LAURENCE, WEBSTER, MESSER, & NICHOLLS—COWAN & STEWART, W.S.—ASHURST, MORRIS, CRISP, & Co.—TODS, MURRAY, & JAMIESON, W.S.—THOMAS COOPER & Co.—J. & J. ROSS, W.S.

No. 6.

HENRY LAWRIE, (Pursuer) Respondent.—*Munro, K.C.*—*A. M. Stuart.*

Dec. 12, 1911.

THE BANKNOCK COAL COMPANY, LIMITED, (Defenders)
Appellants.—*D.-F. Dickson*—*Beveridge.*

Lawrie v.
Banknock
Coal Co.,
Limited.

Process—Sheriff—Removal to Court of Session for jury trial—Competency—Action of damages by father of deceased workman against son's employers—Workmen's Compensation Act, 1906 (6 Edw. VII. cap 58), secs. 13 and 14—Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. cap. 51), secs. 30 and 52.

The Workmen's Compensation Act, 1906, enacts, sec. 14, that where an injured workman raises an action in the Sheriff Court against his employer concluding for damages under the Employers Liability Act, 1880, or alternatively at common law or under the Act of 1880, the action "shall, notwithstanding anything contained in that Act, not be removed under that Act or otherwise to the Court of Session, nor shall it be appealed to that Court otherwise than by appeal on a question of law." Sec. 13 enacts that any reference to a "workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative or to his dependants."

The Sheriff Courts (Scotland) Act, 1907, enacts, sec. 30, that cases above £50 in value originating in the Sheriff Court "(other than claims by employees against employers . . . for damages under the Employers Liability Act, 1880, or alternatively at common law . . .)" may be remitted to the Court of Session for jury trial, and sec. 52, that "all statutes . . . now in force so far as the same are inconsistent with the provisions of this Act," are repealed.

In an action in the Sheriff Court at the instance of a father, whose son had been accidentally killed, against his son's employers for damages under the Employers Liability Act or alternatively at common law, the pursuer averred that the deceased paid his earnings to his parents for the maintenance of the house. The cause having, on the motion of the pursuer, been remitted to the Court of Session for jury trial under section 30 of the Sheriff Courts Act, 1907, the defenders objected to the competency of the remission on the ground that the pursuer, being a dependant of the deceased, or at anyrate his legal personal representative, was a "workman" in the sense of the Workmen's Compensation Act, 1906, and that accordingly, by section 14 of that Act, his right to have the cause removed to the Court of Session for jury trial was excluded.

Held that although it might be that the right of one in the position of the pursuer to have the cause remitted to the Court of Session had been taken away by sections 13 and 14 of the Workmen's Compensation Act, 1906, the right, if taken away, had been restored by sections 30 and 52 of the Sheriff Courts (Scotland) Act, 1907.

Is the Court of Session, 17th March 1911—1911 S. C. 817.)

Dec. 12, 1911.

The defenders appealed to the House of Lords.

The case was heard on 20th and 21st November 1911.

Lawrie v.
Banknock
Coal Co.,
Limited.

Argued for the appellants;—"Workman" was by section 13 of the Workmen's Compensation Act, 1906, defined as including "dependants"; and accordingly removal of this cause to the Court of Session was directly prohibited by section 14 of the Act, the pursuer in the action being a dependant of his son, and therefore, for the purposes of the Act, a "workman."¹ If he was not the dependant of his son, he was at any rate his legal personal representative, which had the same effect. It was true that this definition of workman seemed more appropriate when applied in questions of compensation pure and simple, but it was unlikely that the word was meant to have different meanings in different portions of the Act. Appeal to the Court of Session having accordingly been prohibited by the Act of 1906, it was improbable that it was meant to be restored, indirectly and by inference, by the Sheriff Courts Act of 1907; especially seeing that the main object of that Act was to simplify procedure and restrict appeal. Had it been intended to repeal section 14 of the Act of 1906, the repeal would have been explicit. But an examination of the Act of 1907 disclosed no such intention. That Act, by sections 30 and 31, divided cases into two classes—Employers Liability Act causes and other causes. For the former class of causes a new method of procedure was invented, viz., jury trial in the Sheriff Court without appeal to the Court of Session; for the latter, removal to the Court of Session under certain conditions more or less analogous to those prevailing before the Act. Section 52 of the Act clearly did not repeal the specific provision of section 14 of the Act of 1906.

Ld. Chancellor
(Loreburn).
Ld. Atkinson.
Lord Gorell.
Lord Shaw of
Dunfermline.

Argued for the respondent;—The respondent was entitled to have the action remitted to the Court of Session for trial by jury under section 30 of the Sheriff Courts (Scotland) Act, 1907. He was not an "employee" of the appellants, but the father of one who had been an employee, suing upon his own account an independent action for *solatium* (which differed in its nature from any other action for damages²), and his action was not an action against "employers" in the sense of the section, but an action against independent third parties who had done the pursuer a personal injury or wrong. This right of his to sue upon his own account for the wrong done to him was in no way affected by the Employers Liability Act of 1880. As soon as proof was allowed in his action he had a right to have the case removed to the Court of Session. This was his right before the Act of 1906.³ The Act of 1906 was not meant to, and did not, affect that right. Section 14 of the Act of 1906 was a Scottish procedure section pure and simple, foreign to the rest of the Act and dealing with actions at common law. It did not *per se* exclude the respondent's right; that was only effected, as the appellants argued, by the definition of "workman" contained in section 13. But the definition in section 13 obviously only dealt with the proper subject of the Act,

¹ Main Colliery Co. v. Davies, [1900] A. C. 358.

² Clarke v. Carfin Coal Co., (1891) 18 R. (H. L.) 63, *per* Lord Watson, at p. 65.

³ Employers Liability Act, 1880 (43 and 44 Vict. cap. 42), sec. 6 (3); Sheriff Courts (Scotland) Act, 1877 (40 and 41 Vict. cap. 50), sec. 9; Court of Session Act (Judicature Act), 1825 (6 Geo. IV. cap. 120), sec. 40.

Dec. 12, 1911. viz., workmen's compensation, and did not affect section 14, for which, so far as a definition of "workman" was concerned, reference must be made to the definition of "workman" contained in the Employers Liability Act, 1880. Even, however, if the Act of 1906 had the effect contended for by the appellants, the right had been restored by sections 30 and 52 of the Act of 1907. Section 52 repealed section 14 of the Act of 1906 as being inconsistent with section 30, which directly conferred the right. The respondent's contention was supported by the undernoted cases.¹

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Banknock
Coal Co.,
Limited.

At delivering judgment on 12th December 1911,—

LORD CHANCELLOR.—It is our duty, as I understand it, to construe Acts of Parliament so as to give effect to what we are satisfied was the intention of Parliament, if the language used admits of that construction. But we are not at liberty to amplify an enactment so as to include within its ambit matters which upon the plain meaning of the language are not included, even if convinced that the omission was inadvertent and undesigned.

In the present case the question raised is whether or not the pursuer was entitled to have the cause remitted for trial by jury to the Court of Session. I cannot help thinking that it was probably intended in 1906 to preclude the remittal of a cause like this. Possibly it was not intended in 1907 to undo what was thought to have been done in 1906. But I also think that it was undone in 1907.

Upon this subject I agree with the reasoning of Lord Johnston. Taking sections 13 and 14 together of the Workmen's Compensation Act, 1906, it seems to me that removal and appeal to the Court of Session are barred (save on a question of law) not only where the action is raised by the workman himself, but also where it is raised by his legal personal representative or his dependants, or other persons to whom or for whose benefit compensation is payable. No doubt this is expressed awkwardly by a mere definition clause; and in view of the contrary opinion expressed by the Lord President I cannot say it is free from doubt. I feel that this view leaves anomalies, and may make the right to appeal turn upon the dependency of a father upon a deceased son, which may be a disputed fact and may be irrelevant to the action, as pointed out by the Lord President. But I think upon the whole that these sections have the effect described by Lord Johnston, though I do not desire to rest my conclusion upon that ground.

I agree with the Lord President and the other Lords of Session that the right, if taken away by the Act of 1906, was restored by the Sheriff Courts Act of 1907, section 30. That section expressly gives the right to remit, as was done here, "in cases originating in the Sheriff Court (other than claims by employees against employers in respect of injury caused by accident arising out of and in the course of their employment, and concluding for damages under the Employers Liability Act, 1880, or alternatively at common law or under the Employers Liability Act, 1880)."

Here we have, in this case, an action by the father of a deceased work-

¹ Cook v. Bonnybridge Silica and Fireclay Co., 1911 S. C. 177; Brown v. Glenboig Union Fireclay Co., 1911 S. C. 179; Docherty v. Niddrie and Benhar Coal Co., 1911, 1 S. L. T. 396.

man claiming damages for the death by accident of his son against the employers of the son, resting upon common law or alternatively upon the Employers Liability Act, 1880. How am I to say that this is a claim by an "employee"? There is no definition clause which can be invoked to enlarge the meaning of the word "employee." I do not know whether or not Parliament intended that the employee's father should be in the same position as the employee himself, but it certainly has not said so. I feel that so to hold, as we are asked by the appellants to hold, would be to usurp the function of the Legislature.

Dec. 12, 1911.
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 Limited.
 Lord
 Chancellor.

I am therefore of opinion that the appeal should be dismissed.

LORD ATKINSON.—I concur, and I have only this to add: that though it is not necessary for the decision of this case, as I understand it, to decide what exactly is the meaning of the word "workman" as it occurs in the 14th section of the Workmen's Compensation Act, 1906, still undoubtedly the present inclination of my opinion is that that section was meant to deal with all actions under the Workmen's Compensation Act which could be raised in Scotland, and that therefore the word "workman" must get the extended meaning put upon it by the definition clause. That certainly is the inclination of my opinion at present, but I hold myself quite free to reconsider the point should it again come before your Lordships' House for decision.

LORD GORELL.—The question in this appeal is whether the respondent, who brought an action for damages in the Sheriff Court, alternatively at common law or under the Employers Liability Act, 1880, has the right to remove the cause for trial to the Court of Session, or whether the action must be tried in the Court where it was brought. The respondent is the father of a workman who was killed in the appellants' mine on 21st September 1910. The respondent brought an action against the appellants as employers, concluding for damages, £500 at common law, or alternatively, £179, 8s. in the name of compensation under the Employers Liability Act, 1880, and, *inter alia*, averred that the deceased was his only unfamilial son, and contributed all his earnings to his parents for the maintenance of the house. The appellants in their answer admitted the respondent's right as a dependant to compensation under the Workmen's Compensation Act, 1906.

The respondent removed the cause to the Court of Session, relying on section 30 of the Sheriff Courts (Scotland) Act, 1907, which provides for such a remit except in certain specified cases. The appellants contended that the present case was one of those specifically barred not only by the Sheriff Courts (Scotland) Act, 1907, but also by the Workmen's Compensation Act, 1906, but the First Division of the Court of Session, on 17th March 1911, held that the cause had been competently remitted, and allowed issues for the trial of the cause in the Court of Session.

Leave to appeal to your Lordships' House was granted on 13th May 1911.

The contention on behalf of the appellants is that the remit was incompetent and contrary to law. Whether this contention is correct or not depends upon the construction of the two Acts last mentioned.

I preface the consideration of those two Acts by referring to two earlier

Dec. 12, 1911. Acts, namely, the Employers and Workmen Act, 1875 (38 and 39 Vict. c. 90), and the Employers Liability Act, 1880.

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Lord Gorell.

The Act of 1875 was an Act the object of which was to enlarge the power of the County Court in England, the Sheriff Court in Scotland, and the Civil Bill Court in Ireland in respect of disputes between employers and workmen, and to give Courts of summary jurisdiction a limited jurisdiction in respect of such disputes. The expression "workman" in the Act was defined as not including a domestic or menial servant, but included other persons as therein expressed engaged in manual labour under a contract with an employer.

The Act of 1880 was entitled thus, "An Act to extend and regulate the liability of employers to make compensation for personal injuries suffered by workmen in their service"; and section 1 provided that where, after the commencement of this Act, personal injury is caused to a workman in the five cases mentioned therein, "the workman, or in case the injury results in death, the legal personal representatives of the workman, and any persons entitled in case of death, shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work." Section 2 dealt with exceptions to amendment of the law, and section 3 limited the amount of compensation recoverable under the Act to an amount of three years' earnings estimated as provided.

Under section 6 every action for recovery of compensation under the Act is to be brought in a County Court in England, a Sheriff Court in Scotland, and a Civil Bill Court in Ireland, but might, on the application of either party, be removed into a superior Court in like manner and upon the same conditions as an action commenced in a County Court may by law be removed. This would be by certiorari or otherwise if the High Court or a Judge thereof should deem it desirable that the action should be tried in the High Court. In Scotland the action might be removed to the Court of Session at the instance of either party in the manner provided by and subject to the conditions prescribed by section 9 of the Sheriff Courts (Scotland) Act, 1877.

By section 8 of the Act of 1880 the expression "workman" means a railway servant and any person to whom the said Act of 1875 applies. The Act of 1880 has been continued from time to time and remains in force as amended by section 14 of the Workmen's Compensation Act, 1906.

In the Workmen's Compensation Act, 1906, section 13 gives, "unless the context otherwise requires," certain definitions. A fresh definition of "workman" is given among a number of other definitions, and "any reference to a workman who has been injured shall, where the workman is dead, include a reference to his legal personal representative or to his dependants or other person to whom or for whose benefit compensation is payable." Section 14 contains the special provision as to Scotland. According to it, in Scotland, where a workman raises an action against his employer independently of the Act, in respect of any injury caused by accident arising out of or in the course of the employment, the action, if raised in the Sheriff Court and concluding for damages under the Act of 1880 or alternatively at common law or under the Act of 1880, shall, notwith-

standing anything contained in that Act, not be removed under the Act Dec. 12, 1911.
or otherwise to the Court of Session, nor shall it be appealed to that Court
otherwise than by appeal on a question of law.

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Limited.

The last Act I refer to is the Sheriff Courts (Scotland) Act, 1907. Section 30 allowed of the removal by either party to the Court of Session of cases originating in the Sheriff Court (other than claims by employees against employers in respect of injury caused by accident arising out of and in the course of their employment, and concluding for damages under the said Act of 1880, or alternatively at common law or under the said Act of 1880) where the claim is in amount or value above £50. Certain powers in the Court of Session to remit were given. Section 31 gave a right to either party to have a jury trial before the Sheriff in any action in the Sheriff Court of the kind excepted in the 30th section where the claim exceeds £50, and section 52 repealed the enactments mentioned in the Second Schedule to the Act to the extent therein mentioned, and all laws, statutes, Acts of Sederunt, orders and usages then in force so far as the same are inconsistent with the provisions of the Act.

Lord Gorell.

If the question depended solely on the Sheriff Courts Act of 1907, I think that it would be free from any doubt, because the action is not an action by an employee against an employer in any ordinary sense. But it is said that employee and employer must be read in a sense different from the ordinary because of the earlier legislation, especially sections 13 and 14 of the Act of 1906.

I think, however, though with considerable doubt, that it would be straining language to hold that the words "where a workman raises an action against his employer," in section 14 of the Act of 1906, include an action such as the present; and although the term "workman" may, according to the 13th section, include other persons where the context does not otherwise require, I am unable to read the 14th section as using the term in its wider signification. It looks to me as if the interpretation clause, section 14, had not been introduced with reference to the special provisions as to Scotland.

However this may be, I think that the express provisions of the Act of 1907 remove any difficulty or doubt, and I agree with the views on this point expressed by the Lord President.

It seems to me that when the 14th section of the Act of 1906 and the Act of 1907 were passed, it must have escaped attention that claims could be made otherwise than by an employee, but whatever may have been the intention, I do not see how the express terms of the Act of 1907 can be overcome.

In my opinion the decision of the First Division should be affirmed.

LORD SHAW OF DUNFERMLINE.—I agree with the Lord Chancellor, and I largely share the views just expressed by my noble and learned friend Lord Atkinson.

If the range of vision be narrowed to the meaning of the word "employee" the conclusion is inevitable. And I agree that in the interpretation of this Act it must be so narrowed. The words of the Legislature not being ambiguous, the duty of the Judiciary is not doubtful.

Dec. 12, 1911. The results may be unfortunate, unexpected; it may be, as was argued, that a scandal continues. If so, Parliament will note these things. But with regard to them it is beyond the function of a Court of interpretation to give relief, and perhaps even beyond its province to express views or to proffer opinions.

Lawrie v.
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Limited.

ORDERED that the interlocutor appealed from be affirmed, and that the appeal be dismissed, with costs.

R. S. TAYLOR, SON, & HUMBERT—MACPHERSON & MACKAY, S.S.O.—
BEVERIDGK, GREIG, & CO.—W. & J. BURNES, W.S.

No. 7. THE SCOTTISH NORTH AMERICAN TRUST, LIMITED, Respondents.—
Atkin, K.C.—Lord Kinross.

Dec. 14, 1911.

Scottish
North
American
Trust,
Limited, v.
Inland
Revenue.

RICHARD FARMER (Surveyor of Taxes), Appellant.—
Att.-Gen. Sir Rufus Isaacs—Sol.-Gen. Hunter—J. A. T. Robertson.
Revenue—Income-Tax—Profits of Trade—Deductions—Interest payable on short loans—Income-Tax Act, 1842 (5 and 6 Vict. cap. 35), sec. 100, Schedule D, First Case.

A financial and investment company obtained from bankers in New York sums on temporary and fluctuating loan for periods not exceeding six months in order to pay for securities purchased by it. In stating its profit for the purpose of income-tax the company claimed to deduct the interest paid on these loans, but the Commissioners, being of opinion that the sums borrowed were utilised as additional capital, disallowed the deduction.

Held (aff. judgment of First Division) that the company were entitled to make the deduction, in respect that the sums borrowed were not "capital" within the meaning of the Income-Tax Acts, and the interest was in fact money paid for the hire of the instrument of the company's trade, and as such fell to be treated like any other similar outlay.

Anglo-Continental Guano Works v. Bell, (1894) 70 L. T. 670, 3 Tax Cases, 239, distinguished.

Ld. Chancellor (IN the Court of Session, 16th July 1910—1910 S. C. 966.)
(Loreburn).

Ld. Atkinson. Richard Farmer, the Surveyor of Taxes, the respondent in the
Lord Gorell. Court of Session, appealed to the House of Lords.

Lord Shaw of The case was heard on 21st and 23rd November 1911.
Dunfermline.

Argued for the appellant;—The deduction claimed by the respondents in respect of interest paid by them to the bankers in America upon the loans made to them by the bankers should not be allowed in arriving at the assessable profits of the respondents for the purposes of the Income-Tax Acts.¹ The sums borrowed by the respondents were borrowed for the purpose of being employed as part of their capital. It was immaterial that they were borrowed on short loans,² for that did not alter the circumstance that they formed additional capital in the business. This was clear on the facts of the present case, and it was in every case a question of fact whether or not the money which was borrowed was used as additional capital for the purpose of the business. The present case could not be distinguished from, and was ruled by, the *Anglo-Continental Guano Works v. Bell*.²

¹ Dowell's Income-Tax Laws (6th ed.), pp. 163, 164, 183.

² (1894) 70 L. T. 670, 3 Tax Cases, 239.

That was a case of borrowing money for the purpose of buying particular cargoes of guano; this was a case of borrowing money in order to buy bonds; but the principle was identical. If the Company had borrowed the money required by them upon debentures from persons resident abroad and not liable to income-tax, no deduction would have been allowed.¹ In the case of *Gresham Life Assurance Society v. Styles*,² which was distinguishable from the present, the society's business was to sell annuities, and the question was whether in arriving at its profits it might deduct sums paid in discharge of its annuity contracts. The House of Lords held that the grant of annuities was the business of the society; that it had to pay them out of profits and gains; and that consequently the society were entitled to deduct them. In the Court of Session Lord Johnston referred to a note by Dowell³ with regard to the *Anglo-Continental Guano Works* case,⁴ where he said that in practice such interest had always been allowed as a deduction, and had continued to be so allowed since that decision. That probably might be a correct statement of the practice where the bankers making the loan were English and not foreign bankers. Here the revenue authorities would not have raised the question had the loan been obtained from English bankers, because the interest paid to the bankers would have been taxed as profits of the bank. *Arizona Copper Company v. Smiles*⁵ was in favour of the appellant's contention. The matter might be illustrated as follows:—The company were anxious to purchase American railway shares, their business being to hold these shares for a rise and then sell them, and so make a profit. Not having enough money to buy the shares out of their existing capital they borrowed money; which was nothing more nor less than raising additional capital for the ordinary business of the company. The present case was quite different from the class of case in which a company borrowed a sum of money for a merely incidental purpose, e.g., where a company borrowed money to pay a dock warrant for the release and delivery of its goods which it desired to sell. In considering any illustrations, however, it must not be left out of sight that the question to be decided here was not how an ordinary business man would regard the matter, but whether the Income-Tax Acts allowed the deduction.

Counsel for the respondents were not called upon, but drew the attention of their Lordships to their contention that Rule 3 of the First Case in section 100 of the Act of 1842 dealt with the deduction of a sum for "capital," and did not deal with the question of "interest" at all.

At delivering judgment on 14th December 1911,—

LORD ATKINSON.—This is an appeal from a judgment of the First Division of the Court of Session, as the Court of Exchequer in Scotland, pronounced upon a case stated under the Taxes Management Act, 1880, by

¹ *Alexandria Water Co. v. Musgrave*, (1883) 11 Q. B. D. 174, 1 Tax Cases, 521, considered in *Gresham Life Assurance Society v. Styles*, [1892] A. C. 309, 3 Tax Cases, 185.

² [1892] A. C. 309, 3 Tax Cases, 185.

³ Dowell's *Income-Tax Laws*, 6th ed., p. 188.

⁴ (1894) 70 L. T. 670, 3 Tax Cases, 239.

⁵ (1891) 29 S. L. R. 134, 3 Tax Cases, 149.

Dec. 14, 1911. the General Commissioners of Income-Tax for the county of Edinburgh at the request of the respondents. The respondents were assessed to income-tax under the Income-Tax Acts for the year ending 5th April 1909, on the sum of £2404 in respect of the alleged profits of the business carried on by them.

Scottish
North
American
Trust,
Limited, v.
Inland
Revenue.

Ld. Atkinson.

This sum of £2404 was claimed by the appellant to be the average annual profit made by the respondents from the date of their incorporation on 27th July 1905 during two and a quarter years succeeding. In arriving at the sum of £2404 no deduction was allowed in respect of two sums of £80, 5s. 4d. paid during the period of trading up to 31st October 1906, nor of the sum of £4576, 13s. 4d. paid during the year ending 31st October 1907 as interest to bankers of the Company in America on loans made by them to the Company.

The respondent Company carries on an investment business. It has, under its memorandum of association, power to deal in investments and securities of all classes, and has also power to borrow and raise sums of money by way of loan, discount, cash-credit, overdraft, &c., and, further, to grant security for any sums of money so borrowed.

Its course of business during the years for which its alleged profits and gains are assessed is set forth in paragraph 4 of the case stated as follows : —“ 4. In the course of its business the Company purchased in New York certain bonds, stocks, and other securities of American railroad and other companies. The value of the purchases exceeded the amount of the Company's available cash, and certain of the securities which were lying in New York were pledged to Messrs Ladenburg, Thalmann, & Company, the Company's bankers in New York, in consideration of which the bankers allowed the Company's bank account in New York to be overdrawn. The amount of the overdraft fluctuated from time to time as the Company bought and sold securities, and the Company was charged periodic interest at current rates from day to day. In September 1906 Messrs Ladenburg, Thalmann, & Company opened a loan account, in addition to the ordinary overdraft with the Company in New York, on which they granted a loan not exceeding \$200,000 to the Company for a period of six months at 6 per cent. When this loan fell due it was renewed for a further period of six months, after which the loan account was terminated, and the balance was transferred to current account. Messrs Ladenburg, Thalmann, & Company collected all the dividends and coupons upon the securities in their hands, paying the interest due to themselves out of the sums so collected, the difference or net amount being credited to the Company. In the event of the dividends and coupons collected not equalling the amount of the interest payable in any month, the interest was debited to the overdraft on the current account.”

It will be observed that the loan was not a loan of \$200,000, but a loan up to \$200,000. The sum lent, in fact, might fluctuate from day to day or week to week, from cipher up to this limit. The interest payable in respect of the sum lent was not annual interest or an annuity or annual sum payable out of profits and gains within the meaning of Rule 4 of section 100 of the Income-Tax Act of 1842 any more than was the interest paid on the periodical overdrafts fluctuating in amount. That is obvious.

In *Goslings v. Sharpe*¹ it had already been decided by Lord Esher, M.R., Dec. 14, 1911. and Lindley and Bowen, L.JJ., in the Court of Appeal, that interest upon a loan by a banker to a customer for a period of less than a year did not fall within the words "any yearly interest of money or any annuity or other annual payment," occurring in 16 and 17 Vict. cap. 34, sec. 40. These words are practically identical with the words of Rule 4. I am, therefore, at a loss to understand what possible application the decision in the case of *Alexandria Water Co. v. Musgrave*,² so much relied upon in argument on behalf of the appellant, has to the present case, inasmuch as the question decided in that case was whether the interest payable every half-year on such a permanent security as the debentures of the Company fell within the words of Rule 4.

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The appellant, indeed, does not seek to ground on that rule this wholly unprecedented attempt of his to exact taxation. He rests it on Rule 3, a wholly different rule, on the ground (1) that the debit balances against the Company on their current account, as well as the loans made on the loan account, constitute "sums employed or intended to be employed as capital" in the respondents' trade or business; and (2) that the interest paid by the respondents to the bank in respect of these loans "comes within the words of the rule as deductions 'for' the sum so employed as capital."

The case of *Mersey Docks v. Lucas*³ decided that the general principle upon which the "profits and gains" of any trade, manufacture, adventure, or concern are to be ascertained for the purposes of the Income-Tax Acts is this: that the taxpayer is entitled to deduct from the gross profits of his trade or business the expenses necessary to earn them.

*Gresham Life Assurance Society v. Styles*⁴ establishes that if a taxpayer is trading in money, selling life annuities in consideration of a price received for them, either in a lump sum or by deferred payments, the annuities he sells are precisely in the same position *quoad* this Act as is the coal sold by a coal merchant or the corn sold by a corn merchant, and are no more to be treated *per se* as "profits and gains" of his business than are those material subjects of merchandise to be treated as the "profits and gains" of the business of the merchants who vend them.

The profits and gains of any transaction in the nature of a sale must, in the ordinary sense, consist of the excess of the price which the vendor obtains on sale over what it cost him to procure and sell, or produce and sell, the article vended; and part of that cost may consist of the sum he pays for the hire of a machine or the services of persons employed to produce, procure, or sell the article.

The second proposition established in the last-mentioned case is that in these Acts the words "profits and gains" are, where the context does not otherwise require, to be construed in their ordinary signification. I can see no reason for suggesting that this last-mentioned principle should not apply to the word "capital" when used in these statutes, and no reason why it too, where the context does not otherwise require, should not be construed in its ordinary sense and meaning.

¹ (1889) 23 Q. B. D. 324.

² (1883) 8 App. Cas. 891.

³ 11 Q. B. D. 174.

⁴ [1892] A. C. 309.

Dec. 14, 1911. If one takes the case of an ordinary joint stock bank, whose business consists in the daily or hourly borrowing of money from the customer who lodges money with it either on deposit or current account, for which the bank becomes the debtor, or in lending money to those whose bills or notes it discounts, or whose securities it takes in pledge, and in daily, almost hourly, repaying in driblets, by the cashing of the lenders' cheques, the amount borrowed, then, according to the argument of the Attorney-General, the amount borrowed, fluctuating day by day, if not hour by hour, is to be treated as *capital* employed in the trade, adventure, or concern of the bank, within the meaning of Rule 3 of section 100 of the Income-Tax Act of 1842. No reduction, moreover, is to be made in respect of the sums lent by the bank on the discount side of its business. Indeed the Attorney-General, as I understood, admitted, as he was by the necessities of his argument obliged to admit, that the result would be the same in the case of a joint stock bank which by its charter or articles of association was absolutely prohibited from increasing its capital. That, it appears to me, simply amounts to this, that the word "capital" must, in this Rule, be held to bear a wholly artificial meaning, differing altogether from its ordinary meaning, though there be no context in the clause requiring that there should be given to it a meaning different from that which it bears in ordinary commercial transactions.

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In *Bryon v. Metropolitan Saloon Omnibus Company, Limited*,¹ it was held that the borrowing of money for the purposes of the business of the defendants, a carrying company, was a mode of conducting their business within the meaning of the 33rd and 34th sections of the Joint Stock Companies Act of 1856; and the decision has been treated as having also determined that the borrowing by such a company of money by the issue of debentures does not amount to an increasing of the capital of the company. In *General Auction Estate and Monetary Company v. Smith*² the plaintiff company was established for the purchase and sale of estates and property. It granted advances on estates, on property intended for sale, loans on deposits of securities, discounted approved commercial bills, and received money on deposit; so that its business resembled to some extent that of the company in the present case. Under its memorandum and articles of association it had no express power to borrow money; but it was held that being a trading company it had, as such, implied power to borrow money for the purposes of its business. At p. 441 of the report, Stirling, L.J., dealt with the former of these authorities thus: he says, "Now, upon that it seems to me that the case of *Bryon v. Metropolitan Saloon Omnibus Company*¹ is a direct authority, because what was there done by the company was to raise money on debentures for the purpose of more effectually carrying on the business of the company, and that this is so is shown, I think, by the remarks of Lord Justice Lindley on that very case in *Lindley on Companies*" (5th ed., p. 191; 6th ed., p. 290). "He says, after discussing the subject of borrowing by companies, 'Connected with the subject of borrowing money is increasing capital. The difference between them is illustrated by *Bryon v. Metro-*

¹ (1858) 3 De G. & J. 123.

² [1891] 3 Ch. 432.

politan Saloon Omnibus Company.¹ In that case the capital of a limited joint stock company had been expended, and a majority of shareholders proposed to borrow money on the credit of the company. A dissentient minority sought to restrain the majority from so doing, and reliance was placed on the doctrine that the capital of the company could not be increased by borrowing money without the consent of all the shareholders. But it was held competent for the majority to borrow money on the credit of the company, and that the doctrine relied upon had no application to the case; the capital of the company being one thing and that which was sought to be increased by borrowing (namely, the cash in hand) being a different thing.' ”

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These authorities show that money borrowed by such a company as the respondent company in this case in the fluctuating temporary manner in which it has been borrowed by them—the daily borrowing and lending of money being part of their trade and business—is not to be treated under the Joint Stock Companies Act as “capital.” There is nothing to show that that word should bear a different meaning in the Income-Tax Acts when applied to the proceedings of joint stock companies. The interest is, in truth, money paid for the use or hire of an instrument of their trade, as much as is the rent paid for their office or the hire paid for a typewriting machine. It is an outgoing by means of which the company procures the use of the thing by which it makes a profit, and, like any similar outgoing, should be deducted from the receipts to ascertain the taxable profits and gains which the company earns. Were it otherwise they might be taxed on assumed profits, when, in fact, they made a loss.

It only remains to refer to the case of *Anglo-Continental Guano Works v. Bell*,² so much relied upon in argument in the Court of Session and before your Lordships. On close examination of this supposed authority it will, I think, be found that it does not apply to the present case so directly as seems to have been assumed. In that case a German company incorporated under the German law, carrying on the business of importers and manufacturers of guano, had its head office in Hamburg and branches in London and elsewhere. The London house was carried on as a separate business, with a separate capital, and conducted the whole of the company's business in the United Kingdom. Sometimes the London house purchased cargoes of guano direct, and in order to pay for them got advances (1) from the head office, and (2) from bankers abroad, sometimes directly, but usually through the central office. What was decided in the case was that the sum paid for interest on these loans could not be deducted under Rule 3, on the ground that the money borrowed was employed as capital, and that this interest was a sum deducted “for” this capital; but the case was treated as if it were a case between partners engaged in a partnership business, one or all of whom is or are trading with borrowed capital.

Mathew, J., as he then was, says, “It appears to me clear when you look at the language of the Act that what are intended to be assessed are the profits of the particular business, and that those profits are to be ascertained in the ordinary way without reference to whether or not a particular

¹ 3 De G. & J. 123

² 70 L. T. 67, 3 Tax Cases, 239.

Dec. 14, 1911. partner or all the partners are trading with borrowed capital.”¹ And further on he says, “It is perfectly clear that in the hands of the partners deductions of that class and character are not to be made, because, if made, you would not be ascertaining what really are the profits, not of the partners, but of the business.”² Precisely so. When each of the different members of a firm brings a certain sum of money into partnership, the thing which concerns the firm as a trading entity is the amount brought in, not what it cost each of the contributing members to procure what he brings in. That is a matter as unconnected with the business of the firm as a trading body, whose profits as such are to be ascertained, as is the loss a particular partner might sustain on the sale of the securities he might be obliged to dispose of to procure the money he brings into partnership. Cave, J., deals with the matter in the same way. He says, “It seems to me that that is not so—that the gains of the trade are quite independent of the question of how the capital money is found, that the gains of the trade are those which are made by legitimate trading after paying the necessary expenses, which you have necessarily to incur in order to get the profits; and that you cannot for that purpose take into consideration the fact that the firm or trader has to borrow some portion of the money which is employed in the business.”³ It does not appear to me that the reasoning on which this decision is based can apply to a bank whose business is the borrowing and lending of money, or to an investment company whose business is conducted as is that of the respondents in the present case. If it does apply, then I can only say I think it unsound as so applied, and am unable to concur in it. Moreover, the decision is not binding on your Lordships’ House.

Mr Atkin, though not called on, pointed out that the words of the rule are “no sum shall be deducted for any sum employed or intended to be employed as capital,” and would have argued, I presume, that these words could not apply to interest paid by a trading company for the use of money borrowed for the purposes of their trade. It is not necessary to decide the point. He may be right, but I prefer to rest my judgment on the broader ground. On the whole, therefore, I am of opinion that the decision appealed against was right and should be affirmed, and the appeal be dismissed with costs.

LORD GORELL.—I have had the opportunity of reading and considering the judgment of my noble and learned friend which has just been read by him, and I fully concur in it.

LORD SHAW OF DUNFERMLINE.—I agree.

LORD CHANCELLOR.—I agree.

ORDERED that the appeal be dismissed with costs.

LINKLATER & Co.—GUILD & SHEPHERD, W.S.—SIR FRANCIS C. GORE, Solicitor for England of Board of Inland Revenue—SIR PHILIP J. HAMILTON GRIERSON, Solicitor for Scotland of Board of Inland Revenue.

¹ 3 Tax Cases, at p. 244.

² *Ibid.*, at p. 245.

³ *Ibid.*, at p. 245.

MRS ELIZABETH BUTLER OR BLACK AND OTHERS, (Pursuers) Appellants. No. 8.

—*Morison, K.C.—Munro, K.C.—MacRobert—Mair.*

THE FIFE COAL COMPANY, LIMITED, (Defenders) Respondents.—

Horne, K.C.—Beveridge.

Dec. 19, 1911.

Black v.
Fife Coal Co.,
Limited.

Reparation—Negligence—Master and Servant—Management of mine—Responsibilities of owners—Competency of officials—Breach of statutory duty—Common employment—Coal Mines Regulation Act, 1887 (50 and 51 Vict. c. 58), sec. 49.

The Coal Mines Regulation Act, 1887, enacts, sec. 49 :—"The following general rules shall be observed, so far as is reasonably practicable, in every mine," and then follow, *inter alia*, rules that the ventilation is to be sufficient to render harmless noxious gas, and that competent persons are to make inspections for, and reports on, the presence of noxious gas, and to withdraw miners in case of danger.

An action of damages at common law or under the Employers Liability Act, 1880, was brought against the owners of a pit by the representatives of a miner who had lost his life through inhaling carbon-monoxide gas. The gas, which is a product of incomplete combustion, came from a neighbouring pit (the seams of which were particularly liable to spontaneous combustion), through a connection made about eleven months prior to the accident. The defenders' under-manager and their fireman, for some days prior to the accident, had observed a peculiar smoke in the pit, and knew that a number of the miners had suffered from symptoms which would have suggested the presence of the gas to persons with adequate knowledge, but they made no inspection or report, and did not withdraw the miners, as required by the rules.

It was proved that the managers and fireman were possessed of the qualifications and experience usually required of persons holding these offices, but that they had had little experience of carbon-monoxide gas (which is of very rare occurrence in mines), and failed to realise that what had been observed in the pit indicated the presence of that gas. It was also proved that the defenders, at the time the connection was made between the two pits, took no steps to instruct these officials with regard to this gas, or to secure that their knowledge and qualifications were sufficient to enable them to deal with the dangers arising therefrom.

The defenders, who admitted that the accident was due to the breach of the rules on the part of their managers and fireman, maintained that, so far as the action was laid at common law they were not liable, and the Second Division sustained this contention.

In an appeal, the House (*rev.* the judgment of the Second Division) held that the defenders could not plead common employment but were liable at common law, in respect that (as they had failed to secure that the persons in charge of the mine were competent to deal with the dangers arising from the presence of poisonous gas), they had been guilty of a breach of the duty imposed on them of taking all practicable steps to secure observance of the statutory rules.

Opinion (per Lord Kinnear) that the Coal Mines Regulation Act does not place upon mineowners an absolute duty of seeing that the statutory rules are observed, but that, if injury occurs through a breach of a rule, the onus is on the mineowners of proving that they have done all in their power to prevent such breach.

(In the Court of Session, 24th November 1908—1909 S. C. 152.)

The pursuers appealed to the House of Lords.

The case was first heard on 8th and 10th March 1910.

Argued for the appellants ;—The decision of the Court below was based upon an erroneous view of the law. The Court held, and

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(Loreburn).
Lord
Ashbourne.
Lord Kinnear.
Lord Shaw of
Dunfermline.

Dec. 19, 1911. indeed it was not disputed, that the accident would not have happened had there not been a breach of the general and special rules applicable to the pit. The Court, however, erred in thinking that these rules were imposed solely on the managers and fireman. That was not so. They were imposed absolutely and directly upon the mineowners, and if they were broken, the mineowners were *ipso facto* liable, even although they themselves had been in no way negligent. The doctrine of common employment could not be pleaded by a master where a statutory duty imperatively laid on him had been neglected. The doctrine of common employment was that the risk of negligence on the part of a fellow-workman was one of the risks accepted by a workman as an implied term of the contract of service, but the risk involved in an employer's failure to discharge a statutory duty absolutely imperative on him was not a risk which the workman must be assumed to have accepted. The absolute character of the statutory duty was supported by the undernoted authorities.¹ There was no distinction between rules imposing duties to be delegated to servants and rules imposing duties to be performed directly by the owner. The Coal Mines Regulation Act, 1887, expressly made the owner of the mine liable for breach of all rules, no matter by whom committed.²

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Argued for the respondents;—The only duty which at common law was laid on a mineowner, in the event of his not personally superintending and directing the work, was to select proper and competent persons to do so.³ It was a new suggestion that the breach of these statutory rules displaced the plea of common employment.⁴ The rules which had been infringed in this case were rules laid upon the managers and fireman. They were the persons who had to perform the duties. It was not disputed that where a duty was specifically laid upon an owner he could not delegate it. The defenders admitted liability under the Employers Liability Act, and the only question was whether they were liable at common law.

The House took time for consideration.

On 25th July 1910 the House remitted the case to the Second Division to pronounce a finding upon the following question:—
“When the connection was made with the old mine in which smouldering fires, followed by the giving off of carbon-monoxide gas, had previously occurred, did the defenders take all practicable means to secure that the persons engaged in supervision, and the fireman appointed as a competent person under the statute, were possessed of the knowledge and qualifications required to deal with the special danger of the presence of noxious gases arising from the connection made?”

¹ David v. Britannic Merthyr Coal Co., [1909] 2 K. B. 146, at p. 157, [1910] A. C. 74; Bett v. Dalmeny Oil Co., (1905) 7 F. 787, at p. 790; Groves v. Lord Wimborne, [1898] 2 Q. B. 402, at p. 410.

² Secs. 50 and 51 (3). Hardaker v. Idle District Council, [1896] 1 Q. B. 335, was also cited.

³ Weir or Wilson v. Merry & Cunninghame, (1868) 6 Macph. (H. L.) 84; Bartonshill Coal Co. v. Reid, (1856 and 1858) 3 Macq. 266.

⁴ Sneddon v. Mossend Iron Co., (1876) 3 R. 868, at p. 872; Stewart v. Coltness Iron Co., (1877) 4 R. 952, at p. 954; Macdonald v. Udston Coal Co., (1896) 23 R. 504; M'Mullen v. Newhouse Coal Co., (1896) 23 R. 759; Howells v. Landore Steel Co., (1874) L. R., 10 Q. B. 62; Senior v. Ward, (1859) 28 L. J. (Q. B.) 139.

On 12th July 1911 the Second Division answered the question by Dec. 19, 1911. pronouncing an interlocutor containing certain findings in fact.*

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* The findings in the interlocutor appealed against and in the above-mentioned interlocutor were as follows:—

In the interlocutor appealed against, of 24th November 1908:—"The Lords having heard counsel for the parties on the defenders' appeal against the interlocutor of the Sheriff-substitute of Fife, dated 30th July 1907, sustain the appeal, and recall the said interlocutor appealed against: Find in fact in terms of the first five findings in fact in the said interlocutor appealed against. [These were:—(1) The deceased Alexander Hynd Black, the husband and the father of the pursuers, was on 27th April 1906, and for some time prior thereto, in the employment of the defenders as an oncost worker in their No. 11 pit, Lumphinnans. On the night of Thursday, 26th April, he and Thomas Serrie were sent to repair the main brae in that pit. Early on the morning of Friday, 27th April 1906, while they were so engaged, they were overcome by carbon-monoxide gas and lost their lives: (2) At the time of the accident the air current for ventilating No. 11 pit was brought down the shaft of No. 1 pit, being thus the downcast shaft, and after passing through the Lochgelly Splint and Parrot Seam of No. 1 pit ventilated all parts of No. 11 pit, the shaft of which was the upcast for the return air. The Lochgelly Splint and Parrot Seam is universally recognised to be specially liable to spontaneous combustion, and part of this seam in No. 1 pit was on fire in 1901. This outbreak was treated by sealing up the fire area with stoppings, but it was not possible in long wall workings as these were to be sure that the fire was quite extinguished. The air course from No. 1 pit to No. 11 pit passed near some of these stoppings, and any fumes which might escape from leaking stoppings must be carried with the air through all the workings of No. 11 pit: (3) On Tuesday, 24th April 1906, John Gray, who was manager of both pits, was informed by Hunter, an oversman in No. 11 pit, that there was a strange smell in the air coming to No. 11 pit, and he instructed Hunter to examine the workings. Hunter found some smoke issuing from stoppings not far from the seat of the old fire in No. 1 pit, and set men to repair them. Gray then formed the opinion that the smell came from the seat of the old fire in No. 1 pit: (4) On Wednesday, 25th April, and Thursday, 26th April, there was smoke or haze with a peculiar smell in the workings of No. 11 pit, and several of the miners, including the deceased Black, were affected with headache and vomiting. Some of the men complained of the air to Gibbons, the fireman, who himself felt the effect a little in his head. The air on the Thursday was rather clearer in appearance. The men were allowed to work in the pit as usual on both days, and Black and Serrie were sent down on Thursday night to do repairing work: (5) After the first discovered leak in the stoppings was repaired, smoke and fumes were found to be issuing from another leak, and men began to repair this second leak on Thursday, 26th April. On Friday, 27th April, about 3 A.M., a squad of men resumed work at this stopping; but in two or three minutes some of them were overcome, and they had to abandon the work of repair for the time. It was probably at this time that the deceased Black lost his life in No. 11 pit.] Find further in fact (6) that the cause of the death of Alexander Hynd Black was the escape of carbon-monoxide gas from the fire in No. 1 pit; (7) that John Gray, the manager, John Hunter, the under-manager, and John Gibbons, the fireman, all at No. 11 pit, were possessed of the qualifications and experience usually required of persons holding these offices; (8) that there was no negligence on the defenders' part in appointing and continuing to employ the said manager, under-manager, and fireman; (9) that the said John Hunter and John Gibbons, having duties of superintendence in No. 11 pit, were guilty of negligence in respect that, although for two days prior to the accident they were aware that a haze, having a peculiar smell,

Dec. 19, 1911. employers are not responsible except in terms of the Employers Liability Act, 1880. The Court below has rejected the first alternative and has found in law that the pursuers, the appellants, have no claim against the defenders, the respondents, at common law, but only under the Employers Liability Act. This finding in law which your Lordships are asked to review is based upon a series of specific findings in fact which, by the statute regulating appeals of this description, this House is bound to accept as "finally and conclusively fixing the several facts so specified." The interlocutor appealed against was pronounced by the Second Division of the Court of Session, on reviewing a judgment of the Sheriff Court of Fife proceeding on a proof taken upon a record made up in that Court. The Court of Session had full power to review the Sheriff's judgment both in fact and in law, and for that purpose the learned Judges were bound to consider the proof and determine the facts for themselves. But their judgment is appealable to this House "only in so far as the same depends on or is affected by matter of law." This House, therefore, as Lord Watson puts it in *Mackay v. Dick & Stevenson*,¹ "has no concern with the proof led in the Sheriff Court"; and although a remit may be made to the Court below to pronounce further findings if it can be shown that there are material questions of fact left undetermined, "that can only be shown," says Lord Watson, "by a reference to the record and not to the proof." In this case, accordingly, your Lordships, being precluded from looking at the proof, made a remit to the Court of Session in order to obtain their determination of a material question of fact fairly raised upon the pleadings and the opinions of the learned Judges, but which had not been explicitly answered in the interlocutor under appeal. We now have their answer, which is perfectly clear and explicit, in the interlocutor of 12th July; and the whole determining facts are therefore to be found in the two interlocutors read together.

From these interlocutors it appears that the deceased miner was killed by a poisonous gas while working in the defenders' colliery on 27th April 1906. The pit in which he was working, No. 11 pit, was at the time ventilated by an air current brought down the shaft of another pit (No. 1), with which it had been brought into connection in the previous year, and the accident was due to the formation of this connection. No. 1 pit contained a seam, called the Lochgelly Splint and Parrot Seam, which, according to the finding of the Court, is universally recognised to be specially liable to spontaneous combustion, and part of it was on fire in 1901. The fire area had been sealed up, but it was impossible, from the character of the workings, to be sure that the fire was quite extinguished; and in fact it was still smouldering when the connection with No. 11 was made. It appears that an underground fire in this condition may give off a gas called carbon monoxide, which is so poisonous that the presence of a very small quantity of it in the atmosphere will cause death. It is, however, a gas of very rare occurrence in mines; and the learned Judges say in their opinions, although it is not expressly so found in the interlocutors, that it is very difficult to detect its presence except by its effect on the system, since

¹ 8 R. (H. L.) 37, at p. 46.

it has neither colour, taste, nor smell, and cannot be perceived by the senses. It was an escape of this deadly carbon-monoxide gas from No. 1 into No. 11 pit which caused the death of the miner. Dec. 19, 1911.

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These facts being ascertained, the Court had next to inquire whether the death was imputable to the fault of any person or persons employed in the mine; and on this question they found that the gas escaped into No. 11 pit through leaks in the stoppings which surrounded the whole area of the fire in No. 1 pit. I do not understand that the mere existence of leaks is imputed to negligence. But the possibility of their occurrence, and the necessity for repairing them when they occurred, were known to the manager, under-manager, and fireman; and it is found that "John Hunter, the under-manager, and John Gibbons, the fireman, were guilty of negligence in respect that, although for two days prior to the accident they were aware that a haze having a peculiar smell had appeared in the pit and that several workmen had been seized with headache and sickness, they took no steps, by withdrawing the workmen or otherwise, to guard against injury to those employed in the pit, until the cause of the haze and smell were discovered and removed"; and further, they found that John Gibbons failed to observe the provisions of Rule 4 (1) and Rule 7, enacted by section 49 of the Coal Mines Regulation Act, 1887, and also of special Rule 37 passed in terms of the powers conferred by section 51 of the said Act, and that the said John Hunter failed to observe the provisions of the said Rule 7. The grounds in fact and law for these findings are expressed very concisely and forcibly by the Lord Justice-Clerk when he says: "Upon the question whether there was conduct on the part of the responsible persons in charge involving liability under the Employers Liability Act, I have no doubt whatever. I cannot hold that either Hunter, the under-manager, or Gibbons, the fireman, fulfilled their duty of due inspection, or of moving the men out of danger in the circumstances. The account given of the exceptional state of things that was found on the day in question convinces me that there was sufficiently strong ground for not allowing the ordinary work to go on, until it was made clear, by proper means being taken, that there was no danger." I take it that the learned Judges thought that the two men in question neglected a duty imposed upon them by the circumstances, independently of special enactment, as well as by the statutory rules cited in the interlocutor. But for the present purpose it is more important to attend to the specific duties imposed by the statute. The general Rule 4 (1) provides for a daily inspection of the mine before the miners go to work; and, in particular, it prescribes that "a competent person" shall inspect the mine, "and shall ascertain the condition thereof" in certain respects, and in particular "so far as the presence of gas . . . and general safety are concerned," and that a report specifying where noxious or inflammable gas, if any, was found present, and what, if any, other source of danger was observed shall be recorded without delay in a book to be kept at the mine for the purpose and accessible to the workmen. Rule 7 prescribes that if at any time it is found by the person for the time being in charge of the mine or any part thereof that by reason of inflammable gases prevailing in the mine or that part thereof, or from any cause whatever, the mine or that part is dangerous, every workman shall

Lord Kinnear.

Dec. 19, 1911. be withdrawn and a competent person appointed for the purpose shall inspect the mine, and make a true report of its condition ; and a workman shall not, except in so far as is necessary for inquiring into the cause of danger or for the removal thereof, be re-admitted into the mine or part found dangerous, until the same is stated by the person appointed as aforesaid not to be dangerous. The special Rule No. 37 required the fireman to record without delay, in a book to be kept at the mine for the purpose and accessible to the workmen before commencing work, where noxious or inflammable gas, if any, was found present. For the application of these rules to the case it is proper to add that "the person for the time being in charge of the mine" was Hunter, the under-manager, because the manager was unwell at the time and unable to go down the pit ; and that Gibbons, the fireman, was the competent person required to make the daily inspection, and to make and record the reports specified in Rule No. 4 (1) and the special rule. The learned Judges impute to these two persons, therefore, that they failed to observe rules which are perfectly clear and explicit and obviously of the utmost importance for the protection of the workmen. For two days before the accident they had observed the presence in the workings of a peculiar haze or smoke, and at the same time they knew that some of the men had been suffering from headache and sickness. They might not be sufficiently instructed to connect these symptoms with carbon monoxide, but there was evidence enough of the presence of a poisonous gas of some kind to make it their plain duty to keep the men out of the pit until the leakage from No. 1 pit had been discovered and stopped. This plain duty they failed to perform, and the fireman Gibbons failed also to perform the special duty incumbent upon him of recording these things in a book accessible to the workmen, and so affording them an opportunity of refusing to go into the working places until the haze had been got rid of.

Now the judgment is not impugned in so far as it imputes to these two men negligence for which the respondents are liable under the Employers Liability Act ; and the grounds on which it has been so decided, so far as we are in a position to judge of them, appear to me irresistible. But the question remains whether the judgment is right in so far as it finds that the respondents are liable only under that Act and not otherwise.

This finding in law is based upon two specific findings in fact : (7) that the manager, the under-manager, and the fireman "were possessed of the qualifications and experience usually required of persons holding these offices" ; and (8) that "there was no negligence on the defenders' part in appointing, and continuing to employ, the said manager, under-manager, and fireman." If this last finding were an exhaustive statement of fact, and of fact only, it would be conclusive of the whole case, because your Lordships have no jurisdiction to review the decision of the Court below on matter of fact. But it involves matter of law, because it means that no ground of liability in respect of negligence has been established against the respondents. But negligence is not a ground of liability, unless the person whose conduct is impeached is under a duty of taking care ; and whether there is such a duty in particular circumstances, and how far it goes, are questions of law. If a definite duty has been ascertained, a finding that it has been duly performed or neglected is a mere finding in fact

which your Lordships will not review. But a finding as to negligence, Dec. 19, 1911. which implies the existence of a duty without explicitly defining it, is a proposition of mixed fact and law. Your Lordships must therefore disentangle as well as you can the facts from the law in order that you may decide the question which the parties are entitled to bring to this House by way of appeal. In that duty I think there is little difficulty in the present case, because the learned Judges have explained very clearly the legal liability which in their view attaches to the respondents. In so far as the eighth finding "depends on or is affected by" the law so expounded, it is unquestionably subject to appeal.

The main ground on which the judgment on this point was impugned by the appellants' counsel was that the statute imposes the duties, which are found to have been neglected, absolutely and directly upon the mineowners; and, therefore, that they have a good ground of action independently of negligence. I agree that if an absolute duty is imposed upon mineowners by statute, they must be liable absolutely to those for whose benefit it is imposed; and that if the things so required to be done are not done, it will be no answer to say that the failure is not owing to any fault or omission of theirs. That such an absolute duty may be imposed by statute I have no doubt whatever, and probably there may be some such duties imposed upon mineowners by the statute in question. But I find no such absolute duty in the statute with reference to the two rules which are said to have been infringed. The table of rules in which they occur is introduced by the general enactment that the following general rules are to be observed, not absolutely and in any event, but "so far as reasonably practicable in every mine." Nor are the two rules in dispute addressed directly to the mineowners. Section 49 imposes a variety of obligations upon a variety of persons, some upon managers and inspectors, some upon working colliers, some upon owners, and some upon anybody who goes down into the pit; and the particular rules with which we are concerned are imposed expressly and directly, not upon the owners themselves, but upon the manager in charge for the time being, or upon the person specially appointed by him or the owners for a certain specific purpose. But it is unnecessary to argue whether rules so qualified and so directed import an absolute duty on the respondents or not, because the point is decided by the judgment of this House in *David v. Britannic Merthyr Coal Company*.¹ In that case an action was brought by the widow of a miner who had been killed by an explosion in a mine caused by blasting operations conducted in contravention of the statutory rules, and the learned Judge by whom the case was tried directed the jury that the duty of the owners in respect of the rules was, in the first place, to publish them, and, in the next place, to enforce them to the best of their power as rules for the working of the mine, and that if they did so to the best of their power they would not be responsible if one of their servants by a breach of the rules caused damage; and with these directions he left to the jury the questions, first, whether the shot was fired in contravention of the rules, and, secondly, whether the contravention was brought about by the defendants not taking reasonable means

¹ [1909] 2 K. B. 146, [1910] A. C. 74.

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¹ [1909] 2 K. B. 146, [1910] A. C. 74.

Dec. 19, 1911. to prevent it by enforcing the rules to the best of their power. But with reference to this last question he further directed them that it was the duty of the plaintiffs to give evidence that the mineowners had neglected their duty of enforcing the rules. The jury answered the second question in the negative; and the Court of Appeal, by a majority, ordered a new trial on various grounds, as to which there was a great diversity of judicial opinion. The judgment was affirmed in this House, but on one ground only, to wit, that the learned Judge had misdirected the jury as to the onus of proof. Lord Halsbury pointed out that the Act required certain precautions to be taken, none of which were taken; that this circumstance obviously called for some explanation; and that on the question whether the authorities of the mine had done their duty in taking proper care for the safety of the miners, the burden of proof lay upon the defendants. The noble and learned Earl expresses no disapproval of the charge in so far as it explains the duty of the mineowners, nor does he indicate that the question whether they had not taken all reasonable means to prevent the accident was not a proper one for the jury; for in stating the effect of the misdirection, his Lordship says, that although the learned Judge left the question to the jury, which I think implies that he left the proper question to the jury, he left it in such a way and with such a direction that it was hardly possible for them to find any other verdict than that which they did find.

It appears to me that by ordering a new trial on these grounds this House has negatived the absolute statutory liability for which the appellants contend. For if each of the rules contained in section 49 imposes on the mineowners an absolute duty irrespective of negligence, it would have been no answer to say that they had taken all reasonable means to prevent contravention, and no question of onus could have arisen. But then the case decides at the same time that, although it be not an absolute duty, there is still a duty cast upon the mineowners in respect of the performance of the statutory rules even when these are to be actually carried out by other persons than the mineowners themselves, and further, that if an injury be caused by a breach of the rules, the burden of proving that they have done all in their power to prevent such breach lies upon the mineowners themselves. I confess to thinking that the learned counsel for the appellants put their case unnecessarily high when they argued so strenuously for an absolute liability. The judgment of which they complained finds that the respondents are not liable, because the accident which caused this miner's death was due to the negligence of persons in their employment. The true question appears to me to be, not whether the statute imposes an absolute duty with reference to each and every one of the specific rules which the 49th section contains, so that in every case of contravention and in all circumstances the owners must be liable for any consequent injury; but the question is whether it imposes such a duty upon the mineowner personally as to preclude him from putting forward the defence of common employment. This is, of course, a perfectly well-established exception from the ordinary rule of law which makes a master responsible for his servants, because it is held to be an implied term of the contract of service that the workman takes the risk of injuries arising from the negligence of other servants in the same employment. But that goes no further than to

relieve the master of liability to his servant unless there be negligence on his part in that which he personally undertakes, or is required by statute to do, for the benefit of the servant.

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Limited.

The question which is raised by the judgment, therefore, is whether there was any statutory duty incumbent upon the respondents themselves which will exclude the plea of common employment, notwithstanding that the direct cause of injury has been found to be the negligence of their under-manager and fireman. I think that that question again is decided by the case of *David v. Britannic Merthyr Coal Company*.¹ But to apply that decision to the present case it is necessary to see what is the precise statutory duty in which the respondents are said to have failed. The judgment in *David v. Britannic Merthyr Coal Company*¹ does not expound in detail the particular clauses of the Act upon which the question arises; and I cannot express with confidence any opinion of my own as to the exact construction of the 49th and 50th sections, because it is hardly possible to do so without finding oneself at variance with one or other of the very eminent Judges who have already given conflicting opinions upon that point. I venture to say, however, that to my mind the preferable way of interpreting the Act is to take these two consecutive clauses together, to consider how they are related to one another, and so to get at the true meaning and intent of the whole enactment.

Now the 49th section, as I have already said, imposes certain specific duties upon particular persons, but it begins with a general imperative enactment that the rules which are thereafter to be stated in detail shall be "observed so far as is reasonably practicable in every mine." I think that is an enactment expressly directed not only to people who are charged with the actual performance of specific duties, but also to the owners who have the ultimate control of the mine. There is nothing in the form of the language to limit its application to particular persons. It is addressed to all whom it may concern; and I think it impossible to suppose that the mineowners are outside the scope of that general enactment. But the particular rules which are covered by it are for the most part addressed not to the owner, but to the working miners and managers underground. For example, I think it out of the question to hold that if a working collier neglects a specific direction as to the use of a safety lamp, or if he is found in particular parts of the mine with lucifer matches in his possession, that is a breach of an absolute duty imposed upon the mineowner. It may be that certain of the other rules of a different character directly affect the mineowner, as was held by the Court of Session in *Bett v. Dalmeny Oil Company*.² But the two with which we are now concerned are not among these, because mineowners are absolutely debarred by the statute from interfering personally with the management of the mine. They are bound by very stringent regulations to appoint certificated managers and under-managers, whose authority completely displaces their own. It is nothing to the purpose to say that employers, and in particular joint stock companies, must act through their servants; because the point to be established is that the defence of common employment is excluded by reason of a

¹ [1909] 2 K. B. 146, [1910] A. C. 74.

² 7 F. 787.

Dec. 19, 1911. statutory duty imposed on the employers personally, which they cannot throw over upon their servants. But I think the appellants make that point good when they appeal to the general enactment that the rules shall be observed, because in so far as it is addressed to the mineowners that provision, in my opinion, imposes upon them a duty to use due care and diligence to secure that the rules shall be obeyed. If this is a duty of diligence, it follows that the mere breach of a rule addressed directly to a servant will not of itself fix the employer with an absolute liability, but on the other hand it follows equally that the occurrence of an accident through a breach of rule, which it was his duty so far as possible to prevent, raises a presumption against him which he is called upon to rebut. If the rules are broken and mischief follows, there is *prima facie* evidence of failure of duty, and although the employer may have a complete defence if he has done his best, the burden of proving it lies upon him. This involves no departure from the general rule that, where the balance is even as to the existence of negligence, the party who founds upon the negligence of another must prove his cause of action, because the scale is turned when it is proved that an accident has happened which the employer was bound to prevent.

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Fife Coal Co.,
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Lord Kinnear.

I come to this conclusion upon the 49th section alone, but I am confirmed in my reading of it by the provisions of the 50th section, which make every contravention of, or non-compliance with, the general rules an offence against the Act punishable by a fine. I agree that the imposition of a penalty as for a statutory offence does not prove that there is also a civil liability. But the 50th section does not define the offence, which it makes punishable, otherwise than by reference to the 49th. It assumes that there are duties already created, and recognizes that they are incumbent in different ways upon different persons. For it begins by enacting that every person who contravenes any of the general rules shall be guilty of an offence, and that is as directly applicable to owners and managers as to anybody else; and then it goes on to show that there is another and different duty imposed upon owners and managers as such, and not upon persons engaged in the daily work of the mine. For it says that in the event of a contravention by any person whomsoever "the owner, agent, and manager shall each be guilty of an offence against the Act unless he proves that he had taken all reasonable means, by publishing and to the best of his power of enforcing the said rules as regulations for the working of the mine, to prevent such contravention or non-compliance." I cannot read this last clause as the remission of a penalty which it assumes to be already imposed. It is an essential part of the definition of the offence. If any person whosoever, other than the owner himself, has contravened a rule, the owner has committed no breach of duty and is guilty of no offence, provided he can prove that he has taken all reasonable means to the best of his power to prevent such contravention. If he has not taken such means he is in breach of duty and is therefore guilty of an offence. I do not go to the penalty clause for the purpose of inferring a civil liability. But I think it of material importance to the question of construction because, while the duty had been already laid down, it became necessary to determine its scope and extent with more precision when non-performance was to be made a punishable offence.

If the duty be established, I do not think there is any serious question as to the civil liability. There is no reasonable ground for maintaining that a proceeding by way of penalty is the only remedy allowed by the statute. The principle explained by Lord Cairns in *Atkinson v. Newcastle Waterworks Company*,¹ and by Lord Herschell in *Cowley v. Newmarket Local Board*,² solves the question. We are to consider the scope and purpose of the statute, and in particular for whose benefit it is intended. Now the object of the present statute is plain. It was intended to compel mineowners to make due provision for the safety of the men working in their mines, and the persons for whose benefit all these rules are to be enforced are the persons exposed to danger. But when a duty of this kind is imposed for the benefit of particular persons, there arises at common law a correlative right in those persons who may be injured by its contravention. Therefore I think it is quite impossible to hold that the penalty clause detracts in any way from the *prima facie* right of the persons for whose benefit the statutory enactment has been passed to enforce the civil liability. I think this has been found both in England and Scotland in cases in which the point was directly raised, the case of *Groves v. Lord Wimborne*³ in England, and *Kelly v. Glebe Sugar Refining Company*⁴ in Scotland.

Then, if that be so, the only question that remains is whether the duty so imposed upon the mineowner of using all due care and diligence to prevent the contravention of the rules by anybody in the mine, is or is not a duty that precludes him from putting forward the plea of common employment. I think it is very clear that it is such a duty. The negligence of the persons in the employment of the respondents is the very cause of liability which the statute creates. They are to do their best in order to prevent persons in their employment from contravening the rules, and it is out of the question to say that it is a good defence to show that the direct cause of the injury was the negligence of their servants, which is the very thing they were bound to prevent, if they did not do what was in their power to prevent it. But I am afraid I ought not to have detained your Lordships so long by an examination of the statute or its legal consequences, because I say again I think this point, like the former, is directly decided by the case of *David v. Britannic Merthyr Coal Company*,⁵ for your Lordships in that case held that, when an action had been brought for an injury caused by a contravention of the rules, the question as between the plaintiff and the mineowners was whether the contravention had happened notwithstanding that the mineowner had done all in his power to prevent its happening, and that the burden of proving that he had performed that duty, which was cast upon him for the safety of his workmen, lay upon the mineowner.

The only question that remains then is whether upon the findings in fact, which form the only basis upon which your Lordships must apply the law to the particular facts of this case, it is shown that the respondents

¹ (1877) 2 Ex. D. 441.

² [1898] 2 Q. B. 402.

³ [1909] 2 K. B. 146, [1910] A. C. 74.

⁴ [1892] A. C. 345.

⁵ (1893) 20 R. 833.

Dec. 19, 1911. have discharged the burden laid upon them by proving that they have formed their duty towards their workmen. I should have thought very doubtful if it had to be determined by reference to the interlocutory judgment first appealed against, as explained by the opinions delivered in the cases below. It is evident in the first place that the learned Judges treated the case as an ordinary action for negligence, in which it was for the pursuers to prove the negligence that they alleged. And, since the injury was due to the fault of fellow-servants, the Court held that this could only be done by showing that the master had failed to use due care and diligence in the selection of competent persons to superintend and carry on the work. That is the meaning of the judgment. This is clearly brought out in the opinion of the Lord Justice-Clerk, where he says,—“On a consideration of the evidence in this case I am not satisfied that the defenders have been proved to have been negligent in making the appointment.” This is the point of view which the statute requires to be taken. But a difficulty was created by the terms of the interlocutor finding that the defenders were not negligent. It is preceded, as your Lordships are aware, by a finding that the persons whose conduct is impugned as negligent were possessed of the qualifications and experience usually required in persons holding their office. If the succeeding finding, that there was no negligence, meant only that the employers were not negligent in respect to the appointments they made, it would mean that they had satisfied themselves that the qualifications and experience of these two men were those of ordinary under-managers and firemen, who might be without the knowledge and experience which would enable them to detect and guard against danger from carbon monoxide, your Lordships, I think, would have required to consider whether that was not a finding “affected” (to use the phrase in the Judicature Act) by an erroneous view of law. But then there might be quite a different question if the terms of the finding, that there was no negligence in continuing to employ these persons, were intended to mean that when a new danger was brought into existence by the connection of No. 11 pit with No. 1, so as to expose the persons working in the former pit to injury by the escape of poisonous gas from the latter, the respondents had directed their attention to the question of the skill and experience which was required for dealing with the emergency and had continued to employ the men originally appointed because they were then satisfied that they possessed such skill and experience. I apprehend it might very reasonably be said that mineowners, who are themselves precluded from interfering with the working in the mine, could do no more than take due care to see that the people whom they employed were competent and had qualifications adequate to meet the particular danger which they had to consider; and therefore your Lordships thought it necessary that we should obtain from the Court a more specific statement as to what they held that the respondents had really done in order to satisfy themselves of the competency of the men employed to deal with this particular emergency. Your Lordships have received an answer, and I think it necessarily follows from all I have said that the answer actually given by the Court to this question is conclusive against the respondents, for the answer is, “That it would have been practicable”—and I pause to remind your

Lordships that under the provisions of section 49 practicability is the test—Dec. 19, 1911.

“That it would have been practicable (had such a danger been anticipated) ^{Black v.} for the defenders to cause instructions to be given to Gray, Hunter, and ^{Fife Coal Co.,} Gibbons as to the symptoms and dangers of an outburst of carbon monoxide, ^{Limited.} and that the defenders did not take any means at the time when the con- Lord Kinnear. nection between No. 1 and No. 11 pits was made, or thereafter, to secure that the knowledge and qualifications of the persons engaged in the supervision, and of the fireman, were sufficient to enable them to deal with the special danger which might arise from a sudden outbreak of carbon-monoxide gas.”

I think that is conclusive of the whole question. But then the learned Judges in the Court below have thought it necessary or proper to accompany this answer to the question which was put to them by your Lordships by a series of findings in fact which were not before the House when the case was first argued. I think, if I may respectfully say so, the Court was perfectly right in taking this course, because I think it was for them to make it clear to the House what the specific determining facts really were, and if they had omitted from their first interlocutor, for reasons which might be perfectly sufficient in the view which they took of the law, any specific fact which they thought material to the question put to them by this House, it was right and proper that they should now state it and bring it under your Lordships' notice. But then I think the only question which arises upon this specific statement of new facts is whether anything in that statement modifies or detracts from the legal effect of the final statement, that the respondents took no means to secure that the knowledge and qualifications of the persons engaged in supervision were sufficient to enable them to deal with the special danger which arose. This might not have been conclusive if it had been found that no such means were practicable. But the contrary is found in the preceding sentence. I think this amounts to a finding in fact that the respondents failed to perform the duty imposed upon them for the safety of their workmen, inasmuch as they failed to take all reasonable means to the best of their power to prevent the contravention of rules which brought about the accident.

I am therefore of opinion, and I so move your Lordships, that the interlocutor appealed from should be reversed. I presume, unless the parties agree as to damages, the case must go back to the Court of Session in order that they may assess damages upon the ordinary rules of common law liability and not upon the limited scale provided by the Employers Liability Act.

LORD SHAW OF DUNFERMLINE.—On the position of this House, in view of the findings of the Second Division, I agree entirely with the judgment of my noble and learned friend Lord Kinnear. It appears to me that on pure questions of fact the findings must be here accepted as final. But (1) it is not so in regard to any findings which are findings in law or on mixed fact and law; (2) nor is it so as to the legal results implied in or following from any findings whether of law or of fact.

The case on its merits and facts is one of such general importance in the

Dec. 19, 1911. mining and industrial world, and has been so fully and anxiously pressed and considered, that I have thought it right to resume them as follows

Black v. Fife Coal Co., Limited. Alexander Hynd Black and a fellow-workman, Serrie, both oncost workers in the defenders' No. 11 pit, Lumphinnans, on 27th April 1906 lost lives in the mine by inhaling carbon-monoxide gas. The learned Sheriff-substitute (Hay Shennan) has detailed the circumstances in the first findings in fact by him,¹ which are adopted in the interlocutor of the Second Division. No one can peruse these without being satisfied that, if it is possible to impute personality and knowledge to a limited company, the defenders must have been well aware that the particular coal measures then being worked were of a specially dangerous character, owing to the occurrence of fires and the escape of noxious and deadly gases. Three men, George the manager, Hunter, the under-manager, and Gibbons, the fireman, were employed at the pit. The Second Division find "(9) that the said John Hunter and John Gibbons, having duties of superintendence in No. 11, were guilty of negligence in respect that, although for two days prior to the accident they were aware that a haze having a peculiar smell had appeared in the pit, and that several workmen had been seized with headache and sickness, they took no steps, by withdrawing the workmen, or otherwise, to guard against injury to those employed in the pit until the cause of the haze and the smell were discovered and removed." The learned Sheriff-substitute in the adopted findings shows that this was not a mere case of withdrawing the workmen, but a case on two, and possibly three successive days of readmitting workmen to parts of the mine in which the most noxious and dangerous gas, known as carbon monoxide, was apt to operate with fatal effect.

It is extremely difficult to understand how, in such a situation, men could be supposed to be competent who had no knowledge of the dangerous properties of the gases in these pits, or of the peril to human life involved in the non-withdrawal or readmission of workmen in the circumstances described. I share to the full, accordingly, the view expressed by the learned Lord Justice-Clerk, when he says: "I have found this case to be not unattended with difficulty, particularly in view of the fact that the Sheriff-substitute who evidently gave the case great attention, has held that the defenders are liable in damages at common law on the ground that they did not exercise due care in appointing persons of sufficient skill to take charge of the work in their mine." I think it incredible that if men had had such knowledge without which it is manifest that the lives of those who had to obey their orders were put in hourly peril, they should not have complied with vigour and alacrity to the statutory obligations prescribing imperatively for the withdrawal and non-admission of men from and to the dangerous area.

As the case originally came to your Lordships' House it was a matter for consideration whether the Second Division did find, or did not, that the persons "put in charge of the works" by the respondents knew these essential facts—essential, that is, if the intention of the Legislature to afford those workmen protection from the perils which surround them were to receive anything like attention and effect. Lord Low remarks that it is

¹ *Vide* footnote, *supra*, (H. L.) p. 35.

"proved that the death of the miner, Black, was caused by carbon monoxide having found its way into No. 11 pit along the air passage from the old fire, and that the managers and fireman were not alive to the danger, having had no previous experience of carbon monoxide." What then—this being—was the actual finding of fact upon which your Lordships' judgment could proceed? It is in these terms: "(7) That John Gray, the manager, John Hunter, the under-manager, and John Gibbons, the fireman, all at No. 11 pit, were possessed of the qualifications and experience usually required of persons holding these offices." And then followed upon that a mixed finding of law and of fact, viz.—"(8) That there was no negligence on the defenders' part in appointing and continuing to employ the said manager, under-manager, and fireman."

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What did this mean? Did it mean that they knew what do appear to be the essentials of their business in so far as the protection of human life is concerned and so were competent? It seemed to be clear, from the opinions of the learned Judges of the Second Division, that their view was that these men did not know these essentials. Or did it mean that they were ignorant thereof, and yet, nevertheless, were competent for their business, because their ignorance was consistent with the possession of the "qualifications and experience usually required"? If so, I find it difficult to figure a finding more hazardous to the pit workers of this country, and more inconsistent with the spirit of those protections which the Legislature thought fit to provide in the Coal Mines Regulation Acts. I may say that I hold it to be not entirely satisfactory that after an express finding of incompetency made with care, and on apparently strong and sound reasons, by the Sheriff-substitute, the Court of Session should, recalling these findings, simply tender the proposition that these men had the qualifications and experience usually required. But further consideration of that proposition, standing by itself, may be foregone in view of the further findings made in answer to the supplementary question remitted by this House on 25th July 1910, to which I shall afterwards refer.

By their tenth finding the learned Judges of the Second Division find "that the said John Gibbons failed to observe the provisions of Rules 4 (1) and 7 enacted by section 49 of the Coal Mines Regulation Act, 1887, and also of special Rule 37, passed in terms of the powers conferred by section 51 of the said Act, and that the said John Hunter failed to observe the provisions of the said Rule 7." The last finding is, "That the pursuers have no claim against the defenders at common law, but only under the Employers Liability Act."

None of the findings of the Second Division deals with what appears to me to be one of the most important rules directly applicable to the present case, namely, Rule 1. It is in these terms: "An adequate amount of ventilation shall be constantly produced in every mine to dilute and render harmless noxious gases to such an extent that the working places of the shafts, levels, stables, and workings of the mine, and the travelling roads to and from those working places, shall be in a fit state for working and passing therein." That rule is expressly founded upon by the pursuers and appellants, and, indeed, is quoted at length in article 10 of their condescendence in the action.

Dec. 19, 1911. Rule 1, thus founded on, is the first of a series, following words which, so far as they themselves are concerned, are absolute and imperative, namely, "The following general rules shall be observed, so far as is reasonably practicable, in every mine." It is admitted that protection in the present case from noxious gases was reasonably practicable, and so the unconditional imperative both of the words of the section and of the specific language of Rule 1 remains. This unconditional imperative, dealt with in further passages in my judgment, is, I repeat, one which arises on the assumption that the prescribed protection under the rules was "reasonably practicable." Rule 1 appears very clearly, indeed, to throw around workmen pursuing the hazardous calling of coal mining these two elementary protections: that the air of the workings shall be fit to breathe, and the roads fit to travel, without peril.

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The question as to roads was tried in Scotland in *Bett v. Dalmeny Oil Company*,¹ and another rule (21), also providing for the same protection, was founded on, namely, "the roof and sides of every travelling road and working place shall be made secure . . ." A road had not been properly supported while the operation of cutting away certain pillars was being conducted, and this in consequence of the negligence of the manager or oversman. It was strongly contended that, notwithstanding the statutory obligation for safety the pursuers could not recover under the common law, but that the sole remedy lay under the Employers Liability Act, the accident having been caused through the fault of the manager or oversman as fellow-employees. A verdict was given for the pursuers.

Lord M'Laren delivered the judgment of the First Division, consisting of himself, Lord Adam, and Lord Kinnear. He used these words: "It follows, then, that the verdict ought not to be disturbed unless the defenders are in a position to say that this is a case falling within the rule as to common employment. Now, the principle of that rule is that it is an implied term of the contract of service that the workman takes the risk of such misfortunes as may result from the negligence of persons who are engaged in the organisation of labour of which he is a member, and that the master is only responsible for the performance of such duties as he can reasonably be supposed to undertake in person—such as the provision of a competent staff of men, adequate material, a proper system, and effective supervision. But in the case under consideration the duty of supporting the roof is a statutory duty, and stands on a different plane from those duties which a master undertakes as implied conditions of the contract of service. The duty is not merely to provide a competent underground manager, and to supply him with material for supporting the roof of the mine where necessary. The statutory duty of the mineowner is to give necessary support to the roof, and in my opinion it is not an answer to a case of neglect of that duty to say that the employer had delegated the performance of the duty to a competent manager."²

In *Groves v. Lord Wimborne*,³ a case founded upon the neglect to keep machinery properly fenced in accordance with the provisions of the Factory and Workshop Act, the same view on the point of principle was taken,

¹ 7 F. 787.

² *Ibid.*, at p. 790.

³ [1898] 2 Q. B. 402.

A. L. Smith, L.J., remarking: "In the present case, which is an action founded upon the statute, there is no resort to negligence on the part of a fellow-servant or of anyone else. There being an unqualified statutory obligation imposed upon the defendant, what answer can it be to an action for breach of that duty to say that his servant was guilty of negligence, and therefore he was not liable? The defendant cannot shift his responsibility for the performance of the statutory duty on to the shoulders of another person."¹ The language of Rigby, L.J., is, if possible, still more unambiguous. It is in the following terms: "There has been a failure in the performance of an absolute statutory duty, and there is no need for the plaintiff to allege or prove negligence on the part of anyone in order to make out his cause of action. That being so, the doctrine of common employment is out of the question."²

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When to the dicta of these learned Judges there are added those of Fletcher Moulton, L.J., and Buckley, L.J., in the case of *David v. Britannic Merthyr Coal Company*,³ it cannot be denied that a powerful body of authority stands on the books in favour of the proposition, in its absolute sense, that the defence of common employment is not pleadable to an action based upon the neglect of statutory duty. I desire for myself to say that I appreciate the force and cogency of the opinion of Fletcher Moulton, L.J., in the case of *David*.³

There are three views:—(1) Either the imperative declaration of Parliament that the air of a pit should be fit to breathe by the workman must be read in, what is *ex facie*, its absolute and peremptory sense, subject to no exception; (2) or this declaration is subject to exception in every case where personal fault cannot be established against the mineowner, and the defence of common employment is one so imbedded in the law that it must be assumed to have been left open unless expressly excluded by the terms of the Act; (3) or a third situation may be figured, of which *David's* case³ is indeed an example. The Court of Appeal in *David's* case,³ notwithstanding the judgments referred to, did not apply the rule in its absolute sense, but remitted the case for new trial, leaving the burden of proof upon the mineowner to establish the defence that he had done everything possible to obey the terms of the statute, and that what happened had occurred by reason of some disregard of the rules, in defiance of the owner's regulations and efforts. This view was acquiesced in by the House of Lords,⁴ but I desire to put on record that I do not for myself express any dissent from the main proposition laid down by Fletcher Moulton, L.J., which is in line with those already cited from Lord M'Laren, A. L. Smith, L.J., and Rigby, L.J., that the defence of common employment is out of the question where a statutory duty imperatively laid has been neglected. I repeat that it was not treated as necessary to decide that question in *David's* case.³

The case may be figured of the most careful superintendence, the most complete compliance by the mineowners, so far as they were concerned, with every obligation resting upon them under the statute, of the settled

¹ [1898] 2 Q. B. at p. 410.
³ [1909] 2 K. B. 146.

² *Ibid.*, at p. 413.
⁴ [1910] A. C. 74.

Dec. 19, 1911. order and management of the mine being in such a position that, unless disturbed, the statute would have been in all points complied with; and yet that such a disturbance took place by reason of something which,—to put it in the language of another Act of Parliament,—might be called the serious and wilful misconduct of some person engaged in the employment. I take that case to be reserved, and I treat the point of whether responsibility in such cases would attach to the mineowner as not one which is necessary to be here decided. But when I come to this present case I find it in no respect whatever to be a case of the disturbance of the settled order and management of this mine; but, upon the contrary, it is a case in which the Judges have found that what did occur happened not by reason of any person interfering with the management, interposing something which caused the accident, in spite of all that the owners and the management had done, but simply and solely in consequence of the equipment of the mine, in the sense of the staff charged with the performance of the statutory duties, being insufficient; because the staff was entirely ignorant of what was necessary in gassy mines for the protection of human life. I cannot bring myself to think that such a state of matters as that is permissible without civil responsibility at common law, in face of a statute which has declared for the protection of the lives of the workmen in mines in this country that the air in which they work and travel shall be fit to breathe.

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Rule 7 makes stipulations for the withdrawal of workmen in case of danger; it confirms, in my judgment, the need for the knowledge of noxious gases on the part of the management, and in no respect abates or shifts the obligations upon the owner arising under Rule 1. It appears from the judgments of the Judges of the Second Division that the manager was appointed in 1902, and the under-manager and fireman in 1904. At these dates this pit was not known to be gassy, and although, for myself, I should hold it to be a dangerous thing, some excuse might be tendered for the proposition that the staff did not then need to be acquainted with gas dangers. In 1901, however, in an adjoining pit several men lost their lives by the escape of carbon-monoxide gas, and in 1905 a connection was made of that gassy and dangerous pit with the pit now in question, the latter being thus rendered, as is now lamentably clear, liable to the presence of the fatal gases. What was done to equip the officials of the latter pit with the knowledge necessary to cope with the changed and dangerous conditions? It rather appears that nothing was done. They remained as ignorant as before.

It is at this point that reference can appropriately be made to the procedure of this House in the cause on 25th July 1910. On that day it was adjudged "That with a view to the further hearing of the cause, the cause be, and the same is hereby, remitted to the Second Division . . . in order that the learned Judges of that Division may pronounce a finding of fact upon the following question, viz.:—When the connection was made with the old mine in which smouldering fires, followed by the giving off of carbon monoxide gas, had previously occurred, did the defenders take all practicable means to secure that the persons engaged in supervision, and the fireman appointed as a competent person under the statute, were possessed

of the knowledge and qualifications required to deal with the special danger of the presence of noxious gases arising from the connection made?" Dec. 19, 1911.

The learned Judges have given in answer a careful series of eight findings dealing with the history of the pit and other matters, but the reply to the specific question remitted by the House is answer 8, which is in these terms: "That it would have been practicable (had such a danger been anticipated) for the defenders to cause instructions to be given to Gray, Hunter, and Gibbons as to the symptoms and dangers of an outburst of carbon monoxide; and that the defenders did not take any means at the time when the connection between No. 1 and No. 11 pits was made, or thereafter, to secure that the knowledge and qualifications of the persons engaged in the supervision, and of the fireman, were sufficient to enable them to deal with the special danger which might arise from a sudden outburst of carbon-monoxide gas."

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This matter being thus cleared up, I now recall the situation as described in the findings of the Second Division. Three men, the manager, the under-manager, and the fireman, have been found incompetent by the Sheriff-substitute on account of their ignorance of the knowledge which would appear to be elementary if human life is reckoned of value in such circumstances. The Court of Session do not pronounce, notwithstanding these express findings of incompetency, that the men so failing in the equipment of knowledge were competent (it is manifest that that could not be done, it would not be a finding, but a flat contradiction, of fact), but they find that they were "possessed of the qualifications and experience usually required of persons holding these offices." A pronouncement has been made that the staff of a mine is possessed of the qualifications and experience usually required, although the officials are men who do not know the elementary necessities for the protection of the lives of the workmen who are under their orders.

The great gravity and general importance of an acquittance of the mineowners from common law responsibility, an acquittance which is furnished on any such finding, is only too obvious. And still more serious may be the effect in destroying, or tending to destroy, those safeguards which Parliament had set up in the case of those working in the coal mines of the country. It is admitted that if the mineowner had been an individual managing his own pit—had been, as I suppose is possible, his own certificated manager—and ignorant of the requirements or dangers attending the working of those gas-bearing seams which formed part of the workings, his plea of ignorance would have availed him nothing as a civil defence to a common law claim, and that the plain imperative of the statute bound him in the responsibility of providing his workmen with those protections which had been prescribed. But it is said that the owner can escape the responsibility of his own dangerous ignorance by organising the mine with a staff labouring under the same dangerous ignorance, and that, although the former case would fall under the plain peremptory rule of the statute and its consequences, the latter case forms an exception thereto.

When one considers that nearly the whole, if not all, of the mines of this country are under delegated management, then this alleged exception to the imperative statutory rule is seen to be no mere exception, but to be equiva-

Dec. 19, 1911. lent to a destruction of the rule as a safeguard of life. It is argued law Courts must consent to this destruction because the exception is fruit of legal doctrine, and the decision of the Second Division is defeated on that ground. The commanding principle in the construction of a statute passed to remedy the evils and to protect against the dangers which front or threaten persons or classes of His Majesty's subjects is that, consistently with the actual language employed, the Act shall be interpreted in the sense favourable to making the remedy effective and the protection secure. This principle is sound and undeniable.

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But the Court below hold that the Company are not responsible at common law, because these men were fit when appointed, Lord Shaw remarking on the fact that the connection between the two pits "was made till early in 1905, a considerable time after the appointment of the men."

With much respect to the Court below, it humbly appears to me that they have not attached the proper significance to these facts. When the pit was turned, or possibly turned, into a gassy pit, then—if not before—certainly from that time onwards—the permitting of men without requisite knowledge of gases and their dangers to be on the managing staff of the mine was an inexcusable neglect on the part of the owners, and I fail to understand what a reference to some previous date and a different set of conditions has to do with abating this serious responsibility.

But this point is made, unhappily, clearer by another, namely, by considering what Rule 7 requires as to the inspection when gases are found in any part of the mine. "A competent person appointed for the purpose is to inspect and make a report, and no person is to be admitted, & until he, the competent person, declares that it is no longer dangerous, the mine is free from noxious or deadly gases.

Not one of these things was done in the present case. For who was the "competent person"? The owners had recognised their duty to appoint a competent person, and he had accordingly been named as such by the 43rd special rule of the pit. He was the fireman, the man possessed of the theoretical or practical knowledge on the subject of pit gas, and appointed before the connection with the gassy pit was made. This was the man who was ticketed by the owners as the "competent person" under the statute. In my opinion this proceeding was, on the part of the owner, the most highly reprehensible and dangerous, and it led to these two men's deaths. It constituted, what, in my opinion, was a defiance of those protections which the Coal Mines Regulation Act had, after scrupulous care by Parliament, thrown around the coalworkers of this country.

In my opinion the judgment should be reversed, and the decree giving for the sums brought out by the learned Sheriff-substitute as due at common law should be restored.

LORD ASHBOURNE.—The question in this case is whether there is a liability at common law or under the Coal Mines Regulation Act, 1887, or whether the damages can be assessed only under the Employers Liability Act.

Your Lordships cannot review the findings of fact in the Second Division

which were originally before the House, but your Lordships are at liberty Dec. 19, 1911. to consider whether, taken in connection with the further findings on the remit ordered, a question of law is raised which calls for examination.

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It is found that there was negligence on the part of the assistant manager and the fireman, but that the respondents are not liable, as those officials were in a common employment with the deceased, and were appointed by the respondents after they were satisfied that they "were possessed of the qualifications and experience usually required of persons holding these offices."

Lord
Ashbourne.

I do not think this is a very satisfactory statement that they were believed by the respondents to be entirely competent, but I believe, from the language used by Lord Low, that that was the opinion of the Second Division.

The gas that produced the fatal effects was carbon-monoxide gas, a deadly but obscure gas of slow and insidious action, not very familiarly known in ordinary mines, but likely to be generated in and likely to escape from a pit, part of which had a smouldering fire, being the product of imperfect or incomplete combustion. The respondents were acquainted with the risks of this gas. They had themselves an unextinguished or smouldering fire in one of the neighbouring pits, and this so attracted their attention to the risks of monoxide gas that they in 1901 circulated a pamphlet on the subject amongst their officials and employees, drawing attention to its dangers.

In the year 1905 a connection was actually made from the pit, the seat of danger, to the pit where the death was caused, and in the words of Lord Low, "The death of the miner was caused by carbon-monoxide gas having found its way into pit No. 11 along the air passages from the old fire, and the managers and fireman were not alive to the danger, having no previous experience of carbon monoxide." This connection created a new and dangerous position in pit No. 11, which cast upon the defenders the onus of seeing that the manager, assistant manager, and fireman were competent to deal with this new peril, alive to its reality, and duly warned as to the observance of the rules 1 and 7 so often referred to. The case of *David v. Britannic Merthyr Coal Company*¹ quite supports this view, and Lord Halsbury there said that "the burden of proving that the authorities of the mine had done their duty in taking proper care of the safety of the miners" was on the defendants. Their Lordships deemed it right, after the first hearing here, in July 1910, to remit this case to the Second Division to answer the question, "When the connection was made . . . did the defenders take all practicable means to secure that the persons engaged in supervision and the fireman appointed as a competent person under the statute were possessed of the knowledge and qualifications required to deal with the special danger of the presence of noxious gases arising from the connection made?"

The reply of the Second Division (after findings on the general case) was to the effect that it would have been practicable, and that the "defenders did not take any means at the time when the connection was made, or there-

¹ [1909] 2 K. B. 146, [1910] A. C. 74.

Dec. 19, 1911. after, to secure that the knowledge and qualifications of the persons engaged in the supervision and of the fireman were sufficient to enable them to deal with the special danger which might arise from a *sudden* outbreak of carbon-monoxide gas."

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It will be noticed that the finding in the remit mentions "sudden outbreak," which was not mentioned in the question remitted to them and cannot narrow the duty of the defenders.

Whatever may have been the statutory duty of the respondents as to ventilation adequate to dilute and render harmless noxious gases, I think that when this connection was made with pit No. 11 the steps in the question remitted should have been taken, and it is to be regretted special warning was not circulated amongst their officials, drawing their attention to the new and deadly danger which might be thus introduced by the possible and insidious presence of this monoxide gas. I think that the question needed closer examination than the Second Division gave it at the first hearing and required the remit to ascertain a crucial fact. What is the effect of the finding in the remit? We must not allow ourselves to be hampered or embarrassed by other findings. Is it shown that it is now open to the House to consider whether the defenders are liable? I think it clearly is; and that your Lordships are quite justified in holding that the defenders were guilty of neglect of their statutory duties in not taking any steps to deal with the special danger of the presence of noxious gases arising from the connection made.

I therefore think that the appeal should be allowed.

The parties then intimated that they were agreed that the interlocutor of the Sheriff-substitute should be restored.

ORDERED that the interlocutor appealed from be reversed: that the interlocutor of the Sheriff-substitute be restored: and that the respondents do pay to the appellants their costs in this House and in the Courts below.

WALKER, SON, & FIELD—D. R. TULLO, S.S.C.—A. & W. BEVERIDGE—
W. & J. BURNES, W.S.

No. 9.

CRAWFORD & LAW, Pursuers (Appellants).—*Bailhache, K.C.*—
D. P. Fleming.

Dec. 19, 1911. ALLAN LINE STEAMSHIP COMPANY, LIMITED, Defenders (Respondents).
—*Morison, K.C.*—*C. H. Brown.*

Crawford &
Law v. Allan
Line Steam-
ship Co.,
Limited.

Shipping Law—Bill of Lading—Through bill of lading—Construction—Acknowledgment that goods in good order at place of departure—Goods found damaged at place of arrival—Claim against last carrier—Onus.

A quantity of flour in bags was consigned from Minneapolis, U.S.A., to Glasgow on a "through" bill of lading signed by an agent on behalf of the various carriers on the route (including the steamship company carrying from New York to Glasgow), and bearing that the goods were "received at Minneapolis in apparent good order, except as noted." The bill of lading provided that no carrier should be liable for damage not occurring on his portion of the route, and, in particular, that the steamship company should not be liable for inland damage; the steamship company, on the other hand, agreeing to pre-

sent promptly to the inland carriers any claim for damage to the goods before delivery at New York. The bill of lading also incorporated the ordinary ocean bill of lading of the steamship company, which proceeded, "Received in apparent good order and condition, . . . " and further provided that the shipment was subject to the provisions of an American statute which made it obligatory upon shipowners to issue to shippers a bill of lading stating the condition of the goods at the time of shipment. No bill of lading, other than the through bill of lading, was signed on behalf of the ship. On receiving the cargo the steamship company notified a few bags as damaged, but on the discharge of the cargo at Glasgow a large number of bags were found to have been "caked," i.e., damaged by fresh water. The consignees thereupon brought an action of damages against the steamship company.

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ship Co.,
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Held (rev. judgment of the Second Division) that (except as regarded the small number of bags which had been notified as damaged) the defenders were bound by the admission in the through bill of lading that the flour had been received in apparent good order, and the onus was on them to prove that the damage had been sustained before the flour came into their possession; and that, having failed to discharge that onus, they were liable to the pursuers.

(In the Court of Session, 17th May 1911—1911 S. C. 791.)

The pursuers appealed to the House of Lords.

The case was heard on 24th and 27th November 1911.

Argued for the appellants;—Under the through bill of lading each carrier was liable only for the damage occurring on his portion of the route, and was bound to notify any damage which he found had been done to the goods before he received them. This effected a limitation of the liability of each carrier. The fact that the defenders did not notify that the goods were damaged when handed to them at New York precluded them from maintaining that they had not received them in good order and condition; or at any rate, in a question with the pursuers, made it impossible for them, as the last carriers, to escape liability unless they proved affirmatively that one of the previous carriers was responsible.¹

Ld. Chancellor
(Loreburn).
Ld. Halsbury.
Ld. Atkinson.
Lord Gorell.
Lord Shaw of
Dunfermline.

Argued for the respondents;—The pursuers' construction of the bill of lading imposed too heavy a burden upon shipowners. The statement in the bill of lading was that the goods were in good order at Minneapolis, and did not apply to their condition at New York, there being many stages in the journey at each of which the goods were taken by the succeeding carrier at the owners' risk. All that the defenders were under obligation to do was to hand over the goods at Glasgow in the condition in which they had received them at New York. This they had done. The goods were received in rain,—were received wet, as was duly notified; and if the wet caused subsequent caking the defenders were not liable, for they had used all the ordinary and usual precautions in conducting the operation of loading. If the flour was caked before the operation of loading commenced the defenders could not be liable. All that they acknowledged under the bill of lading—on the assumption that it was

¹ Reference was made to *Craig & Rose v. Delargy*, (1879) 6 R. 1269; *Carver's Carriage of Goods by Sea*, 5th ed., sec. 103a; Act of Congress of the United States of Feb. 13, 1893, entitled "An Act relating to Navigation of Vessels" (The Harter Act), sec. 4.

Dec. 19, 1911. applicable—was that the flour was in “apparent” good order. That acknowledgment was perfectly consistent with the damaged state of the flour, for caking was not a defect which was apparent in the sense that it could be detected from any examination which it was reasonably possible to make during the operation of loading.

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At delivering judgment on 19th December 1911,—

EARL OF HALSBURY.—The importance of this case depends not so much on the amount sued for as the effect to be given to what is called a bill of lading, but which goes somewhat beyond what in commercial circles is generally known by that name. It is a written document dealing with the carriage of a cargo of bags of flour to be carried from Minneapolis, in Minnesota, one of the northern States of America, to Glasgow. This transit, involving as it does carriage by railroad, inland lake, and ocean voyage, comprehends the handing over of the goods to be carried by several independent carriers. It has been found convenient both to the carriers and to the owners of merchandise to devise this form, which is in some respects a novel form, of bill of lading, so as to fix the responsibility of each of the successive carriers in turn for any damage or loss of or to the goods, so carried under this contract, during the period of transit.

The facts may here be very briefly stated. The flour was in 41,000 bags in good order and condition, and was so delivered to the first carriers on the route prescribed to go *via* New York, and each carrier in turn was to certify, by a system of checking, the state and condition of the goods carried in handing them over to his successor, and the succeeding carrier was to receive them in like order and condition and to be responsible for himself delivering them to his own successor on the route except so far as they were marked. It is proved that this course was pursued at New York (whether this was accurately done is another matter with which I will deal presently). A somewhat trifling number were marked at New York, but a very serious number—upwards of 4000 bags—were discovered at Glasgow to have been damaged.

Here I may say that it appears to me to be irrelevant to discuss what is the nature of the damage done and whether it may or may not be comprehended in certain other words. In respect of the question as applicable to the parcel of 4000 bags caked the question may be separated entirely from the question of the amount of damages that may be recovered. It is enough to say that there is no doubt that these 4000 and odd bags had been damaged, and the sole question for decision is, to my mind, upon whom the responsibility for this rests under these bills of lading. The question is one of law, because it does not appear to me that upon the facts stated there is any real dispute between the parties. The question is, as I have described, the validity of this form of bill of lading.

It is proved, as I have said, that the above was the course of business pursued at New York, and whether what I have described as the course of business was done accurately or not at New York does not appear to me (if the bill of lading, as it is called, is valid) to be very material, because, as I think the Lord Ordinary has pointed out, it is quite clear one must assume that each of these carriers in turn receives the goods in good order

and condition, except so far as notified in the manner which has been described. Dec. 19, 1911.

The Lord Ordinary decided after proof that the defenders were liable by reason of the contractual engagement by the documents called bills of lading, which were signed by an authorised agent.

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Of course this part of the arrangement was most important, since but for it neither carrier nor merchant could fix responsibility for loss or damage, as there is an express stipulation that no one of the independent carriers should be responsible for loss or damage except that occurring on his own part of the line. The contract embodying this obligation amongst others was duly signed by Mr P. R. Jarvis on behalf of the defenders. The successive obligations and responsibilities of each succeeding carrier are absolutely essential to such a system as is established by the through bill of lading, enforced as it is by the contract, to which all are parties, that none of them shall be held answerable for loss or damage beyond their own line; and I am wholly unable to agree to the passage in Lord Salvesen's judgment in which he says that no bill of lading of any kind was signed by the master or agent of the steamer at New York. Of course the learned Judge does not mean that it must have been signed at New York. He has, I think, omitted to notice that the bill of lading, which is given to us as a specimen of all the bills of lading, was signed by Mr P. R. Jarvis expressly on behalf of the steamer which was to carry the flour from New York to Glasgow—that is on behalf of the defenders themselves. The learned Judge appears not to have noticed this fact, yet upon it the whole question turns. If this bill of lading is valid according to its true construction, I do not think it is necessary to go into the question of the incorporation of the contract, because the bill of lading describes with considerable accuracy what is to be done, and what is to be assumed if no such marks as are indicated are found upon the bags on their arrival. This has been done. It appears to me that the judgment of the Lord Ordinary is perfectly right, and ought to be restored.

Ld. Halsbury.

LORD ATKINSON.—This is an appeal from an interlocutor of the Second Division of the Court of Session pronounced on 17th March 1911, recalling an interlocutor of the Lord Ordinary dated 23rd December 1909.

The action in which this last-mentioned interlocutor was pronounced was raised to recover damages alleged to amount to £167, 12s. 6d. for injury done to 4132 bags of flour, less 110 bags, portion of a cargo of 41,110 bags loaded at New York on 19th December 1903, and following days, on the respondents' steamship "Corinthian," and carried by her for freight to the port of Glasgow, and there delivered to the consignees, the appellants, on 11th January 1904, and the days following.

It is not disputed by the respondents that these 4132 bags of flour were, when delivered in Glasgow, "caked." Caking is the damage complained of, and consists in this, that the texture of the bag getting wet, the wet got through the bag and wetted a portion of the flour immediately contiguous to its inner surface, turning the flour into dough, which, when dry, hardened, and became what is called a cake. It is admitted on both sides that this caking does not injure the uncaked portion of the flour contained in the

Dec. 19, 1911. **bag.** And it is further admitted that the caking in this case resulted from the bags having been wetted by fresh water, and that this wetting did not take place in the hold of the steamer "Corinthian," though, of course, the caking might, and almost certainly would, take place there if the bags were wet when placed in the hold. It is admitted further that the bills of lading were not drawn up, delivered, or signed by the master of the ship, and that they were not expressly conversant with the ocean voyage from New York to Glasgow. The goods had been purchased from the Pittsburg Wasburn Flour Mills Company, Limited, carrying on business at Minneapolis, Minn., in the United States of America, and were on 10th October 1903, delivered to the Lehigh Valley Transportation Company, consigned to Glasgow to the order of this milling company, to be carried, as the appellants alleged, the entire way to this Scotch port under the terms of certain bills of lading, somewhat peculiar in form, for a through freight. One of these bills of lading is printed as a specimen at p. 374 of the Appendix. It is signed P. R. Jarvis, agent, "on behalf of carriers severally, but not jointly." And immediately above this signature the following paragraph is to be found:—
"In witness whereof, the agent signing on behalf of the said Lehigh Valley Transportation Company, and of the said Ocean Steamship Company, or ocean steamer and her owner, severally and not jointly, hath affirmed two bills of lading, all of this tenor and date, one of which bills being accomplished, the other to stand void."

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The sum sued for is of small amount, but the proper construction of through bills of lading such as this, which are common, and the determination of the rights and obligations of the parties concerned under them, are of vast importance. It is for the purpose of getting these matters finally decided that this litigation was admittedly commenced. The bill of lading contains on the face of it a statement that the flour was received "in apparent good order except as noted." The provision immediately following is to the effect that the goods so received "are to be carried to the port of New York, and thence by Allan State Line to the port of Glasgow, Scotland . . . and to be there delivered in like good order and condition as above consigned, or to the consignee's assigns," &c. It then proceeds to provide that, in consideration of the freight named, the service stipulated for is to be performed thereunder subject to the conditions, whether printed or written, contained in it. Then follow eleven conditions dealing with the service up to the port of New York.*

It is only necessary to refer to three of these, namely, No. 1, providing that no carrier shall be liable for loss or damage caused, amongst other things, by "heat, frost, wet, or decay"; No. 3, providing that "no carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route, nor after said property is ready for delivery to the next carrier or to the consignee . . ." and further, that claims for loss or damage must be made in writing to the agent at the point of delivery promptly after arrival of the property, and if same be delayed, for more than thirty days after delivery, or after due notice of readiness to deliver,

* The conditions of the bill of lading are printed *in extenso*, 1911 S. C., p. 791.

no carrier should be liable thereunder; and No. 11, providing that the contract is deemed to be executed and accomplished and all liability thereunder to terminate on the delivery of the property to the steamer, her master, agent, or servants, or to the steamship company, and that the inland freight and charges should be a first lien due and payable by the steamship company.

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The second part of the bill of lading deals with the service after delivery at New York, and until delivery at Glasgow. It contains nineteen separate paragraphs. Of these No. 1 provides, amongst other things, that the steamer should not be liable for inland damage, and No. 11 that the steamer should only be responsible for such part of the goods as are actually delivered to her at the port of New York, and should not be liable for any loss or damage that might have occurred before such delivery, "while agreeing to promptly present to inland carriers for account of owners of goods any claim for shortage, or loss, or damage that may have occurred before delivery of goods at the port" of New York.

It is, I think, plain that by these provisions for the prompt delivery of claims for damage, contained in paragraph 3 (dealing with inland carriage), and in paragraph 11 (dealing with ocean carriage), it was designed to set up machinery to protect on the one hand each carrier from claims for damages not occurring on his portion of the through route, and to secure on the other hand to the owner of the goods the means of enforcing any claim he might have against the carrier on whose portion of the through route his goods were, in fact, lost or damaged. The shippers contracted with the transport company to carry these goods in the way and by the means stipulated for to their destination at Glasgow. The shippers were neither bound nor entitled to interfere with the cargo *en route*, and if, on the arrival of the goods at Glasgow in a damaged condition, the consignees were left to discover for themselves on what part of the route the damage was caused, they would be absolutely at the mercy of the carriers. It suits the interest of these carriers to carry goods in this way for through freights; but, if they adopt that method of doing business for their own gain, it is but reasonable that, if they wish to escape liability themselves, they should be bound by noting the condition of the goods when received by them to protect the interest of their customers, the shippers.

The second part of the bill of lading contains two other important provisions; first, by clause 2, it provides that the shipment until delivery at Glasgow is to be subject to all the provisions of the American statute of 1893, called the Harter Act. (By section 4 of that Act, the owner, master, or agent of every vessel transporting goods from an American port to any foreign port is bound to issue to the shippers a bill of lading containing, amongst other things, a statement of the apparent order and condition of the property delivered when received by the owner, master, or agent of the vessel for transportation, which document is thereby made *prima facie* evidence of the receipt of the merchandise described in it); and secondly, clause 18 contains a provision to the effect that the property covered by the bill of lading is to be subject to all the conditions expressed in the regular forms of bill of lading in use at the time by the steamship company. One of these so-called ocean bills of lading is printed on pp. 383 and 384 of the

Dec. 19, 1911. Appendix. It commences with the statement "Received in apparent good order and condition by the Allan State Line from the . . . to be transported by the good British steamship 'Corinthian' . . . to be delivered" in like order and condition at the port of Glasgow.

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Unless, therefore, the respondents violated the American law, the bill of lading so signed by Jarvis must be taken to be a bill of lading issued by them for the ocean voyage, and Jarvis must be taken to be their agent for that purpose.

I am quite unable, therefore, to follow the reasoning of Lord Salvesen when he says, as he is reported at p. 445 of the Appendix to have said, that the admission contained in the through bill of lading as to the condition in which the flour was received applies, and can only apply, to Minneapolis. That condition is that the goods are to be taken to be in apparent good order and condition except as notified. It is more restricted than what is required by the Harter Act or by the ocean bill of lading. Neither can I follow his reasoning where, at pp. 447 and 448, he says: "It would, of course, have been different if there had been a bill of lading signed on behalf of the ship acknowledging receipt of the flour in good order and undertaking to deliver it in the same order, for this would have been a contractual obligation which it would lie on the ship to excuse itself from discharging. Here, as I hold, there is nothing of the kind." But what are the facts? The flour arrived at New York in due course. It was there warehoused. On 12th November 1903 H. C. Davis, the foreign freight-agent of the Lehigh Valley Company, wrote to Austen, Baldwin, & Company, the agents of the respondents, to notify them of the arrival of flour "engaged with you for Glasgow," and asking for a shipping permit. The only way in which the flour was "engaged" with the respondents for Glasgow was under the through bill of lading. On 12th December these same agents of the respondents sent a permit authorising the receiving clerk of the "Corinthian" to receive this flour from the Lehigh Valley Company.

That is followed by the delivery of the goods to the steamer on the 19th and subsequent days of December 1903, in presence of the respondents' officials, their receiving clerk, L. L. Le Furge, having been sent there for the purpose of checking the delivery and giving receipts for it. He gave receipts, on a printed form, I presume, headed "Received for shipment on board steamship 'Corinthian,' bound to Glasgow, subject to the exceptions and restrictions of liability contained in the usual bills of lading of the Company." But these latter are the bills of lading incorporated into the through bill of lading by clause 18 of the latter. It would, therefore, appear to me impossible not to hold that, whether Jarvis, when he signed the general bill of lading, purporting to act as agent for the respondents, amongst others, had antecedent authority from them so to do or not, they have adopted, acted upon, and taken the benefit of the contract of carriage he purported to enter into on their behalf, and can no more be permitted now to disclaim any liability it may by its terms impose upon them, than if they had placed the seal of the Company under Jarvis's signature on 10th October 1903.

Neither can I concur in the suggestion of Lord Salvesen, found at p. 488 of the Appendix, that the inland carrier who tendered this flour to the ship

was, as regards the loading, the agent of the original shipper, and that accordingly the consent of this carrier to have the goods loaded in rain binds the appellants. I think Mr Bailhache is quite right in his contention that the shippers had contracted with the first carrier to transport and deliver these goods to the steamship, just as the steamship had contracted to receive them when delivered, that the relation between the shippers and the inland carrier was the contractual relation thereby created, and that the carrier was no more the agent of the shippers to see to the proper delivery of the goods than was the Steamship Company their agent to see to the proper reception and stowage of them.

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It is not suggested that this flour got wet in the warehouse. If it did it must have been caked when delivered, and this should have been readily detected. It is admitted it must have got wet before it was placed in the hold of the steamer, though the caking might, and possibly did, take place there. I concur with the Lord Ordinary in thinking that the respondents have failed to prove that these bags of flour had either caked before they came into their custody or got so wetted before they came into their custody that, as a necessary consequence, they caked afterwards. If anything of that kind occurred the evidence, I think, shows that it could have been readily detected in the process of loading, and if detected it should have been notified so as to preserve the appellants' remedy against the wrongdoer. It has not been notified, and, that being so, I think the respondents are bound by the statement contained on the face of the bill of lading, that the flour was received in good order and condition save as noted, *i.e.*, save as to the 110 bags which were noted and are not included in those for which damages are claimed. I think the interlocutor appealed against was, therefore, erroneous, that that of the Lord Ordinary was right and should be restored, and this appeal allowed.

LORD GORELL.—The appellants in this case claim for damage to certain sacks or bags of flour carried on the respondents' steamship "Corinthian" from New York to Glasgow. The Lord Ordinary found that the respondents were liable to the appellants in respect of 4022 bags "caked" (being the difference between 110 and 4132), but the Second Division recalled the interlocutor of the Lord Ordinary, and assoilzied the respondents from the conclusions of the action.

The summons in the action was as far back as May 1904, and the amount in dispute is not large, but the Lord Ordinary states that the object of the action was to stop the loading of flour at New York in wet weather.

The flour was despatched under through bills of lading from Minneapolis for Glasgow. It is admitted that the sacks or bags of flour when delivered to the inland carriers were in apparent good condition (minute of admissions, Appendix, p. 413). According to the bills of lading, a copy of a specimen of which is at p. 374 of the Appendix, the goods were stated to be received at Minneapolis "in apparent good order (except as noted), contents and condition of contents of package unknown," to be carried to New York and thence by the Allan State Line to Glasgow, and there delivered in like good order and condition. The conditions in the bills of

Dec. 19, 1911. lading were divided into two parts. The first dealt with the service by the inland carriers, the Lehigh Valley Transportation Company, to the port of New York, which terminated with delivery to the steamer (clause 11). The delivery in this case was from the inland carriers' lighters when the sacks or bags were placed in the steamer's slings to be hoisted on board the steamer.

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The second part dealt with the service after delivery to the steamer until delivery at Glasgow. By condition 1 of the second part the steamer was not liable for inland damage, and by condition 2 of that part the shipment was subject to all the terms, provisions, and exemptions in what is known as the Harter Act—an Act of the United States in 1893. By condition 11 of the same part the steamer was only responsible for such part of the goods as was actually delivered to her at New York, and not liable for any loss or damage that might have occurred before such delivery, “while agreeing to promptly present to inland carriers for account of owners of goods any claims for shortage or loss or damage that may have occurred before delivery of goods at the port first above mentioned,” i.e., at New York. Condition 18 of the said second part provided “That the property covered by this bill of lading is subject to all conditions expressed in the regular forms of bills of lading in use by the steamship company at time of shipment, and to all local rules and regulations at port of destination not expressly provided for by the clauses herein.”

The through bill of lading was signed by an agent on behalf of the carriers, severally but not jointly.

The receipts given by the respondents at New York to the inland carriers were headed “Received for shipment on board steamship ‘Corinthian’ bound to Glasgow subject to the exceptions and restrictions of liability contained in the usual bills of lading of the Company.” I understand that these receipts notified that 26 sacks or bags were “caked” and that 84 were wet, but on delivery at Glasgow it was found that 4132 were “caked.” “Caking” appears to be a well-recognised form of damage to flour resulting from wet; a layer next the covering becomes hard, and the covering seems to be firm and hard to the touch. It is not disputed that the caking in question was caused by fresh water. Caked flour requires reconditioning, and the expense of this process to 4022 sacks or bags (the difference between 4132 bags found caked at Glasgow and the said 110 notified at New York as wet or caked), £167, 12s. 6d., is claimed in this action.

The Harter Act, which will be found conveniently given in the late Judge Carver's work on Carriage by Sea, section 103a, requires the giving of an ocean bill of lading, or shipping document, in case of goods carried out of the United States by sea, and such bill of lading must state, *inter alia*, “the . . . apparent order and condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be *prima facie* evidence of the receipt of the merchandise therein described.”

The through bill of lading in question in effect incorporates, by clause 18 of the second part, the respondents' form of ocean bill of lading which is given in the Appendix, p. 383, and commences, “Received in apparent

good order and condition," and provides for delivery "from ship's dock, Dec. 19, 1911. where the shipowner's responsibility shall cease, in like order and condition at the port of Glasgow," and also incorporates the Harter Act.

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In my opinion the effect of these documents is to charge the respondents with the receipt of the flour in apparent good order and condition, except so far as they notify the inland carrier that this is not the case. Here they notified 110 sacks or bags as caked or wet. There were also notifications in respect of other matters not material to the case. Thus the appellants have an admission that the goods were received by the respondents in apparent good order and condition, except to the extent of 110 sacks or bags, and except as to other matters not material. And I think it would be for the respondents, if they could, to show that the damage complained of was in fact done before they received the goods. The Lord Ordinary found that they had not discharged the onus of proving this.

Lord Gorell.

During part of the time in which the cargo was loaded, after intimation from the steamship agents that the steamer was ready for cargo, the weather was wet, and precautions appear to have been taken to prevent the goods from being wetted as they were being taken on board from the lighters in which they came alongside. The Lord Ordinary found that there had not been negligence in the attempts to protect the goods, but it seems reasonably clear that they, in fact, became wetted in the loading, although it is said the loading was stopped when heavy showers or storms came on (Appendix, p. 208). If the bags were wet when taken on board the steamer, it would be apparent, and if they were at that time caked, the Lord Ordinary finds that "caking is damage to the contents of the bag indicated by external appearance."

In these cases of through bills of lading the consignors and consignees have no control over the transit, and the convenience of business requires that the shipowner, when he receives from the inland carrier, shall be careful to see what the apparent order and condition of the goods then is. If he accepts them as in apparent good order and condition, he takes the responsibility of delivering them in that order and condition, except so far as it is shown that the damage complained of was done before he received the goods or was caused by perils excepted in his part of the contract. None were relied on in this case. If they are not in apparent good order and condition he must notify the inland carrier against whom the owner of the goods may claim, subject to any answer that the carrier has. It is said that this imposes a heavy duty on the shipowner, but I do not see that this places him in any worse position than would be the case were he the first receiver of the goods, as in any ordinary case of shipment, from port to port, where, for his own protection, he must be careful not to sign bills of lading for goods as in apparent good order and condition when the goods are not so in fact.

The result is that in this case goods are admitted to have been received by the respondents in apparent good order and condition, to have been discharged in a damaged state, and no sufficient proof is given by the respondents that the damage was in fact done before they had possession of the goods, or by perils excepted after they had such possession.

If it had been established that the damage had in fact been done before

Dec. 19, 1911. the steamer took delivery of the goods, the question would arise as to the duty imposed on the respondents to notify the inland carrier, and I think they would be liable for breach of duty in this respect if they did not make a reasonable and proper inspection in the circumstances and notify the results to the inland carrier by qualifying the receipts accordingly.

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The Lord Ordinary finds that the loading of what was a very large cargo was pressed on with the result that the examination which would have disclosed caking was not properly made. It seems to me the evidence shows this. An experienced witness, Mr Maloney, states that it was about the biggest shipment of flour that he ever saw (Appendix, p. 354). The owners were evidently anxious to get the steamer away on her sailing day, and it would seem that they could not do this without going on loading notwithstanding the state of the weather (Appendix, p. 282), and that the result was an inadequate and hurried examination. It is not an excuse that the respondents desired to keep to the steamer's sailing date. If the shipowners do not notify, they in effect admit that the goods are received by them in apparent good order and condition, and if they wish to protect themselves they must make a proper examination. If they do notify, then the cargo owners must look to the inland carriers so far as the latter are not excused by the terms of their contract.

I am of opinion that the appeal should be allowed, and the decision of the Lord Ordinary restored.

LORD SHAW OF DUNFERMLINE.—There are two questions in this case. One is a question of law, namely, what is the proper construction of a document called in these proceedings a "through bill of lading"? The other is a question of fact—as to the time and cause of certain damage suffered by a cargo covered by that bill. On both of these questions I agree with all of your Lordships that the conclusions reached by the learned Lord Ordinary (Lord Mackenzie) were correct, and, with the greatest respect to the learned Judges of the Second Division, that their judgment, as expressed in the opinion of Lord Salvesen, was erroneous and falls to be recalled.

First. The "through bill of lading" was for the transport of goods from Minneapolis to Glasgow *via* the Great Lakes. It was most natural that the consignor in such a case should make a contract for the entire journey and know his rights throughout, and most natural that the transporting interests should combine to facilitate such business. Your Lordships have given the details of the document. It was signed by P. R. Jarvis, agent "on behalf of carriers severally, but not jointly," the document stating that the agent signed "on behalf of the said Lehigh Valley Transportation Company and of the said Ocean Steamship Company or ocean steamer and her owner." There are stipulations in it, also perfectly natural, that no carrier is to be liable for loss or damage by causes beyond his control, or not occurring on his own road or his portion of the through route; and it is provided that claims must be made in writing to the agent at the point of delivery promptly after the arrival of the goods, and, if delayed for more than thirty days after delivery, no carrier to be liable.

A special branch of the contract with a special series of provisions applies to the seagoing portion of the route, and the earlier portion just

referred to only bears upon this case as illustrating that the provisions of Dec. 19, 1911. the entire contract point to liability for damage being promptly localised and the damage being paid—the particular carrier being thus ascertained —by that carrier. In the second portion of the contract, into which the form of an ocean bill of lading is imported by reference, it is provided, entirely in accordance with the general scheme of the bargain just mentioned, that the steamer is not liable for loss that may have occurred before delivery to it, while the ocean carrier agrees to present promptly to inland carriers “any claims for shortage or loss or damage that may have occurred before delivery of goods at the port.”

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In the document as a whole the flour, which was the cargo, was acknowledged as received at Minneapolis in apparent good order, and it is further admitted by the joint minute of parties that each bag and sack of flour when delivered to the inland carrier was in good condition. In the adopted form of ocean bill of lading precisely the same language—“Received in apparent good order and condition”—was used. It is admitted that the Allan Line Company, the respondents, accepted delivery of the goods at New York taking exception to the caked condition of about only a hundred sacks (I proceed upon the concessions as to figures quite properly made in argument), and that when the goods were ready for discharge at Glasgow over 4000 sacks were discovered to be caked.

Were it not for the judgment of the Second Division, it would be rather difficult to discover what, upon those facts, constitute difficulties in the way of construing this contract. These difficulties, however, in so far as they have led to the reversal of the Lord Ordinary's judgment, appear to be reduced to two. It has been held, to use Lord Salvesen's words, that “The admission contained in the through bill of lading as to the condition in which the flour was received applies, and can only apply, to Minneapolis, and the obligation to deliver in the like good order and condition, while it is undertaken by the agent who signs it on behalf of all the carriers severally but not jointly, does not apply in turn to successive carriers.” I can only say that the very opposite appears to me to be the case. “In the second place, I think,” says the same learned Judge, “it may well be argued that the inland carrier, by whose servants the flour is tendered for shipment, is the agent for that purpose of the original shipper.” It humbly appears to me that this is not the contract of parties. Under a proper construction of this contract the several carriers must, in the view which I entertain, be held bound, unless notification to the contrary is promptly made, to the fact that the goods were received in apparent good order. And with regard to the shipowners for the Atlantic voyage, it appears to me, first, that they are expressly bound by the terms of the through bill of lading signed by Jarvis, who was agent for them as well as for the other carriers, that bill of lading stating that the goods were received in apparent good order and condition; while, further, it must be borne in mind that, under the law of the United States, such an obligation could not be dispensed with. It would appear to me to be a curious result if, by the device of a through bill of lading, a means of escape could be provided from the general shipping law of the United States.

Once, however, the point of law is settled in the sense that I have indi-

Dec. 19, 1911. **Crawford & Law v. Allan Line Steamship Co., Limited.** **Lord Shaw of Dunfermline.** cated, I do not find in Lord Salvesen's opinion that there would be any doubt in the mind of that learned Judge as to the legal consequences which would follow. "If there had been a bill of lading, signed on behalf of the ship, acknowledging receipt of the flour in good order, and undertaking to deliver it in the same order . . . this would have been a contractual obligation which it would lie on the ship to excuse itself from discharging." I entirely agree in that view. As, accordingly, I am, along with your Lordships, of opinion that there was such a bill of lading on behalf of the ship in this case, I think the contractual obligation referred to rests upon the respondents. When the judgment of the Inner House is analysed, it is, however, to be observed that a consideration of the facts and of points as to the onus of proof is made from the opposite point of view, namely, that there was no such contractual obligation, and that the onus under a contract, worded like the present, for through carriage by land, lake, and ocean, rests upon the consignor to prove how the damage was caused and to localise where it occurred. This might be singular as a matter of business; and it appears to me to be out of keeping, not only with the provisions, but with the scheme of the bargain of parties.

Secondly, the construction of the contract being as stated, the determination of the case upon fact is greatly simplified. If there had been no proof whatever, then so standing the contract, the principle of the "*Peter der Grosse*"¹ would apply. That principle is thus expressed by that very learned Judge, Sir Robert Phillimore,—“Fairly construed (*i.e.*, the bills of lading), and giving all due weight to the legal effect of the marginal note, the result must be that apparently, and so far as met the eye, and externally, they were placed in good order on board this ship. Well, then, if that be so, if the plaintiffs have shown by *prima facie* evidence that, having put these bales and bags in good order on board the ship, they were taken out in bad order both externally and internally, I agree with the observation which was made that it is not incumbent on them to show either how or when the damage was done.”² I may add, however, that, quite apart from any questions of onus, I could not have seen my way to differ from the view of the evidence taken by Lord Mackenzie. It appears to me that the respondents were extremely anxious for business reasons for the speedy loading of the “*Corinthian*” with this exceptionally large cargo of flour, and that they took weather risks, they, however, having the complete option on the documents, under “the condition that such cargo can, in the judgment of the steamer's agent (having regard to weather and other circumstances) be put on board the steamer in proper time.” I do not follow the reasoning as to the weather not being exceptionally rainy for New York, or the introduction into this case of the custom of the port. If it had been necessary to fix time and cause for the damage to this cargo of flour, I think it to be fairly established that the appellants have done so, and that the responsibility rests with the shipowners.

I humbly agree in the course proposed.

THE LORD CHANCELLOR concurred.

¹ (1875) 1 P. D. 414.

² *Ibid*, at p. 420.

ORDERED that the interlocutor appealed from be reversed, that the interlocutor of the Lord Ordinary be restored, and that the respondents do pay to the appellants their costs here and in the Courts below.

Dec. 19, 1911.
Crawford &
Law v. Allan
Line Steam-
ship Co.,
Limited.

WOODHOUSE & DAVIDSON—GILL & PRINGLE, W.S.—PRITCHARD & SONS—
WEBSTER, WILL, & Co., W.S.

ALEXANDER STEPHEN & SONS, LIMITED, (Pursuers) Appellants.—
Laing, K.C.—Horne, K.C.

No. 10.

ALLAN LINE STEAMSHIP COMPANY, LIMITED, (Defenders) Respondents.
—*Butler Aspinall, K.C.—Robertson Dunlop.*

Mar. 11, 1912.

Ship—Collision—Compulsory pilot—Merchant Shipping Act, 1894 (57 and 58 Vict. cap. 60), sec. 633.

Alexander
Stephen &
Sons, Limited,
v. Allan Line
Steamship
Co., Limited.

The Merchant Shipping Act, 1894, enacts :—Sec. 633. “An owner or master of a ship shall not be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of that ship within any district where the employment of a qualified pilot is compulsory by law.”

A ship, proceeding up the Clyde in charge of a compulsory pilot, collided with a vessel lying moored at a wharf. In an action of damages by the owners of the latter vessel against the owners of the former vessel, *held* (aff. judgment of the First Division) that the defenders fell to be assoilzied, in respect that, the ship being in charge of a compulsory pilot, it was necessary for the pursuers to prove that the collision was caused by the fault of the defenders or those for whom they were responsible, and this they had failed to do.

(In the Court of Session, 17th May 1911—1911 S. C. 836.)

The pursuers, Alexander Stephen & Sons, Limited, appealed to the House of Lords.

Ld. Chancellor
(Loreburn).
Lord Mac-
naghten.
Ld. Atkinson.
Lord Shaw of
Dunfermline.
Lord Robson.

The case was heard, with Nautical Assessors, on 11th March 1912. After hearing counsel for the appellants, and without calling on counsel for the respondents :—

LORD CHANCELLOR.—I do not think it is necessary to enter at all upon the interesting details of this appeal, which is one wholly relating to matters of fact. The learned Judge who heard the witnesses takes one view, and in substance I think the same view is taken by the Lord President, of what took place on the occasion of this collision. I myself agree with the views which have been expressed, and I really do not think that any good purpose would be served by entering upon a consideration of the various arguments that have been adduced by one side or the other. I am content to accept the judgment of the Lord President.

I think the appeal ought to be dismissed, and I move your Lordships accordingly.

LORD MACNAGHTEN.—I agree.

LORD ATKINSON.—I concur.

LORD SHAW OF DUNFERMLINE.—I desire to say that so far as the form of process goes in this case I do not myself see any occasion for the change of the interlocutor which occurred in the Inner House. It appears to me that

Mar. 11, 1912. the finding of Lord Dewar, which was recalled by the First Division, was completely justified by the clear and conclusive narrative which he gave in stating his opinion. The change of form which has occurred did not arise, as I observe, from any change of view in the First Division as to the fault or negligence of the pilot. The Division, or at least the majority thereof, came back at the conclusion of the case to exactly the position in which Lord Dewar left it. I concur in the course proposed.

Alexander
Stephen &
Sons, Limited,
v. Allan Line
Steamship
Co., Limited.

LORD ROBSON.—In this case it has been found by two Courts in Scotland that the fault lay wholly with the pilot, and I think to that finding no objection can be taken. Some difficulty, no doubt, arises on the evidence as to the look-out kept by the ship, but it cannot be said that the pilot was without warning or information as to the danger which he realised too late. When the vessel got alongside the "Koombana," a vessel moored at the west end of Shieldhall Wharf, the captain of the "Buenos Ayrean" drew the pilot's attention to the loom of the "Koombana," so that he knew he was very near the wharf and any vessels that might be there, and he ought to have taken immediate steps to get more into mid-channel so as to clear any vessel that might be lying further on. He did not do so. That error caused the accident, and I think it cannot be said that the evidence as to the look-out was sufficient to make out fault against the defenders.

THEIR LORDSHIPS dismissed the appeal, with expenses.

THOMAS COOPER & Co.—J. & J. ROSS, W.S.—PRITCHARD & SONS—
WEBSTER, WILL, & Co., W.S.

No. 11.

HENRY HARGREAVE, (Defender) Appellant.—*Constable, K.C.*—
Moncrieff—Gilbert Beyfus.

Mar. 12, 1912.

HAUGHHEAD COAL COMPANY, LIMITED, (Pursuers) Respondents.—
D.-F. Dickson—H. W. Beveridge.

Hargreave v.
Haughhead
Coal Co.,
Limited.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), First Sched. (1) (b) and (16)—Cessation of incapacity—Review—Ending of compensation—Loss of eye—Diseased condition of other eye—Risk of future incapacity—Concurrent causes of incapacity.

A miner lost his right eye through an accident arising out of his employment, and for a time received from his employers compensation for total incapacity. Subsequently, in proceedings for review, the arbitrator ended the compensation, on the ground that the miner's incapacity had ceased, and that he was fit to resume his former work as a miner. He however also found that there was incipient cataract in the remaining eye which would gradually produce incapacity for work, but that the cataract was not due to the accident.

Held (aff. judgment of the Second Division) that the arbitrator was right in ending the compensation.

Ld. Chancellor (IN the Court of Session, 17th June 1911.)
(Loreburn).

Lord Mac-
naghten.

Ld. Atkinson.
Lord Shaw of
Dunfermline.
Lord Robson.

In an arbitration under the Workmen's Compensation Act, 1906, the Haughhead Coal Company, Limited, asked the interim Sheriff-substitute at Airdrie (Millar Craig) to find that the right of Henry Hargreave to compensation, in respect of an accident which occurred to him on 18th February 1910 while working in their colliery at Broomhouse, ceased on 15th September 1910.

The Sheriff-substitute ended the compensation, and, at the request Mar. 12, 1912. of the workman, stated a case for appeal.

The case set forth:—"The case was heard before me on 13th February 1911, when the following facts were admitted or proved:—^{Hargreave v. Haughhead Coal Co., Limited.} (1) That on 18th February 1910 the appellant sustained injury to his right eye by an accident arising out of and in the course of his employment as a miner with the respondents in their Broomhouse Colliery. (2) That in consequence of the injury the eye had to be removed. (3) That the appellant received compensation from the respondents in respect of total incapacity from the date of the accident till 15th September 1910, at the rate of 13s. 9d. per week. (4) That on 12th November 1910 the appellant's incapacity had ceased, and he was fit to resume his former work as a miner. (5) That the appellant had on 12th November 1910, and has now, incipient cataract in his left eye. (6) That incapacity for his work will result gradually from the cataract. (7) That the cataract in the left eye is not due to the accident. (8) That it is admitted that the appellant's condition was the same at 15th September as at 12th November 1910. (9) That in the beginning of December 1910 the appellant resumed his former work as a miner with the respondents. (10) That his wage-earning capacity is not diminished by the loss of his right eye.

"On these facts I ended the compensation as at 15th September 1910, and found no expenses due to or by either party."

The question of law for the opinion of the Court was:—"Was the arbitrator right in the circumstances stated by him in ending the compensation payable to appellant by respondents in respect of the accident sustained by him on 18th February 1910?"

The case was heard before the Second Division (consisting of the Lord Justice-Clerk, Lord Dundas, and Lord Salvesen) on 17th June 1911, when their Lordships pronounced an interlocutor answering the question of law in the affirmative, and affirming the decision of the arbitrator.*

* OPINIONS.

LORD JUSTICE-CLERK.—The Sheriff here has found certain facts, and we must assume, we are bound to assume, that he found those facts as basing his judgment upon the evidence which was before him. If there was a deficiency of evidence we have nothing to do with that; we must assume that he had evidence before him which justified him in coming to the conclusion upon the facts at which he arrived. I leave out of view altogether the question about the cataract, because it does not interfere with the appellant's work at present, and it is not an affection which necessarily involves the ultimate loss of his second eye. It is not suggested, and I understand cannot be suggested, that the cataract has anything to do with the accident which happened, whereby he lost the right eye.

Now, the appellant resumed his work as a miner, and the finding in fact of the Sheriff-substitute is that his wage-earning capacity is not diminished by the loss of his right eye. That is a finding in fact. Mr Constable contended that that finding was unreasonable, and that we were entitled to say that we must find otherwise. I am not of that opinion. I think if the Sheriff had evidence before him which satisfied him of the fact that the man's earning capacity was not diminished by the loss of his right eye he was quite entitled so to find; and that can be decided not by theory at all, but by the fact that for a considerable period of time the man with his one eye was doing his work in the mine and earning the same wages that he

Mar. 12, 1912.

Hargreave v.
Haughhead
Coal Co.,
Limited.

Hargreave appealed to the House of Lords.

The appeal was heard on 12th March 1912.

Argued for the appellant;—The arbitrator ought not to have ended the compensation, but should have made either a suspensory order or a nominal award, so as to keep matters open, and thus enable the workman to obtain compensation should incapacity again supervene. The view that had been taken in certain Scottish decisions that the adoption of such devices was incompetent was not good law. [The Lord Chancellor intimated to counsel that it was unnecessary to argue the point, as the competency of such devices had been settled affirmatively by the House in the recent case of *Taylor v. London and North-Western Railway Company*.¹] From the arbitrator's findings in fact it was almost certain that incapacity would supervene sooner or later. The only question, therefore, remaining in the case, was whether that incapacity, when it arose, would or would not be due to the accident. It clearly would be due to the accident, because if there had been no accident there would have been no incapacity, as the miner would still have had one eye with which to continue his vocation. The accident, therefore, would be a concurrent cause of the incapacity. The Workmen's Compensation Act contained nothing which limited its benefits to these cases only where the injury

used to earn before—the same wages, in fact, as other miners were earning with the same output.

If that is so, it seems to me that the case of *Rosie v. Mackay*, 1910 S. C. 714, as Lord Salvesen has said, is conclusive against the pursuer. In that case the question was one of rupture, and the possibility was stated there that the man could do a good deal of labour and the rupture might not affect him so far as his capacity to do his work was concerned; nevertheless—the question being whether, at that time and with reasonable prospects for the immediate future, he was able to do the work which he undertook to do and proved it by doing it without any appearance of injury caused by the doing of it—the Court of Seven Judges held, by a majority of five to two, that he was not entitled to any further compensation, and that the Sheriff had been wrong in allowing him compensation of 9s. 2d. a week upon the footing that something would happen in the future, of which there was no certainty whatever as to when it would occur or whether it would actually occur.

On these grounds I think there is no reason for interfering with the judgment at which the Sheriff-substitute has arrived.

LORD DUNDAS.—I am of the same opinion. I confess that when the learned counsel for the appellant was reading the stated case over to us, and came to the tenth finding in fact, I wondered what his argument was going to be, because it seemed to me upon the facts that it was very difficult to see what was to be said to us to raise a question of law upon which the appellant could succeed. The point turned out to be that finding ten was an unreasonable finding. It was said to be unreasonable because it was alleged that it was logically inconsistent with the second finding. I do not think that is the case at all. The whole findings must be read and considered together. The tenth finding is, like the others, a pure question of fact upon which the Sheriff-substitute has found. He may be right or he may be wrong upon it—I do not see any reason to suppose that he was wrong—but he arrived at it upon a consideration of the facts. I think it is final, and see no reason for our interference in the matter.

LORD SALVESEN.—I agree.

¹ [1912] A. C. 242.

was the *causa proxima* of the incapacity, but granted compensation Mar. 12, 1912. wherever incapacity "results from the injury."¹ Here the apprehended total blindness would certainly be in part, at least, the "result" of the original accident. In cases of negligence, where an injury resulted from the concurrence of negligence and some extraneous cause, the negligent person was liable for the whole effect.² *Cory Brothers & Company v. Hughes*³ supported the appellant's contention.⁴

Hargreave v.
Haughhead
Coal Co.,
Limited.

Counsel for the respondents were not called upon.

LORD MACNAGHTEN.—In this case the appellant lost his right eye by an accident, and at that time there was no sign of incipient cataract in his left eye; there was nothing the matter with it. The fact is not perhaps very clearly stated by the Sheriff-substitute, but I think that is the fair result of his finding. The incipient cataract only dates from 12th November 1910. The accident occurred on the 18th of February preceding. There is nothing to connect the accident with the disease. That being so, it seems to me that it is impossible to say that the award ought to have been kept open, unless your Lordships are prepared to hold that when a man being gifted by nature with two organs of vision loses one, the award ought always to be kept open on the chance of his losing the other before he becomes unfit to work or is unable to earn his livelihood.

I think that the appeal ought to be dismissed, and I move your Lordships accordingly.

LORD ATKINSON.—I concur. As I understand the case, the learned Sheriff-substitute has found that this cataract is not due to the accident—that is, that it is not caused by the accident. Now, the compensation is given where the injury is caused by an accident arising out of and in the course of a man's employment, and it is in respect of that injury, and of that alone, that the workman is entitled to receive compensation. The function of the schedule is to supply a measure of damages for that compensation; but a man is not entitled to compensation for an injury not inflicted upon him by the accident with which he meets.

If the argument of the appellant were well founded then, if a man loses one eye, inasmuch as if anything happens to the other eye he would become totally blind, the award must be for ever kept open in order to see whether that misfortune will ever befall him. If that were so, there would be no finality in such a case. It is, on the other hand, quite understandable that, if a man is in a diseased condition at the time he meets with an accident, and the accident accelerates in any way his disease, that, as well as the actual physical injury directly caused by the accident, may be fairly taken into account. And if this cataract was in an incipient stage at the time when the injury to the right eye was sustained, and if that injury to the right eye accelerated the disease in the left eye, it might possibly be

¹ First Schedule (1) (b).

² Beven on Negligence (3rd edition), vol. i., pp. 79, 81.

³ [1911] 2 K. B. 738.

⁴ *Ball v. William Hunt & Sons, Limited*, [1911] 1 K. B. 1048 (subsequently reversed on May 13, 1912, reported [1912] A. C. 496, and in footnote *infra*, (H. L.) p. 77), was also referred to.

Mar. 12, 1912. that the award should be kept open to meet further developments. But it appears to me—taking the finding here to be that this cataract did not exist at the time the man sustained the injury to his right eye, but that it developed subsequently, coupled with the seventh finding, “that the cataract in the left eye is not due to the accident”—that the award should not be kept open to meet the possibility of the consequences which may hereafter ensue.

Hargreave v. Haughhead Coal Co., Limited.
—
Ld. Atkinson.

LORD SHAW OF DUNFERMLINE.—In my opinion when the Sheriff made his award in this case he made it as a final award, meaning to exclude from the scope of that award anything in respect of or in connection with the cataract in the left eye. I think that the finding in head 7, “that the cataract in the left eye is not due to the accident,” destroys all causal link of connection between that ailment and any accident arising out of and in the course of the employment. The causal connection having been thus destroyed, it appears to me that it would be straining the statute and contrary to its provisions to apply it to a case like the present.

No question of probable or possible recurrence of the effects of an accident can arise in a case like the present, where, as I say, all causal connection between the ailment and the accident has been definitely settled not to exist.

The LORD CHANCELLOR and LORD ROBSON concurred.

THEIR LORDSHIPS dismissed the appeal.

DEACON & Co.—SIMPSON & MARWICK, W.S.—BEVERIDGE, GREIG, & Co.—
W. & J. BURNES, W.S.

No. 12. THOMAS MACDONALD OR DURIS, Appellant.—*Lord-Adv. Ure—Moncrieff.*

May 13, 1912. WILSONS AND CLYDE COAL COMPANY, LIMITED, Respondents.—
D.-F. Dickson—H. W. Beveridge.

Duris v. Wilsons and Clyde Coal Co., Limited. *Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), First Sched. (1) (b), (3), and (16)—Incapacity for work—Inability to get work—Review—Competency—Change of circumstances.*

An injured workman, having to some extent recovered, was given light work by his employers, and entered into an agreement with them for payment to him of a certain weekly sum as compensation for partial incapacity. A medical referee certified him as fit for light work. Subsequently he was dismissed from his employment, and failed to find work elsewhere. He thereupon brought an application for review of the weekly payment, in which he averred that owing to his condition he was unable to obtain employment, and sought to have the weekly payment increased to the sum due to him as for total incapacity. There had been no change in his physical condition since the medical referee's report.

Held (rev. judgment of the First Division) (1) that a workman's inability to obtain work owing to his injured condition is “incapacity for work” within the meaning of the Act, even though he may be physically capable of doing work; (2) that supervening inability to obtain work is a relevant ground for reviewing a weekly payment, even though there may have been no change in the workman's physical condition.

Boag v. Lochwood Collieries, Limited, 1910 S. C. 51, overruled.

(In the Court of Session, 28th June 1911.)

May 13, 1912.

In an application under the Workmen's Compensation Act, 1906, at the instance of Thomas Macdonald or Duris, coal miner, Castle Street, Hamilton, for review of weekly payments of compensation paid to him under a memorandum of agreement between him and his employers, Wilsons and Clyde Coal Company, Limited, the Sheriff-substitute at Hamilton (Hay Shennan) refused the application, and, at the request of the workman, stated a case for appeal.

Duris v.
Wilsons and
Clyde Coal
Co., Limited.
—
Ld. Chancellor
(Loreburn).
Lord Mac-
naghten.
Ld. Atkinson.
Lord Shaw of
Dunfermline.

The case set forth:—"This is an arbitration under the Workmen's Compensation Act, 1906, raised on the 9th day of February 1911, in which I was asked by the appellant to review the weekly payments of 16s. 11d. of partial compensation agreed to be paid by the respondents to the appellant under memorandum of agreement, recorded in the Hamilton Sheriff Court on 11th January 1911, in respect of injuries by accident sustained by him while employed as a miner at No. 1 Pit, Clyde Colliery, Hamilton, belonging to the respondents, on 16th February 1909, and to increase said weekly payments to the sum of 20s. in terms of section 16 of the First Schedule to the said Workmen's Compensation Act, 1906. The appellant averred as the ground of his application for review that ' . . . owing to his condition he is unable to obtain work in the district, and the said Wilsons and Clyde Coal Company, Limited, are unwilling or unable to supply him with same.' The relevancy of the appellant's averment above quoted for an increase of his compensation was disputed, and a debate was heard before me, when the following facts were agreed on between the parties, viz.:—(1) The appellant obtained light work with respondents in May 1909 at the picking tables; (2) while at said light work in September 1910 the parties remitted the question of appellant's fitness for work to a medical referee under Schedule 1, section 15, of the Workmen's Compensation Act, 1906, who reported that the appellant was fit for light work such as he was at that date engaged in; (3) that the appellant was dismissed from his employment with respondents on 6th December 1910; (4) that appellant's physical condition had not changed in any way since the date of the said medical referee's report. In these circumstances, founding on the case of *Boag v. Lochwood Collieries, Limited*,¹ I found that the appellant had set forth no relevant grounds for reviewing the weekly payment."

The question of law was:—"Was I right in holding that the appellant's averments disclosed no relevant grounds for review of his compensation?"

The case was heard before the First Division on 28th June 1911.

Counsel for the appellant stated that he was unable to distinguish the case from *Boag v. Lochwood Collieries, Limited*,¹ and the Court, without calling upon counsel for the respondents, pronounced an interlocutor answering the question in the affirmative, and dismissing the appeal.

Duris, the workman, appealed to the House of Lords, and in a supplementary statement he averred, *inter alia*:—"The appellant is prepared to prove that he has made repeated applications in the district for work of a class which, in his impaired condition of health, he might be able to undertake. All these applications have been unsuccessful, and the appellant is prepared to show that his want of success has not been due to the state of the labour market, but to his incapa-

¹ 1910 S. C. 51.

May 13, 1912.

Dunis v.
Wilsons and
Clyde Coal
Co., Limited.

city, and also to the very limited type of work which is now within his powers. He has been refused employment on the ground that, having regard to his obviously injured condition, employers would not employ such a workman. The appellant is not earning, nor is he able to earn, any wages whatsoever, and his injured condition precludes him from obtaining employment at any suitable employment or business at which he could earn wages. The result of the accident has been and continues to be total incapacity on the part of the appellant."

The case was heard on 12th March 1912.

Argued for the appellant;—The case of *Boag v. Lochwood Collieries, Limited*,¹ by which the First Division felt themselves bound, was wrongly decided, and should now be overruled. It was true that that case contained no specific averment that the workman's inability to get work was caused by his incapacity, but the Court did not proceed on that ground, and the appellant was prepared to argue his case on the footing that the two cases were indistinguishable. The appellant was ready to prove, if allowed, that owing to his physical condition brought about by the accident he was unable to obtain any "suitable employment"² in the district. "Suitable" must be interpreted as meaning "in the district," but even if this were not so, the appellant was prepared to prove that his inability to obtain employment was not confined to the district. He was able and willing to work but no one would employ him, and this inability to obtain work amounted to "incapacity for work" in the words of the statute. This had been recognised both in Scotland and in England. In *Clelland v. The Singer Manufacturing Company*,³ Lord M'Laren said that the question which the arbitrator had to consider was "what could the man earn in the open market after the accident had happened as distinguished from what he actually earned in the open market before the accident," and in *Rosie v. Mackay*⁴ the Lord President recognised the fact that the report of the medical referee, although final upon medical matters, was not final or conclusive as to the man's wage-earning capacity. The English cases were to the same effect. *Sharman v. Holliday & Greenwood, Limited*,⁵ recognised that the fact that a workman had been repeatedly refused employment owing to his physical condition was admissible as evidence of incapacity, notwithstanding medical testimony that he was able to work. The same principle was given effect to in the undernoted cases,⁶ and was assumed to be applicable in *Cardiff Corporation v. Hall*.⁷

Argued for the respondents;—*Boag v. Lochwood Collieries, Limited*,¹ was rightly decided, and ruled the present case. The only question in the case was whether the workman was or was not physically incapable of working, and it was only where the workman was physically incapable of working that the Act gave compensation. The medical referee had decided that the workman was physically capable

¹ 1910 S. C. 51.

² Workmen's Compensation Act, 1906, First Schedule (3).

³ (1905) 7 F. 975, at p. 983.

⁴ 1910 S. C. 714, at p. 720.

⁵ [1904] 1 K. B. 235.

⁶ *Clark v. Gas Light and Coke Co.*, (1905) 21 T. L. R. 184; *Radcliffe v. Pacific Steam Navigation Co.*, [1910] 1 K. B. 685; *Proctor & Sons v. Robinson*, [1911] 1 K. B. 1004.

⁷ [1911] 1 K. B. 1009. *Carlin v. Stephen & Sons, Limited*, 1911 S. C. 901, was also referred to.

of working, and, indeed, that fact was admitted. It was wrong to say that inability to obtain work was equivalent to "total or partial incapacity." Neither *Rosie v. Mackay*,¹ nor *Clelland v. Singer Manufacturing Company*,² were inconsistent with the view that it was purely physical incapacity which had to be considered. The English cases did not go as far as the appellant contended. In *Cardiff Corporation v. Hall*,³ Fletcher Moulton, L.J., recognised that it was only in very exceptional cases, *e.g.*, where an accident left a man's labour an "odd lot" in the labour market, that the employer might have to prove that the workman was able to get work. The present was not such a case, as it was found as a fact that the appellant had "picked" coal, which was a well-known line of light work. The fact that employers did not care to employ a damaged man was unfortunate for the man, but irrelevant to the legal question under consideration. Although the respondents were willing that the general question should be decided, it was to be noted that on technical grounds also the case of the appellant was irrelevant. His averment was that "owing to his condition" he was unable to obtain work; he ought to have added "as the result of the accident." Also, the words "in the district," were a fatal limitation on his averment of inability to obtain employment.

May 13, 1912.
Duris v.
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Clyde Coal
Co., Limited.

At delivering judgment on 13th May 1912,*—

¹ 1910 S. C. 714.

² 7 F. 975.

³ [1911] 1 K. B. 1009, at p. 1020.

* On the same day their Lordships delivered judgment (reported [1912] A. C. 496), in *Ball v. William Hunt & Sons, Limited*, an appeal from a decision of the Court of Appeal in England, reported [1911] 1 K. B. 1048. In that case a workman lost the sight of his left eye through an accident, which did not, however, produce any change of appearance in the eye or physical disfigurement. He continued to work at his old rate of wages. Many years afterwards he met with a second accident to the left eye which necessitated its removal, and on recovering from the operation he was unable to obtain work in consequence of his being manifestly a one-eyed man, though his ability to work remained exactly as it was before.

The County Court Judge and the Court of Appeal held that the workman was not entitled to compensation. The House of Lords reversed this decision, delivering the following opinions:—

LORD CHANCELLOR.—In this case the appellant was already blind of one eye when, in September 1910, the blind eye was again injured by an accident in the course of his work and had to be removed. The result is alleged to have been that his disfigurement prevented his obtaining employment. He remained equally able to do work after as he was before September 1910, but says that his partial blindness became apparent as it had not been before, and so he could get no work. Can it be said that incapacity for work resulted from the injury of September 1910? The injury did not prevent him from being able to work, but it did reduce him to a physical condition which prevented him from getting work suitable in the circumstances.

In my opinion, if the County Court Judge thinks these facts are established (as I gather he did think), he ought to award compensation on the footing of total or partial incapacity, according as he may find. By the first section of the Workmen's Compensation Act compensation is to be paid for personal injury by accident within the terms of the Act. What the schedule does is to fix the scale and conditions. In the ordinary and popular meaning which we are to attach to the language of this statute I

May 13, 1912. LORD CHANCELLOR.—In this case the appellant asked for a review of a certain agreed weekly payment of 16s. 11d. under the Workmen's Compensation Act upon the ground that "owing to his condition he is unable to obtain work in the district and the said Wilsons and Clyde Coal Company, Limited, are unwilling or unable to supply him with the same." In fact it was agreed that he was fit for light work such as is done at the picking tables, and was so employed by the respondents for some eighteen months after the accident, and still is so fit, but was dismissed by the respondents in December 1910, and thereupon applied for a review under Schedule I.,

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think there is incapacity for work when a man has a physical defect which makes his labour unsaleable in any market reasonably accessible to him, and there is partial incapacity for work when such a defect makes his labour saleable for less than it would otherwise fetch. I think this view is in accordance with previous decisions of the Court of Appeal. The principle is carefully discussed in *Cardiff Corporation v. Hall*, [1911] 1 K. B. 1009, And certainly the opposite view would leave a workman uncompensated for what may be very real and direct consequences of an injury. In my opinion this case should be remitted to the learned County Court Judge.

LORD MACNAGHTEN.—I am unable to agree in the conclusion at which the Court of Appeal has arrived, and I must add, with all respect, that the process by which the learned Judges who formed the majority of the Court arrived at that conclusion has not been regarded with much favour in this House.

Both the Master of the Rolls and Buckley, L.J., turn to the First Schedule. Finding there the expression "total or partial incapacity for work" they hold that it is an answer to the present claim to say that the claimant's physical condition is just what it was before the accident happened, and that his dexterity and capacity for manual labour are as good as ever. "Incapacity for work" they take to be the same as "incapacity to work." In fact one of the learned Judges treats the two expressions as synonymous and uses them as convertible terms. Now "incapacity for work," as the phrase is used in the schedule, seems to me to be a compendious expression meaning inability to earn wages, or full wages, as the case may be, at the work in which the injured workman was employed at the time of the accident. But whether that be so or not, it is laid down most distinctly in this House (*Lysons v. Andrew Knowles & Sons, Limited*, [1901] A. C. 79) that you must not resort to the schedule for the purpose of cutting down the right to compensation. The right to compensation is given by the Act. The Act is the workmen's charter. The schedule prescribes the scale of compensation and the mode and conditions of its enjoyment. That is the office of the schedule. The key to the meaning of the Legislature is not to be looked for there.

As Lord Halsbury observed in the case I have just mentioned, "the first thing, I think, one has to do is to apply one's mind to what is the substantive intention and meaning of this statute." It seems to me that the injury for which the statute gives compensation is not mutilation or disfigurement or loss of physical power, but loss or diminution of the capacity to earn wages in the employment in which the injured workman was engaged at the time of the accident. At that time this man was earning 20s. a week as an edge tool moulder. That is what he was worth then. What is he worth now? As he is now no one will take him on at that work. Everybody would say offhand two eyes are better than one for such a job as that. So he is heavily handicapped in seeking employment. This disadvantage or disqualification, whatever you choose to call it, has resulted from the accident. It is (to use another expression to be found in the Act) "due to the accident."

It seems to me therefore that this workman is entitled to claim compen-

paragraph 16. The learned Sheriff ruled that the appellant's averments disclosed no relevant grounds for review of his compensation, and in this view the First Division upheld him.

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I am not able to arrive at the same conclusion, and I think the English cases cited to us proceed upon the sound view. The purpose of the Act as declared in the first section is to compensate for injuries. The measure of the compensation is given in the First Schedule, paragraphs 1 to 3 inclusive. Ought we to say that if a man, though physically fit for some work,

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sation under the Act. With the amount of compensation, if compensation be awarded, we have nothing to do. That is a matter for the arbitrator or the County Court Judge.

I agree that the appeal should be allowed and the case remitted to the proper tribunal.

LORD ATKINSON.—In this case the workman, through an accident arising out of and in the course of his employment, lost his eye. It was a blind eye, no doubt, but it is impossible to contend, I think, that the loss of even a blind eye is not an injury within the meaning of section 1, subsection 1, of the Workmen's Compensation Act of 1906. His employer was therefore liable to pay him compensation under the provisions of that section. That is the workman's absolute right. Before the accident he was, though blind of one eye, physically able to do the work he was then doing, and is still able to do work of that kind. There was a market for his labour then because his blindness was not observable. There is no market for his labour now because his blindness is observable. The recent accident has destroyed his market, though it has left his physical ability to work what it was before.

Before the later accident he was not suffering under any incapacity whatever. He was able to work and able to get employment, and I cannot see how the words "antecedent incapacity" apply to the appellant's case. Though the first section of the statute plainly confers upon an injured workman the right, in cases coming within it, to obtain compensation, it does not fix the amount of compensation, or indicate the principle upon which the compensation is to be measured; that is the function of the schedule, but it is its only function. The employer is by section 1, as he was by section 1 of the Workmen's Compensation Act of 1897, made liable to pay compensation "in accordance with the schedule," elastic words importing in themselves a degree of latitude which it is difficult to define—*Thomas v. Kelly*, (1888) 13 App. Cas. 506, at p. 511.

The argument for the respondents resolves itself into this: as paragraph 1 of the schedule only provides for the payment of compensation in two cases—(a) where the death of the workman results from the injury, and (b) where total or partial incapacity for work results from it—the workman in the present case cannot get any compensation because he is as able physically to do his work as he ever was, though no one will employ him to do it. In other words, that in construing the words "incapacity for work," used in the schedule, the absence of a market for the workman's labour, though due, not to the state of the labour market nor to fluctuations of trade, but to some defect personal to himself caused by the injury he has received which renders his labour unsaleable, is to be entirely left out of consideration. His power of earning wages may be completely gone, yet for the loss of that power, directly resulting from the disfigurement caused by the accident, he is not to receive any compensation. Such a construction as this, it would appear to me, cuts down the right expressly conferred upon the workman by the statute. It involves a repeal *pro tanto* of section 1.

The question whether a schedule such as this can legitimately be construed in such a way as to cut down the right conferred by the statute was

May 18, 1912. is prevented by the consequence of the injury from obtaining it—in other words is disabled from earning wages—that nevertheless he is “able to earn” wages and is not under any incapacity for work? He is under an incapacity, if his condition makes his labour unsaleable or saleable only at a less wage.

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In regard to the averment that he is “unable to obtain work in the district,” I think it must be understood in the sense that he cannot get work suitable for his condition in any place within reasonable access. The

considered in your Lordships’ House in the case of *Lysons v. Andrew Knowles & Sons, Limited*, [1901] A. C. 79. In that case Lysons, the workman, a miner, entered the respondents’ employment on a Tuesday, on which day in each week the miners’ week in the respondents’ colliery ended. He worked piecework on that day and on the Tuesday following, earning 6s. each day. He was then injured by an accident, giving a right to compensation under the first section of the Act of 1897, which is practically identical with the first section of the present Act.

The County Court Judge held that the workman had earned 12s. during one week, and that he was therefore entitled, under paragraph 1 (b) of the Schedule to that Act, to 50 per cent of his average weekly earnings, i.e., 50 per cent of 12s., or 6s. per week for every week during which his disablement lasted after the first fortnight. The words of the clause are “not exceeding 50 per cent of his average weekly earnings during the previous twelve months.” The Court of Appeal held that Lysons was not entitled to any compensation, as he had not been employed for two weeks. This construction plainly cut down the right conferred upon the workman by the statute, and was for that very reason disapproved of and rejected in this House. At p. 85 of the report Lord Halsbury, then Lord Chancellor, is reported to have said,—“The first thing, I think, one has to do is to apply one’s mind to what is the substantive intention and meaning of this statute. Does it mean that every workman, who ever is employed in one of the prescribed trades, shall be (subject to certain conditions not relevant to the matter now under debate) entitled to compensation? Or does it mean that only workmen shall be entitled to compensation in respect of whom it is possible to say that the periods of their employment and the mode in which they are paid will render it possible to establish an average weekly payment, so that anybody who comes outside that category is not entitled to any compensation at all. My Lords, for my own part, I cannot entertain a doubt that the Legislature did mean that every workman in the prescribed trades should be entitled to compensation, and I think that is the language which one would naturally expect to have been used by the Legislature if that was the meaning of the enactment. But now it is said that the language of the enactment is that the employer is to ‘be liable to pay compensation in accordance with the First Schedule of this Act.’ It is to be observed that even upon that language it is not such compensation as is enacted in the schedule, but ‘in accordance with the First Schedule to this Act’; and when we look at the First Schedule of the Act we find that there are a variety of provisions which are very intelligible indeed, if we take what I say is the leading enactment, that every workman is entitled to compensation. But it is said: if a workman is not employed for at least two weeks, how can you average his earnings, or his agreed earnings, by an ‘average,’ which, when you have only got one term, is an impossible phrase? Well, my Lords, for my own part, if I came to the conclusion that there had been no mode by which the quantum should be fixed in the schedule, I should still be of opinion that there was no repealing of the right which had first been granted, but that by arbitration, or by some other means, which I think would be quite within the powers of the Act, the compensation should be

arbitrator must say what a man can fairly be asked to do in order to obtain May 13, 1912.
employment and so maintain himself wholly or in part in order not to be a
burden upon others. This is only one of the numberless difficulties in
applying this Act, but it is a difficulty of fact, not of law.

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LORD MACNAGHTEN.—I entirely agree.

LORD ATKINSON.—I concur.

LORD SHAW OF DUNFERMLINE.—In this case the appellant sustained an

ascertained ; because I do not look upon the provision made in respect of the compensation as one which, either in language or in the intention of the Legislature, was meant to cut down and override the primary right given to every workman to compensation, but I regard it as a mode of ascertaining what the quantum was to be."

Lords Macnaghten, Davey, Shand, Robertson, and Lindley gave judgment to the like effect, and Lord Brampton concurred.

On examining the schedule one plainly sees that what is to be compensated for is not, as in ordinary actions of tort, the pain and suffering which the plaintiff has endured, or the disfigurement of, or injury to, his body which has been inflicted upon him, but the loss of the power to earn wages which has resulted from the injury. In the case of the workman's death it is only those dependants who are dependent wholly or in part upon those earnings who are to receive any compensation, and the amount of it is, subject to certain limits, measured by the amount of those earnings in the employment in which he met with the accident which caused his death. However great may be the pecuniary loss the dependants sustain from the workman's death by reason of the cessation on that event of a pension, or life annuity, or income from property, they are not entitled to any compensation under the Act in respect of this loss.

The obvious meaning of paragraph 1 (b) of the Schedule, when read with paragraph 3, is that the higher scale is to be adopted when the workman is not able to earn anything, and that where he does earn or is able to earn something in a suitable employment credit is to be allowed for this sum to the extent specified. The words "or is able to earn" are most significant. They point to the retention of the power to earn something in a suitable employment, and to the extent that this power is retained or has returned, though he may not try to exercise it, he does not incur the particular kind of loss for which compensation is to be given. Paragraph 16 of the schedule points in the same direction. The weekly payment may be ended or diminished or increased according, presumably, as the ability to earn has completely returned, has increased, or has diminished. There would be no meaning, it would appear to me, in these provisions making the amount of wages which were, are, or can be earned so much the basis of compensation, if the market for the workman's labour has to be left out of consideration. The earning of wages depends as much on the demand for the workman's labour as it does upon his physical ability to work. If because of his physical defects no one will employ him, however efficient he may be in fact, he has lost the power to earn wages as completely as if he was paralysed in every limb.

If it be then the paramount object of the Act to compensate for the loss of the power to earn wages, the workman whom, because of the injury caused by an accident, nobody will employ, comes within its purview as much as one who is rendered unable to do any work at all.

I am unable to follow the line of reasoning based upon the antecedent existence of the man's blindness. It was not apparent, and, as the result shows, he got employment because it was not apparent. The employers,

May 13, 1912. injury by accident arising out of and in the course of his employment. He became totally incapacitated and received compensation of 20s. per week, and a memorandum of agreement was recorded on 27th May 1909. The respondents provided him with light work at the picking tables till December 1910, and during that period his compensation was reduced by agreement, and thereafter continued to be paid at the rate of 16s. 11d. per week. In September 1910 a report was obtained from a medical referee to the effect that the appellant was fit for the light work such as he was then

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possibly because they think the loss of the workman's vision, which is now obvious, will render him more liable to accident, refuse to employ him.

It may well be that the words "incapacity for work" would not, in their ordinary meaning, *prima facie* apply to a case such as this, but it has been well established that in the construction of a statute it is perfectly legitimate to give to some of its words a meaning different from their ordinary meaning, where that is necessary to forward and effect the main purpose and object of the enactment.

I therefore concur that the matter should be remitted to the County Court Judge to ascertain the amount of compensation.

LORD SHAW OF DUNFERMLINE.—I think this case is an important one, but its material facts can be stated in a word. About fifteen years ago the appellant, who is an edge tool moulder, suffered an injury to his left eye, the ball of which was penetrated by a steel chip. This accident resulted in the blindness of that eye, but did not produce any disfigurement in the workman's appearance, which remained unchanged. On 7th September 1910, however, the appellant, being engaged in cutting out brickwork, was struck in the same eye by a piece of brick. The result of this accident was that the eye had to be removed. A marked disfigurement has consequently resulted from the mutilation. With regard to his power to do work, it remains as before; but with regard to his power to get work, that appears to have been lost, or at least diminished, and, up to the time of the trial, notwithstanding frequent applications in various quarters, he has been refused employment on account of the disfigurement above referred to.

The case depends upon the construction of certain frequently quoted words in the Workmen's Compensation Act of 1906. The first passage referred to is section 1, subsection (1):—"If in any employment personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule to this Act." It is admitted that the appellant did sustain a personal injury by accident arising out of and in the course of his employment; and, so far as this subsection is concerned, the language of the Act would seem to cover his case.

It is, however, the words of Schedule I. that have caused difficulty and difference of opinion. The material words of that schedule are as follows:—"Schedule I. (1) The amount of compensation under this Act shall be . . . (b) where total or partial incapacity for work results from the injury, a weekly payment during the incapacity not exceeding 50 per cent of his average weekly earnings," &c. It is said, on the one hand, that incapacity for work has not resulted from the latest injury, because he can do work as well now as before. On the other hand, so far as the practical result to the workman is concerned, this would seem to avail him little, if, by the injury, he has been so disfigured that, while he could do the work if he obtained it, he, nevertheless, cannot get employment, and, so far as compensation to him is concerned, from all practical points of view, he

engaged in, namely, at the picking tables. On 6th December 1910, the May 13, 1912.
 respondents, who were reducing the number of their workmen, dismissed him. The appellant maintains that the circumstances are now different from those which existed when he agreed to accept 16s. 11d. per week, because he has entered the open labour market, and, notwithstanding all his efforts, he is unable, on account of his injuries, to obtain any employment. He asks an opportunity of proving that his applications have been unsuccessful, and that his want of success "has not been due to the state

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equally suffers by reason of the accident, whether the accident has prevented him from doing work or from getting it. In one view "incapacity for work," which is the language used in clause (b), might not be held to include the case of his being rendered ineligible for employment; whereas many cases occur to the mind, and illustrations have been given in the judgment of Fletcher Moulton, L.J., which show that, as matter of common experience, the capacity for work may remain quite unimpaired, although the eligibility as an employee may be diminished or lost. If a butler is burned by the explosion of a lamp, his appearance may be such, after his recovery, as to prevent him from obtaining a situation as a butler, and he may find himself out of all kinds of employment. In domestic service or in business, particularly shop business, or in cases like those of commercial travellers, the instances might be repeated without limit in which the workman or workwoman would be forced into the ranks of the unemployed by an accident of the kind figured, although in each of these instances, if employers or society would only have disregarded appearances, the workman's real capacity would have been found the same as before.

Admitting the difficulties, I think that not a little help in their solution arises from this consideration, that when compensation for injury is being treated of by the statute, the theory and datum upon which such compensation proceeds is that of compensation for injury to the worker as a wage-earner, and it is the incapacity to earn a wage which forms the standard upon which the compensation is reckoned. A good illustration is found in paragraph 3 of the schedule, which says that: ". . . in the case of partial incapacity the weekly payment shall in no case exceed the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident, but shall bear such relation to the amount of that difference as under the circumstances of the case may appear proper." In the present case, as in those other illustrations to which I have ventured to refer, the workman is neither earning, nor is he able to earn, anything after the accident, and at least he may have to be turned on to a less remunerative position. In the latter case, it is quite clear that the data have been reached under the statute for the estimate of compensation, namely, the difference between his former and his later wage—that difference having been brought about by reason of personal injury by accident arising out of and in the course of his employment. In these circumstances, I incline to the opinion that the true meaning of the statute is that "incapacity for work"—the term employed—does include the case of his eligibility to obtain work being diminished or lost, or, in other words, of his capacity to get work being impaired or destroyed. In the case before us, this arose from the mutilation and disfigurement which he suffered by reason of the accident in September 1910.

It is necessary to keep clearly in view in such cases the distinction between inability to obtain work arising as the result of the injured or disfigured condition of the workman and inability to obtain work arising from the state of the labour market. It does not appear to me to be any part of the scheme of the statute to make the employer responsible for a non-

May 18, 1912. of the labour market, but to his incapacity, and also to the very limited type of work which is now within his powers."

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I am of opinion that this is a relevant claim for inquiry. The question of law put for the opinion of the First Division by the learned Sheriff-substitute was, "Was I right in holding that the appellant's averments disclosed no relevant grounds for review of his compensation?" The First Division, following *Boag v. Lochwood Collieries, Limited*,¹ answered the question in the affirmative. I am of opinion that it should have been answered in the negative, that the case of *Boag*¹ was wrongly decided, and

employment which is owing to general economic causes. The non-employment, as I say, must be connected with the injury which has been received and with the incapacity for work which has been thereby produced. Even treating that incapacity as inclusive of the case of the impossibility or improbability of obtaining work, as well as of doing it, that impossibility or improbability must be traceable to the thing which has differentiated this workman from his other able-bodied comrades, namely, the injury received. If, for instance, one of the probabilities were that, at the first appearance of scarcity in the demand for labour, a workman in his injured condition would be the first to suffer, that is simply one of those circumstances with regard to which the County Court Judge as arbitrator would have to make his best and most judicious estimate. He might, probably he would in the majority of cases, treat such a problematical consideration as entering into his estimate in but a slender degree. But the refinements in these cases have been so frequent that I desire to say once for all that the entire results causally connected with an injury ought to enter into the estimate, but that results attributable to economic causes, such as the state of the labour market, ought to be excluded therefrom.

I am accordingly of opinion that the conclusion reached by the learned Lord Justice Fletcher Moulton is preferable to that reached by the majority of the Court of Appeal, and that this class of case, namely, of persons suffering injuries which result in their unemployment, should not be excluded from the scope of the compensation payable under the Act.

I am glad to think that the general conclusions on this subject which I have ventured to state are in accord with the trend of the decided cases in England upon this subject. These cases are already legion. But the question whether compensation is, under the statute, limited to an award in respect of physical incapacity alone has of necessity, and owing to the circumstances as presented to the Courts, been considered alongside of this other, namely, whether an award once made, say in consequence of the report by a medical referee, can be reviewed by reason of subsequent experiments, and, in particular, of the experiment which the injured man has himself made of placing his labour on the market, with his experience of finding, or being unable to find, employment.

Upon this latter point the opinion of Lord Collins (then Master of the Rolls) in *Sharman v. Holliday & Greenwood, Limited*, [1904] 1 K. B. 235, at p. 238, has been frequently referred to, and has been followed. There is in the case of *Cardiff Corporation v. Hall*, [1911] 1 K. B. 1009, at p. 1015, what, if I may venture to say so, appears to me a most valuable summary of the English case law upon this subject. These opinions I respectfully adopt. In addition I would venture to quote two sentences from the late Master of the Rolls in *Clark v. Gas Light and Coke Company*, 21 T. L. R. 184, as also expressing my own view on this subject. The learned Judge there states the point thus: "The contention was that the only question to be considered was as to the physical condition of the applicant, and that

¹ 1910 S. C. 51.

that the case put forward by the workman was one suitable for investigation. It should be explained that the appellant's averment as the ground of his application for review that "owing to his condition he is unable to obtain work in the district" was, by a very proper agreement between the parties, who desired to have the more general question decided, held equivalent to an averment not confined to the particular district or small locality in which he had been working, but was held equivalent to a proposition that he was unable to obtain suitable work.

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In the case of *Ball v. William Hunt & Sons, Limited*,¹ I have to-day

when it was once proved that his physical condition was such as to render him capable of earning the same wages as before, there was an end of the question. It was argued that the question whether his opportunity of finding work from which he might earn the same wages had been narrowed in consequence of the accident ought not to be taken into consideration, the one and only question being as to his physical capacity for work." Upon that subject his view was as follows: "If the applicant was unable in consequence of the accident to command the right of earning wages, who was to suffer, he or his employers? In his opinion, if the applicant, after repeated attempts, could not find an opportunity of putting his diminished powers of working into operation, he was justified in saying that his wage-earning capacity was not the same as before."

In *Radcliffe v. Pacific Steam Navigation Company*, [1910] 1 K. B. 685, at p. 688, the present Master of the Rolls says: "Although I think it is competent to the County Court Judge to review an award similar to that which was made in June, it is right to add that any such application should be jealously scrutinised, and, further, that great care must be taken not to allow the fluctuations of the general labour market to justify a review. But a workman is entitled to say that, although the physical effects of an accident may have disappeared or may be unaltered, yet he, as a damaged man, may be more and more handicapped in the labour market as years pass by. The unwillingness of masters to employ men suffering from any infirmity has been greatly increased by the Workmen's Compensation Act, and this is a circumstance which cannot be disregarded." I refer also in particular to the judgment of Buckley, L.J., in which he dwells upon the distinction between inability to obtain employment arising from the injury and such inability arising from general economic conditions. To that distinction I have already alluded.

I regret to observe the marked difference which has arisen on this subject between the English and the Scottish Courts. Upon the general question as to the treatment of the worker under the statute from the point of view of a wage-earner, the opinion of Lord M'Laren in *Clelland v. Singer Manufacturing Company*, (1905) 7 F. 975, at p. 983, may be referred to. "What," said he, "the arbiter has to consider is not what the man is receiving, whether under the name of wages or charity, from his employer, but what could the man earn in the open market after the accident had happened as distinguished from what he actually earned in the open market before the accident." And later expressions show in some points a near approximation to the views of the learned Judges in England. In *Carlin v. Stephen & Sons, Limited*, 1911 S. C. 901, at p. 907, Lord Salvesen analyses these English cases, and says: "In my opinion, incapacity for the purposes of the Workmen's Compensation Act is primarily physical incapacity, in which may well be included such personal disfigurement as may lessen the sphere of employment, although the power to work remains as good as before. It does not, in my opinion, include inability to get employ-

¹ [1912] A. C. 496, *supra*, footnote, p. 77.

May 13, 1912. had occasion to deal with the law of England and Scotland upon this subject and with the difference which has arisen between the two; and I referred to the present case as following that of *Boag*,¹ decided by the Second Division of the Court of Session. I need not accordingly recapitulate my views. For the reasons there stated by me, I am of opinion that this appeal should be sustained.

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INTERLOCUTOR of the First Division reversed, and case remitted to the Sheriff-substitute to adjudicate accordingly.

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ment which arises from something not personal to the workman." Had the state of the Scotch decisions been in accord with these sentences, a difference between them and the English cases would have been far to seek.

In the case, however, of *Boag v. Lochwood Collieries, Limited*, 1910 S. C. 51, the question of what is the meaning of the statutory expression "incapacity for work" was broadly and emphatically decided. The case arose under the Workmen's Compensation Act, 1897, but the language under construction and the point were the same as in the subsequent Act. A workman averred that he was entitled to have a weekly payment reviewed and increased "in respect that his employers were unable to give him suitable light work, and that he was unable to obtain light employment elsewhere." It was held that these grounds were not relevant for inquiry. The Lord Justice-Clerk said: "As I read the Act of Parliament and relative schedule the question to be decided in an application to assess compensation, or under an application for review of weekly payments, is the question of the man's *physical* capacity to work. Now, in this case it had been decided by agreement that the workman was partially capable for work. Is it any reason for reviewing the payment to say that the employers cannot find him suitable work for his capacity, or that he has not been able to find such work himself? If the appellant means that his averments if proved would of themselves be a sufficient ground for saying that compensation must be increased to the full allowance under the statute, I should certainly not for myself yield for one moment to any such demand. I take it that the whole question is that of 'capacity to work,' which cannot be decided merely by the fact that the workman has not got work, but only by such evidence as satisfies the Court whether or not he is able to work." This is a broad affirmance of the proposition that incapacity under the Act must be limited to physical incapacity and to that alone. So stated, I think the proposition—with which I have already dealt at length in the earlier part of my opinion—to be an unsound proposition, and the decision of *Boag* to be erroneous. On 28th June 1911, the First Division pronounced a decision in the same sense in the case of *Macdonald or Duris v. Wilsons and Clyde Coal Company*, (*supra*, at p. 75). The case, however, following *Boag* as it did, was treated as being governed by that decision. It follows that, in my view, that case has also been erroneously decided.

I humbly think, accordingly, that the decision of the Court below should be reversed, and that the case should be remitted for adjudication by the arbitrator as to the amount of compensation to be awarded to the appellant.

¹ 1910 S. C. 51.

GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY, (Pursuers) Appellants.—*Sir Alfred Cripps, K.C.—H. P. Macmillan.* No. 13.

THE PROVOST, MAGISTRATES, AND COUNCILLORS OF THE BURGH OF AYR, (Defenders) Respondents—*Murray, K.C.—Hon. W. Watson.* Feb. 27, 1912.

Burgh—Street—Private Street—Railway—Road “forming part of any railway”—Railway lines forming “obstructions” in a street—Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), sec. 4 (31)—Burgh Police (Scotland) Act, 1903 (3 Edw. VII. cap. 33), sec. 104 (2) (d). Glasgow and So.-Western Railway Co. v. Magistrates of Ayr.

The Burgh Police (Scotland) Act, 1892, enacts:—Sec. 4 (31). “ ‘Street’ shall include any road . . . thoroughfare, and public passage, or other place within the burgh used either by carts or foot-passengers, and not being, or forming, part of any . . . railway.”

In 1889 a railway company, under section 38 of the Railways Clauses Consolidation (Scotland) Act, 1845, which provides for the purchase by a railway company by voluntary agreement of land for extraordinary purposes, acquired a strip of ground in a burgh. The strip consisted of an unformed road which had been used by the public as a right of way for traffic of every description since 1841, and continued to be so used after its acquisition by the railway company, who did not utilise it for any purpose connected with the railway until 1908, when they laid a double line of rails along it.

Held (affirming judgment of the First Division), in a question between the magistrates of the burgh and the railway company, that the strip did not form “part of any railway,” and was therefore “a street” within the meaning of sec. 4 (31) of the Burgh Police (Scotland) Act, 1892, and that the rails were liable to be removed, at the instance of the magistrates, as “obstructions” within the meaning of sec. 104 (2) (d) of the Burgh Police (Scotland) Act, 1903.

Observed that “part of any railway” means part of a railway in fact, and that the mere acquisition of land by a railway company does not make the land “part of any railway.”

(In the Court of Session, 21st December 1910—1911 S. C. 298.)

The pursuers, the Glasgow and South-Western Railway Company, appealed to the House of Lords.

The appeal was heard on 13th and 14th November 1911.*

At delivering judgment on 27th February 1912,—

Ld. Chancellor
(Loreburn).
Ld. Atkinson.
Lord Gorell.
Lord Shaw of
Dunfermline.

LORD ATKINSON.—This is an appeal from interlocutors pronounced by the Lord Ordinary, who tried the case, and the First Division of the Court of Session affirming the former.

The controversy between the appellants and respondents, out of which the appeal arises, relates to a strip of ground thirty feet in width, situated formerly within the burgh of Newton-upon-Ayr, now within the extended boundaries of the burgh of Ayr, and forming part of what has come to be known as Oswald Road. One Mr Oswald of Auchencruive was in 1837, when the appellants obtained their first Act authorising the construction of their railway, owner of this land. How he got it, or to what purpose he

* The following authorities were referred to at the hearing:—Kinning Park Police Commissioners v. Thomson & Co., (1877) 4 R. 528, at p. 530; Magistrates of Edinburgh v. North British Railway Co., (1904) 6 F. 620, at p. 639.

Feb. 27, 1912. intended to devote it, is, in my view, irrelevant. He was admittedly seised and possessed of the full proprietary right in it.

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of Ayr.

Ld. Atkinson.

In the year 1889 the appellants purchased this strip of land from Oswald for the sum of £3500. They acquired it under the powers conferred upon them by the Railways Clauses Consolidation (Scotland) Act, 1845, for extraordinary purposes, which purposes are, by section 38 of that statute, defined to be "making and providing additional stations, yards, wharfs, and places for the accommodation of passengers, and for receiving, depositing, and loading or unloading goods, . . ." and "making convenient roads or ways to the railway, or any other purpose which may be requisite or convenient for the formation or use of the railway." Whether as between the Company and the vendor, the strip of land was subject to any right in him over it is irrelevant. The proprietors of the land abutting on the eastern side of this strip, that is the side furthest away from the appellants' railway, at some remote time added a strip of about 10 feet wide for the greater part of the length of the strip so purchased, and this enlarged strip, 40 feet in breadth, is now called Oswald Road. On 23rd February 1908 the Railway Company laid down a double line of rails on this ground. Up to that date they had never used it for any purpose. It was never bottomed, or metalled, or made up as a road. In some places it was grass grown, but the Railway Company admit that there is and long has been a public right of way over it for the passage of horses, carts, and of persons on foot. And further, it has been found on the facts at the trial of the case that the rails so laid down were an obstruction to the right of the public thus to use it.

The earlier litigation it is unnecessary to deal with, but the Town-Council of Ayr on 14th March 1908, acting under the provisions of the 133rd section of the Burgh Police (Scotland) Act, 1892, as amended by the 104th section of the Burgh Police (Scotland) Act, 1903, passed a resolution to have the road put in order and freed from obstruction. This resolution, it is admitted, could only be legally passed by the Town-Council on the assumption that the road in question had, at the date of the resolution, become and was a private street. The Railway Company accordingly instituted this action seeking to have it declared that the strip of ground was not, at the date of the resolution, a private street, and that this being so the respondents had no right to interfere with the pursuers. A proof having been taken, the case, after much litigation, came on for hearing, with the result that the Lord Ordinary pronounced the interlocutor of 13th January 1910, by which the respondents, the Magistrates, were assoilzied; and this interlocutor was by the interlocutor of the First Division, dated 8th December 1910, adhered to.

The question upon which the case turns is this: Had this place become a "private street" within the meaning of the 25 and 26 Vict. cap. 101 (repealed by the Burgh Police (Scotland) Act, 1892), or within the meaning of the latter statute? The definitions of a street and a private street are in the two statutes identical.

Private street in each means a street maintained, or liable to be maintained, by persons other than the commissioners. This place, Oswald Road, was certainly not maintained by the commission. So far as it was

maintained at all, it was maintained by some persons other than the com-
 mission. Then was it a street when these rails were laid down upon it?
 "Street" is thus defined in the Burgh Police (Scotland) Act, 1892, section
 4(31):—" 'Street' shall include any road, highway, bridge, quay, lane,
 square, court, alley, close, wynd, vennel, thoroughfare, and public passage,
 or other place within the burgh used either by carts or foot-passengers, and
 not being or forming part of any harbour, railway, or canal station, depot,
 wharf, towing path, or bank."

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It is not denied that this road was used by horses in carts and foot-
 passengers long before the year 1862, when the 25 and 26 Vict. cap. 101
 was passed. Up to 1889, the date of the purchase by the Railway Com-
 pany, it would appear to me that this statute operated upon the state of
 things existing for twenty-seven years. There could be no question of any
 part of the street being a railway during that period, but even if this were
 not so, I think it is not enough that the soil merely should, after it has
 become subject to a public right of way, be acquired by a railway company
 for extraordinary purposes, if it never has in fact been used for any of those
 purposes. The mere acquisition of the land for extraordinary purposes,
 coupled with an intention ultimately to use it for some of them, cannot by
 itself convert land allowed to lie waste into a railway within the meaning
 of this definition. In my view, therefore, this Oswald Road had become
 a private street, if not long before 1889 certainly before February 1908,
 when the rails were laid down upon it. There is no doubt that a public
 right of way may, under the 46th section of the Railways Clauses (Con-
 solidation) Act of 1845, in the absence of any provision in the special Act
 prohibiting it, be exercised over the permanent way of a railway. *Dartford
 Rural District Council v. Bexley Heath Railway*¹ established this. But
 here the fact has been found against the appellants that the rails as laid are
 an obstruction to the public right of way. It is not necessary to decide at
 present whether if this place, Oswald Road, had become a private street, as
 I think it clearly has, the Company could not ever lay down rails upon it,
 but certainly they cannot do so in such a way as to cause an obstruction
 such as it is found they have created. The decisions appealed from are,
 therefore, in my opinion, right, and should be affirmed, and this appeal be
 dismissed with costs.

LORD SHAW OF DUNFERMLINE.—I do not entertain any doubt that the
 Scotch Courts have come to a correct conclusion in this case. It is only
 because on both sides of the bar it was represented that the question at
 issue between, so to speak, railways on the one hand and municipal autho-
 rities on the other was of great importance in Scotland, that I venture again
 briefly to resume the facts. It does not appear to me to be necessary, how-
 ever, in doing so to go into the history of the strip of ground afterwards
 known as Oswald Road, Ayr, or to recount its various transmissions since
 1765 up to the date when it was acquired by the Railway Company from
 Mr Oswald in 1889.

In 1885 this road or piece of ground, originally a part of the burgh of

¹ [1898] A. C. 210.

Feb. 27, 1912. **Newton-upon-Ayr**, was wholly incorporated in the extended burgh of Ayr.

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Lord Shaw of Dunfermline.

What was then the situation of that piece of ground? That is cleared up by the admission of parties to this effect, that it "has been used by the public as a right of way for all purposes at least since the year 1841," this admission being made, of course, by the pursuers without prejudice to their pleas as to the effect of their acquisition of the solum in 1889 in virtue of their conveyance and the Railway Acts. It may be useful as a test to look at the state of matters in and after this year 1885. The municipal boundaries of Ayr in that year included this ground. It is admitted that it has been used by the public as a right of way for all purposes at least since 1841. The Burgh Police Act of 1892 had no doubt not then been passed, but its predecessor, the Police and Improvement Act of 1862,¹ a statute which was not referred to in the discussion, was in full operation. By the definition of that Act it does not appear to me to be doubtful that the ground was a "private street." By section 3, "the expression 'private street' shall mean any road, street, or place within the burgh (not being or forming part of any harbour, railway, or canal station, depot, wharf, towing path, or bank) used by carts, and either accessible to the public from a public street or forming a common access to lands and premises separately occupied, and which has not been before the adoption of this Act well and sufficiently paved and flagged by the owners of premises fronting or abutting on said street, and which has not been maintained as a public street." As I say, it does not appear to be open to doubt, accordingly, that Oswald Road in and after 1885 was a private street.

In 1889, acting under the provisions of section 38 of the Railways Clauses Consolidation (Scotland) Act, 1845, the appellant Company, by voluntary agreement, acquired that ground. I shall refer later to what I consider to be the effect of that statute, but I may remark that from the date of that acquisition in 1889 until February 1908 the ground does not appear to have been in fact used or appropriated as any part of a railway. No rails were laid down upon it, no exclusive possession was taken of it, but, on the contrary, it stands admitted that the public rights and thoroughfare existed as before. The Town-Council of Ayr exercised their ordinary jurisdiction with regard to private streets over it; and in 1896, without objection by the appellants, a public sewer was laid in Oswald Road, and we were informed that the gas mains were also, under public authority, there laid.

Meantime, in 1892, the Burgh Police (Scotland) Act had passed, and the statutory definitions therein are as follows:—" 'Private street' shall mean any street maintained, or liable to be maintained, by persons other than the commissioners," and it is further provided that " 'street' shall include any road, highway . . . thoroughfare, and public passage, or other place within the burgh, used either by carts or foot-passengers, and not being or forming part of any harbour, railway, or canal station, depot, wharf, towing path, or bank." For the purposes of this case there is no material distinction between this and the language of the Act of 1862, and there can be no reasonable argument against the proposition that both *de facto* and *de jure* in February 1908 the road in question was, and had for many years

¹ 25 and 26 Vict. cap. 101.

been, a private street within the jurisdiction of the municipal authorities of Ayr. Feb. 27, 1912.

There are various conclusions of the summons in this case, but it was candidly admitted by Sir Alfred Cripps that he desired a judgment which would, for practical purposes, combine the third and fourth conclusions in this way—"That the said strip of ground is not subject to any of the provisions of the Burgh Police (Scotland) Acts . . . because the said strip of ground forms part of the railway of the pursuers within the meaning of the said Burgh Police (Scotland) Acts . . . and is not a private street . . . and is in no way subject to any of the provisions of the said Acts relating to streets." There follows the fifth conclusion, which appears to me to be a serious but quite logical consequence of the third and fourth conclusions which I have cited, and to constitute what, in my opinion, is a most audacious demand. It is to the effect that the appellants are entitled to maintain and use for the purpose of their undertaking the said strip of ground and the lines of rails already laid down thereon, and to lay down, maintain, and use for said purposes such further lines of rails thereon, as they may deem expedient.

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It appears that on 14th March 1908 the Town-Council of Ayr had passed, under their statutory powers, a resolution requiring that this portion of Oswald Road should be freed from obstructions and properly levelled, bottomed, &c., and it is, of course, maintained that this resolution was invalid if the other conclusions of the summons are affirmed. In a word, the object of this suit is this: that it was within the power of the Railway Company in February 1908, by laying rails on this private street, to destroy its character as such, and to cut it out of the jurisdiction of the Ayr municipal authorities, and of all the provisions of the Burgh Police Act. The appellants, it is maintained, had the power to do this, because by laying the rails they made the ground part of the railway, and so brought it within the exception to private streets. It follows, accordingly, that the surface of the ground can, according to the argument, be used without let or hindrance by locomotives, trucks, and carriages, and that the rails can be laid, as in point of fact they are, over the drainage system underneath. I mention these things to show the state of confusion and danger, both above and below ground, which might result from a decree in the terms of the conclusions of this summons and from an affirmance of the construction of the Acts of Parliament for which the appellants contend.

The argument hinges upon the proposition that the strip of ground is part of a railway and within the exception to private streets in the Burgh Police Acts. I desire to state broadly, in the first place, that I think "part of a railway" is, and was meant to be, part of a railway in fact, and not merely ground, buildings, or the like, which happen to be the property of the railway. It is easy to figure the acquisition of property, say, for suites of offices or other convenient accommodation, possibly in parts of burghs which are not even adjoining the actual railway as it is generally understood. Such property may be acquired under the 38th section of the Railways Clauses Consolidation Act, and I should hold it to be quite unsound to suggest that the fact of such purchase operated to cut out such ground, buildings, &c., from the municipal jurisdiction of the burgh. But if the

Feb. 27, 1912. ground, buildings, &c., are merely the property of the railway, and do not, in the language of the Act, form part of any harbour, railway, or canal station, &c., then it does not appear to me that the exception which is founded upon has any application.

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I now turn to section 38 of the Railways Clauses Act, 1845, which permits the Company, in addition to their powers of compulsory taking, privately to purchase a certain limited amount of land "adjoining or near to the railway, or to any other railway communicating therewith, and on which the traffic thereupon may pass, and in any town or city adjoining to or near such railways . . . for the purpose of making convenient roads or ways to the railway, or any other purpose which may be requisite or convenient for the formation or use of the railway." Speaking for myself, I do not entertain any doubt that, instead of the land, which is dealt with in section 38, being treated as land which forms part of the railway, it is, on the contrary, treated as land which is different from the railway, in fact, but is "adjoining or near to the railway" or convenient for the "formation or use of the railway." The railway, in short, is one thing, even as used in that statute, and the land which is the subject of section 38 is another thing, and the Act nowhere provides that the mere acquisition of property by the Company shall thereby operate its conversion into part of the railway.

This might be sufficient to dispose of this case, but I desire to give my adhesion to the view which is set forth in the opinion of the learned Lord President. I do not agree with what was maintained to have been his view, that the Act of 1892 must speak from its date, and that accordingly everything must stand fixed at that period. I do not think that the latter of these propositions is implied in what the learned Lord President said, but I understand his meaning to be, and, if so, I entirely concur in it, that when the Act of Parliament passed it became operative when and as the circumstances arose within the area of the burghal jurisdiction to which its provisions could apply. Land might be laid out subsequent to 1892, and rights of access might be granted, or facts as to public thoroughfares emerge, and, as these things occurred, the provisions of the Act of 1892 could be called into operation. I need not go through the many sections of the statute which show that the Act was meant to have its adaptations to emerging circumstances as I have mentioned; but I find nowhere in the Act any countenance to the suggestion that, apart from the express authority of Parliament, the statutory municipal jurisdiction, once set up, could be thereafter cut down or cut into by the acts of inhabitants or corporations within the burgh. This, however, is precisely what, according to the argument of the appellants, has occurred. Against the will of the respondents the Railway Company have placed down these rails, and they propose to treat and use the road as non-burghal, and to bring about the exclusion of the municipal jurisdiction, together with the confusions and dangers to which I have alluded.

I do not think that there is any sanction for these proceedings on account of the fact that the land has been acquired under section 38 of the Railways Clauses Act, nor do I think the effect of the Railway Company's action is to set up the exception to, and exclusion from, the Burgh Police Acts, as contended for.

In view of this opinion, it is unnecessary for me to refer to the subsidiary parts of the case. I think, for instance, that the case of *Stewart v. Greenock Harbour Trustees*,¹ in which it was held that the working of locomotive traffic on rails through a public street was so plainly an obstruction to traffic as not to require any evidence to be led upon the subject, was rightly decided. Nor is it needful to make any pronouncement upon the question of whether finality attaches to the action of the Town-Council in forbidding obstructions, that action having been already ratified *in foro contentioso*. My humble opinion being that the foundation of the appellants' case is unsound, it follows that they had not power, apart from statute, to cut down the burghal jurisdiction, and that they are not entitled to decline to give effect to the Town-Council's resolution for the proper levelling, macadamising, freeing from obstructions, &c., of this road.

I agree in the course proposed, and think that the appeal should be dismissed.

LORD CHANCELLOR.—I agree, and have nothing to add ; and I desire to say that my noble and learned friend Lord Gorell also agrees.

APPEAL dismissed with costs.

SHERWOOD & Co.—JOHN C. BRODIE & SONS, W.S.—JOHN KENNEDY, W.S.—
JAMES AYTON, S.S.C.

BOYD & FORREST, (Pursuers) Respondents.—*Clyde, K.C.—MacRobert.* No. 14.
THE GLASGOW AND SOUTH-WESTERN RAILWAY COMPANY,
(Defenders) Appellants.—*Buckmaster, K.C.—Macmillan.* May 16, 1912.

Fraud—Contract to construct railway—Alleged fraudulent misdescription of nature of soil—Proof of fraud.

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A railway company invited tenders for the construction of a line of railway and, for the information of intending offerers, exhibited what purported to be a journal of bores taken along the proposed line. A firm of contractors to whom that journal had been exhibited tendered for the work, and a lump sum contract was entered into with them for the construction of the railway.

During the progress of the work the contractors discovered that the strata contained more rock or hard substance than they had anticipated, and it ultimately appeared that the so-called journal was not the actual record kept by the borers (who were not professional borers but were ordinary servants of the company), but was compiled by the company's engineer from notes supplied by the borers, and that in several instances he had described strata as soft which the borers had described as hard or rock.

In an action brought by the contractors against the railway company, after the completion of the work, the Second Division of the Court of Session, held, *inter alia*, that the representations made to the pursuers with regard to the journal of bores were false and fraudulent.

The House of Lords, on appeal, *reversed* that judgment, *holding* that the engineer had compiled the journal honestly and to the best of his ability, and had only altered the descriptions given by the borers where he honestly believed these descriptions to be erroneous.

¹ (1864) 2 Macph. 1155.

May 16, 1912. (In the Court of Session, 10th November 1910—1911 S. C. 33.)

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The defenders appealed to the House of Lords.

The appeal was heard on 4th, 5th, 7th, and 8th March 1912. The only question argued was whether the representations made by the defenders to the pursuers with regard to the journal of bores were or were not fraudulent.

Ld. Chancellor
(Loreburn).
Lord Mac-
naghten.
Ld. Atkinson.
Lord Shaw of
Dunfermline.

At delivering judgment on 16th May 1912,—

LORD ATKINSON.—In this case the appellants entered into a contract in writing with the respondents, dated 18th September 1900, for the construction of a certain portion of the appellants' railway, called the Dalry and North Johnstone Railway, about 12 miles in length, and for widening their line between the Dalry and Swinlees Junctions, for a lump sum of £243,690. There were several cuttings to be excavated and embankments to be made in order to form this first mentioned line. One cutting was called the Kilbirnie Cutting, and another the Whirlhill Cutting.

The specification attached to the contract executed by the parties and forming its basis contains the following paragraphs amongst others :—

“ Cuttings and Embankments. ”

“ Bores have been put down at various parts of the line, the positions of which are shown on the small scale plan, and a copy of the journals of these bores may be seen at the engineer's office, but the Company does not in any way guarantee their accuracy, or that they will be a guide to the nature of the surrounding strata. Contractors must, therefore, satisfy themselves as to the nature of the strata, as the Company will not hold themselves liable for any claim that may be made against them on account of any inaccuracy in the journals of the bores.

“ The formation level in both cuttings and embankments shall be 1 foot 9 inches below mean rail level.

“ Of the probability of rock existing in any of the cuttings or other excavations to a greater extent than the quantity given in the detailed schedule the contractor must judge, and also form his own opinion as to the nature of the strata of the material in the various cuttings or excavations and in the base of the embankments, and price the quantities in the detailed schedule accordingly, as no allowance whatever will be made over the lump sum in the detailed schedule for these, although the material may turn out to be different from what is calculated and given in the detailed schedule.

“ On the longitudinal section and cross-sections the hatched brown line shows the assumed surface of rock ; where the journal of bores shows loose or broken rock, then the assumed surface of the solid rock is shown by a dotted brown line on the sections. The calculations of the quantities of the cuttings have been made in accordance therewith ; all the material in the cuttings above the hatched brown line shown on sections is measured as soft cutting, and the contractor will only be paid for it as such.

“ The slopes of all cuttings (except where through solid rock not subject to slip or decay from exposure to the weather) shall be at the rate of $1\frac{1}{2}$ horizontal to 1 vertical, and where through solid rock at the rate of a $\frac{1}{2}$ horizontal to 1 vertical.”

There was a detailed schedule attached to this specification, an important part of which is as follows :—

"Cuttings.

May 16, 1912.

"Between peg 1 and peg 5, on up line side,	soft.
" " 1 " " 5, do.,	broken or loose rock.
" " 6 " " 13, do.,	soft.
" " 13 " " 15, do.,	do.
" " 45 " " 67,	soft.
" " 45 " " 67,	solid rock.
" " 67 " " 87,	soft.
" " 67 " " 87,	broken or loose rock."

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and so on ; with a note at the top to the following effect :—

"*Note.*—The particular attention of intending contractors is directed to the specification in regard to the following matters :—

"The probability of slips in cuttings and embankments and sites of embankments.

"The probability of more or less rock or soft material having to be excavated, as no allowance will be made should the material turn out to be different from what is calculated and given in the schedule."

Boring had been carried on before the contract was entered into by persons named Cowan, father and sons, and the journals mentioned in these paragraphs of the specification referred to the daily records of those operations supplied, or supposed to have been supplied, to the appellants. In point of fact no journals, properly so called, of these borings were regularly kept ; but letters were written to one Mr Melville or his assistant by these borers, and of these a compilation was made in the office of the engineers of the Company from the information received, purporting to record correctly the result of the work. A copy of this document, the so-called journal of bores, the contractors were permitted to peruse and examine before they entered into this contract. It is only necessary to deal with the items contained in it in which the words "black blaes" occur. They run as follows :—

	Feet	Inches
" Bore No. 7. At peg 54 + 184 feet,—		
Blue clay and stones,	13	0
Hard black blaes,	11	0
	<hr/> 24	<hr/> 0
" Bore No. 8. At peg 56 + 230 feet,—		
Clay,	16	0
Black blaes,	8	0
Freestone,	1	0
	<hr/> 25	<hr/> 0
" Bore No. 8A. Near peg 58,—		
Blue clay,	14	0
Black blaes,	5	5
	<hr/> 19	<hr/> 5
" Bore No. 9. At peg 59 + 260 feet,—		
Clay,	12	0
Black blaes,	8	0
	<hr/> 20	<hr/> 0"

May 16, 1912. Bores 53, 54, and 55 were dealt with in a similar manner.

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Now, it is alleged in this action that the plaintiffs were induced to enter into this contract by the fraud of one William G. Melville, the Company's engineer-in-chief, a man of position and experience. The charge resolved itself in argument into this,—that Melville had put into this compilation of the reports of the borers certain statements which he knew to be false, or statements, false in fact, which he recklessly inserted as being true, not knowing whether they were true or false; that these statements were intended by him to deceive, and did deceive, the plaintiffs, who acted upon them. No more serious charge could well be made, and no motive which will bear examination was suggested why Melville should be guilty of it. It was not disputed that these statements, if fraudulently made, were intended to deceive the respondents, and did in fact deceive them. The only question, however, for your Lordships' decision in the present appeal is this: Has this charge of fraud been proved by the respondents—on whom the burden of proving it by reliable evidence most unquestionably lay—or has it not?

It is the more necessary for me to insist upon this point, inasmuch as it appears to me that questions have been rather mixed up together in the Courts in Scotland which ought to have been kept entirely separate. It may well be that, under the contract entered into, Melville owed a duty to the contractors to prepare this journal of bores with reasonable skill, care, and accuracy, or that a term was by implication introduced into the contract to the effect that the Company should appoint, or had appointed, to do the work of boring, skilled persons, fully competent for that work, or again, that the documents submitted to the contractors for perusal should reasonably answer the description of a journal of bores, or further, that the Company warranted that this compilation was correct, or the borers highly skilled; and that an action or several actions against the Company for the breach of one or all of these warranties or contractual obligations would, on the evidence given at this trial, have been sustained. But in my view these matters, so far as they are not proof of Melville's fraud, are wholly irrelevant to the only issue decided upon by the Second Division of the Court of Session from which this appeal has been taken. I accordingly have not formed, and do not express, any opinion upon any of these matters.

According to the specification, only three descriptions of material were to be excavated, namely, solid rock, broken or loose rock, and soft.

Everything which might be met with was treated as falling within this classification. Whatever was not solid rock, or broken or loose rock, was, for the purpose of the contract, to be treated as soft, whatever might be found in the result to be its consistency or composition.

Now, in the borings at bore holes Nos. 7, 8, 8A, and 9, which between them extended over a considerable distance, as well as at those numbered 53, 54, and 55, a substance was stated in the journal of bores to have been found which was described as "black blaes" or "hard black blaes," not as rock, whether solid, broken, or loose. Blaes is another name for shale.

There was a considerable depth of it represented to have been found—at No. 7, 11 feet of it in thickness; at No. 8, 8 feet; at No. 8A, 8 feet 5

inches; and at No. 9, 8 feet respectively. And at Nos. 53, 54, and 55 May 16, 1912. considerable quantities also.

Now, the fraud alleged to have been committed by Melville narrows itself, as I understand it, into this, that this substance which he styled "black blaes" was reported to him at first in three instances as "black ban" or "hard black ban" and, in the case of five test bores subsequently made, as rock, and that he either deliberately misdescribed it in this compilation in terms which would imply that it was not rock, but soft within the meaning of the contract, or, knowing nothing about the actual composition or consistency of the substance found, he recklessly stated it was black blaes, not knowing whether it was so or not. It is conceded that this compilation, purporting to record the information received from the borers, was made by Melville before tenders were asked for, and therefore before he could have known who might be the contractors. The fraud, if designed at all, must have been designed to entrap and deceive whoever might be the future contractor.

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The evidence mainly relied upon in support of this charge consists of letters which passed between the borers and Melville or his assistant, Mr Macpherson, between the middle of October 1898 and the 8th of November following. It is admitted they formed an important portion of the material on which Melville's compilation was made. The letter of the 14th of October 1898 refers to bore No. 7. In it the borers state: "A bore has been put down to the depth of 24 feet (the full distance it was to go down) at about 15 feet from the peg on Dalry side. For the first 13 feet it was blue clay and stones, and after that a hard black substance called 'black ban,' but I do not know if this is the proper name for it." On the 18th October 1898 the borers wrote as to bore 8: "The bore at peg 8 has been put down to the depth of 25 feet, the first 16 feet through clay and remainder 'black band,' except the last foot which is freestone." And on the same day they write as to bore No. 9: "The bore at peg No. 9 has been put down the full depth of 20 feet through clay for 12 feet and 8 feet of 'black band.'" Now after the receipt of these three letters Mr Macpherson, on the 19th, by Mr Melville's directions, wrote to the borers a letter containing the following passage: "I should like you to send me a sample of the substance called 'black ban' so that I may see what it is like. You will probably get it again in the bore the men are now at, and a sample from it would do." On the following day, the 20th October, the borers wrote to Mr Macpherson: "Yours of 19th inst., I have to-night sent you a small parcel containing a sample of the substance designated 'black ban.' The most of it has been churned into the consistency of clay through the working of the chisels in the hole; but there are some chips amongst it which will give you an idea of what kind of stuff it is." Mr Macpherson received this sample, and he, in consultation with Mr Melville, determined to put down additional bores to test the matter further. Mr Macpherson accordingly wrote on the 21st of October to John Cowan, the borer, thus: "Dear Sir,—I have received your letter of 20th inst., and also the sample of the material 'black ban' from the bores. I will visit the borers this afternoon and point out to them the position of other two bores that I wish them to put down." The sites of these two new bores

May 16, 1912. subsequently fixed by Macpherson were in the neighbourhood of No. 9. They were accordingly put down, and on the 3rd of November the borer wrote to Mr Melville: "We have put down other two bores at above peg" (i.e., peg 9), "one 5 yards and the other 15 yards from the peg. The first named sunk 13 feet, rock being struck at depth of 11 feet, and the latter sunk 14 feet, rock being struck at 13 feet down." On the 4th of November the borer again wrote as to bore 9. "Another bore has been put down 13 yards on the Glasgow side of peg No. 9 to the depth of 17 feet. Hard substance was struck at depth of 12 feet, and what appears to be rock was struck at depth of 16 feet." A fourth test bore was for greater certainty put down at bore peg No. 7, and in reference to it the borer, on the 8th of November 1898, writes to Mr Melville: "The above bore has been sunk to the depth of about 26½ feet through about 15 feet of clay and remainder whinstone rock. This completes the bores which were pointed out to be done, and the borers are withdrawn to-night." Now, Mr Melville deposed that he, in company with his assistant, Mr Macpherson, carefully considered the reports of the borers touching all these borings; that they thought the word "whinstone" in the last letter was a clerical error of the clerk, the writer, as they were of opinion, which the result proved to be correct, that there was no whinstone rock there. He further deposed that they had before them the records of all the other bores from Nos. 7 to 12; that they considered these individually and collectively; that they examined the sample of "black ban" sent to them; that they studied the lie and configuration of the ground; that they knew the time which the borers had spent at the test bore near No. 7, and judged that it would be impossible for them to have sunk through 11 feet of whinstone rock in that time, and that, after careful consideration of all these materials, they came honestly, and to the best of their skill and judgment, to the conclusion that the "black ban" or "hard black ban" and "rock" respectively reported to have been found in these borings was "black blaes," not rock at all within the meaning of the contract, but a substance which should be treated as soft, and that they made the compilation on that basis. Mr Macpherson, by Mr Melville's directions, recorded their decision on the point in the note now appearing on the borer's letters 1st to 3rd and 8th and 9th November 1898 respectively. On the former group the note ran thus: "What is called rock in this letter must have been black blaes, see former letter 18/10/98," and on the latter thus: "Keep to first report of this bore, as the rock here referred to must be the 'black blaes' of 14/10/98."

It may be that Mr Melville and his assistant came too hastily to a conclusion, and that they ought to have had further test borings made; that they ought to have called in at this stage a scientific borer who could give precise and reliable information as to the nature and consistency of the substances he might meet with in his operations. That may all be so, though I think it is not so; but that is not the point. The point is this: Are Melville and Macpherson swearing falsely when they state on oath, as they have stated, that they considered carefully in detail and collectively the several matters they have mentioned, and on the data before them honestly and to the best of their skill and knowledge came to the conclusion that the substance designated "black ban" and "rock" by the borers was

in fact "black blaes"? If they have sworn truly there is, in my view, an May 16, 1912.
end of the respondents' case on this point.

The information which boring reveals must always rest more or less upon opinion, not upon demonstration. No contractor could expect that the reports of the borers should, even in a case of doubt, be verified in works such as these by excavating at the site of the bore down from the surface to the proposed formation level of the line. It may be that the wiser and the more prudent thing for Mr Melville to have done in the circumstances would have been to have recorded the information he received from the borers precisely as he had received it, and then have appended a note of his own to the effect that, in his opinion, the borer was in error, that "black ban" was "black blaes," or "shale," and that the rock reported to have been found in the test bores at or near bore pegs 7 and 9 was, in his opinion, also "black blaes." Again, it may well be that the data upon which Mr Melville proceeded to form a judgment, were to some degree insufficient, even in the case of one of his skill and experience, but if he honestly thought they were sufficient, and, after full consideration, honestly came to the conclusion that the borer was mistaken in his description of the substances he had found, and that the description which he (Melville) inserted in the document was the true description, and further, inserted that description with the object of giving what was, in his opinion, true information, deliberate lying is, in my view, not only out of the case, but every element which renders recklessness in statement equivalent to lying, is absent from it as well. The well-known passage from Lord Herschell's judgment in *Derry v. Peek*,¹ was cited by Lord Ardwall. It runs thus:—"First, in order to sustain an action of deceit there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved where it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made."

If there be any truth in the evidence of Messrs Melville and Macpherson, "carelessness of whether the description of these substances was true or false," the absence of an honest belief "that their description was a true and accurate description," and the making of a statement as true of that which was, in fact, false, "without knowing whether it was true or false," are all negatived.

Much was sought to be made of the fact that Mr Melville did not employ professional borers as it was contended he should have done. It may be, as I have already said, that there was an implied term in the contract that

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¹ (1889) 14 App. Cas. 337.

May 16, 1912. none but professional borers, or at all events competent borers, had been employed, and that the Cowans were, in fact, not competent borers, though he thought them to be so. They certainly were not professional borers, but I can discover no evidence whatever to lead legitimately to the conclusion to which Lord Ardwall, at p. 632 of the printed case, states he has come, namely, that the appellants, which in this matter means Melville and his assistants, knew the Cowans were not competent to do this kind of boring, and did not rely upon them as being competent.

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The passage in his judgment runs thus: "In the next place, it is clear that the defenders' engineer did not rely on them. If he had done so he would not have altered their reports when he came to make up what he called the journal of bores, or treated the statements in their letters with the absolute disregard which he did. On this part of the case I think it is clearly proved that the persons who took the bores were not competent to do so, and in the next place, that the defenders knew they were not competent to do so, and did not rely on them as being competent, and yet, in that state of matters, they referred to a journal of bores as if it had been taken by competent men in whom they had confidence, and had been written up by them day by day from their personal observation. All this, in my opinion, constituted fraud."

Before referring to the evidence of Mr Melville as to his belief in the competency of the Cowans, it is well to point out that what the contractor is interested in, in cases such as this, is the accuracy and reliability of the information afforded by the journal of bores rather than the professional qualifications of the borers. If the information be accurate and reliable, that is what concerns him most. For instance, if an action were brought for breach of warranty or deceit for employing non-professional or even incompetent borers, and yet the information as recorded was accurate, then nothing beyond nominal damages could be recovered, because no damage beyond that would have been sustained. Now Melville's evidence as to the Cowans is this. He states (p. 227 and 229) that in January 1898 he instructed his resident engineer to arrange with William Cowan, now dead, to put down bores on the line; that he showed Macpherson where to put them down; that his instructions were to go down below the surface level to the depth of the formation level of the railway line unless they met rock; to work into the rock when they found it for one foot and then to stop; that this was in accordance with the practice he had invariably followed in making bores for railways, namely, to probe the clay or soft material until the borer got to the rock; that this man had not great experience any further than putting down bores such as these; that he was not a qualified mineral borer; that he had carried out any boring of this description he (Melville) wanted done; that he relied upon the accounts he got from William Cowan; that he had regularly dealt with Cowan as an honest and reliable borer, and that he had never any fault to find with his bores; that he (Cowan) was in the habit of making bores for parliamentary purposes and bores for probings; and that he never had occasion at any time to doubt his (Cowan's) honesty, competency, or capacity. As to John Cowan, he (Melville) says that John Cowan succeeded his father as superintendent of the permanent way; that he had been in the service of the

railway company for a good number of years before his father's death. At May 16, 1912. page 279, he states that Brown, a professional borer, made mistakes on two occasions upon which he had employed him; that all borers occasionally make misleading bores; that Cowan had only done what is called surface boring, i.e., probing to get the rock, that that was all his experience.

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Mr Macpherson, at page 352, states that William and his son John made the bores for them in 1896; that the son William Cowan junior was the leading hand; that these two sons who had thus worked with their father put down fifteen bores after their father's death; and that Brown, a professional borer, who was also employed, put down forty-seven bores. I altogether fail to find in this statement any evidence to the effect that Mr Melville knew the Cowans, father and sons, were not competent borers for this kind of work, or that he did not rely upon the statements in their letters, or that he treated those letters with absolute disregard.

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The fact that he, to the best of his skill and judgment, correctly described the substance he honestly thought the borers had misdescribed, is the only foundation I can find for Lord Ardwall's statement that he (Melville) treated the statements in the borer's letters "with absolute disregard." In my opinion it is, with all respect, a wholly insufficient foundation for the purpose.

The peculiarity of this case, moreover, is this, that Melville was, as proved by the result, right to a great degree in the conclusion to which he came. The stuff excavated at bore holes from 7 to 9 inclusive was, to a considerable extent, "black blaes." Some of it hard, no doubt, possibly as hard as rock, but the stratification at that portion of the line was proved to be "troubled," as it was styled, and strata of rock ran through the masses of blaes. Robert Forrest, speaking of the blaes excavated at bore 7, says,— "Some of the blaes may be soft, some hard, but at No. 7 bore, where it was represented that there were 13 feet of clay and 11 feet of blaes, there were bands of rock and bands of clay-band ironstone through the blaes." And Mr Melville, at page 260, says at this time (July 1902),—"Mr Forrest told me that he was being pressed financially, and that the bank were troubling him. It would have been a serious matter for the Company if the work had been stopped. I found there were posts of rock mixed with the blaes which had been shown in the bores. I told Mr Forrest at this time that the only thing I could recommend to assist him was that seeing so many posts of rock had turned up out of this blaes which were not shown in the bores, I would recommend consideration of paying him the rock price for the blaes . . . I spoke to Mr Cooper and recommended him to do this, and he told me to do it." A new line was accordingly drawn on the plans indicating the upper surface of the blaes, and as the result Forrest was paid at rock prices, 4s. 6d. per cubic yard for the 60,656 yards of blaes which he excavated (over £14,000).

Mr Melville insists that this was a concession which, according to the strict terms of the contract, his Company were in no way bound to make; that in contracts for railway construction such as this, blaes or shale, owing to its friable nature, and tendency to split, disintegrate, and slip when exposed to the weather, is not treated as rock "solid, broken, or loose," but that it comes properly under the description of the only other

May 16, 1912. kind of substance contemplated by this contract, namely, "soft"; that in such matters the test is, not so much the consistency of the substance itself, as the batter at which the slopes of the cuttings can be allowed to stand; and that shale slopes, no matter how hard the consistency of the shale, cannot be allowed to stand at the batter of "solid rock, not liable to split or decay from exposure to the weather," as provided in the specification. He further states that from the so-called journal of bores, plans, and sections, it was plain to any contractor that this was contemplated under the terms of the contract. Four expert engineers—presumably from the description given of them, persons of position and standing in their profession—who examined the completed cuttings on the line, were examined at the trial. They supported Mr Melville in every one of these propositions. The general result of their evidence, as I read it, is this, that blaes, whether hard or soft, or with layers or strata of rock interspersed, or stones embedded in it, is properly treated as "soft"; that any contractor of experience who examined the plans, sections, and so-called journal of bores, must have seen that it was so treated in this case, and that, as far as they can now judge from an examination of cuttings, the record of the bores (they ran along the middle line of the cutting) was extremely accurate. One of these gentlemen, Mr Charles Pullar Hogg, stated that some engineers allow rock prices for excavating blaes if it requires to be blasted, but that this is quite exceptional. They all agree that this blaes, though interspersed with rock, could be dug out with a steam navvy of proper strength and power, the more easily, too, one of them thought, from the fact of its being traversed by strata of rock, as that renders the mass more friable. They concur with Melville in thinking that the slopes of some of the cuttings through the blaes have been left at too steep a batter; and one of them, Mr Hall Blyth, in cross-examination, on being asked this question in reference to bores 7 and 9,—“Don't you think that if the engineer had taken the borers' reports as they were given to him and had not put a construction upon them, the schedule would have been different as regards its quantities and as regards the conclusions of what was true hard and soft?” answered, “No, I think the bores show with absolute accuracy the nature of the strata in the cuttings.” And on re-examination he stated,—“Mr Melville got his report of black ban on the 14th of October, and he asked for and got a sample on the 20th of October. That is what I would have done. Assuming there was black ban in two bores, a sample from either of them would have been quite sufficient to enable me to determine what it was, and I would act upon that. When he came to the rock in November, by that time he had several bores before him, and was able to judge of the general nature of the line. Being the engineer for the railway there I agree that he must have personal knowledge that I, as an outsider, could not have.” All these gentlemen were cross-examined at length, but their evidence was unshaken.

As a matter of fact Cowan had proved that the substance, a sample of which was sent, was the same as that first found. More of the so-called posts of rock were, no doubt, found in this blaes formation than was anticipated, but the error may possibly be accounted for, without imputing fraud to the engineer or incompetence to the borer, in this way,

namely, that in the earlier borings black blaes was struck, and in the May 16, 1912. test bores the sites of which were some distance from the others, some of these posts of rock were struck. That may be the true explanation. I cannot but think, moreover that Mr Melville has been most unfairly treated in respect of two other matters:—First, instead of giving him credit for the two considerations which he says induced him to pay for the excavation of this blaes as if it were rock, namely, (1) that he wished to save his company from the inconvenience of having their work stopped, and (2) his desire to come to the aid of the respondents in their financial difficulties, due to the extra expense they had to incur, the suggestion was made that his advice to his company to abandon their strict rights and treat the respondents generously was due to the qualms of a guilty conscience. And second, in endeavouring to twist some answers he gave in part of his cross-examination, in which the word “guess” was used by counsel into an admission of recklessness in his preparation of the so-called journal of bores. The following questions were put to him in these words: “What was the true justification in your mind for assuming that it was black blaes of the same kind as you had reported to you under the name of ‘black ban’ on the 18th of October 1898? (A.) I took it to be the same material. (Q.) Was it just a guess? (A.) There is a good deal of guessing in all boring. (Q.) Don’t you think with such doubts as these that it would have been only right to have got these bores confirmed by efficient people? (A.) As the bores have turned out they have come out correct. (Q.) Don’t you think it would have been right with such results to have got his bores properly confirmed or corrected by competent people? (A.) No, I considered that I had people quite competent to do boring such as this.” It is quite obvious that the forming of a conclusion on the results afforded by boring must in the very nature of things involve a certain element of conjecture, that until the excavation is actually carried out there cannot be absolute certainty, and that this was all Melville meant to say.

The respondents were both examined, and the result of their evidence is this. They say that out of sixty-two bores altogether twenty-two were wrong. They gave the description of what was found at bore 7. There were, they say, bands of ironstone, bands of freestone, and blaes. At No. 8, Robert Forrest states the information given to him was 16 feet of clay, 8 feet of black blaes, and 15 feet of freestone. This latter is wholly wrong, it was only one foot of freestone, and what they found was 13 ft. 6 in. of clay and 25 ft. 6 in. of hard rock which required to be blasted. At 8a the journal gave 14 ft. 0 in. of blue clay and 5 ft. 5 in. black blaes, 19 ft. 5 in. in all. He said he found 25 ft. 5 in. of rock with blaes in between the rock but no continuous blaes. And at No. 9 the information he got was 12 feet of clay and 8 feet of black blaes, but what he found was 8 feet of clay and 12 feet of rock. These are the bores about which there is such controversy. The respondents deal with the remainder of the twenty-two similarly, but it is clear, from the evidence, that they consider that nothing which requires to be blasted, or which cannot be taken out with a steam navvy should be treated as soft. That is their test; it is not, however, the test provided by the contract.

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May 16, 1912. The rest of the evidence given on behalf of the respondents has, I think, no material bearing on Melville's alleged fraud.

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Lord Johnston, the Lord Justice-Clerk, and Lord Dundas, appear to acquit Mr Melville of intentional deceit or fraud. The first named of these learned Judges states his view that the compilation of the journal of the bores was false in fact and made with a recklessness which amounts to fraud, the absence of intentional dishonesty being supplied by the presence of a reckless disregard of the interests of the opposite contracting party where these interests must have been or must be held to have been known to be materially affected by the act in question.

The Lord Justice-Clerk states the conclusion to which he has come in these words:—"I come to the conclusion, on this part of the case, that the defenders acted with culpable recklessness; that they deceived the pursuers into accepting as properly obtained data from bores data obtained from persons known to them to be incompetent, and that they further deceived the pursuers by putting before them as facts representations as to bores which they did not receive from the borers, presenting their own inferences of what they thought the borers should have said in describing strata. . . . I agree with the Lord Ordinary in not imputing direct *mala fides* to Mr Melville. But most unfortunately, he did what he had no right to do, ordered to be written down as being the facts ascertained by the borer something essentially different from what the borer reported. I have no doubt that he thought he was drawing a sound inference, but he must have known that he was putting forward his inference and passing it off as ascertained fact stated by the borer, which it was not. I cannot acquit him of legal fraud in doing so." Well, if Melville thought he was "drawing a sound inference" it is difficult to see how he was guilty of recklessly asserting as true that of which he did not know whether it was true or false, but that is the very essence of what the learned Judge meant to designate as legal fraud.

I am not quite sure whether Lord Ardwall was of opinion that Mr Melville was guilty of deliberate fraud or not. From the following passage in his judgment it would appear to me somewhat doubtful. He expresses himself thus:—"I am of opinion that a false and fraudulent representation was made to the pursuers, inasmuch as it was represented to them that the schedule of quantities, the plans, and the sections were founded on a genuine and honest journal of bores, whereas they were not. That this representation was knowingly made does not admit of a moment's doubt. I have already examined the evidence on the point, and need not go into it again. Mr Melville's own evidence, which I have already referred to, is sufficient to show that he knew perfectly well that the so-called journal of bores was not a genuine journal of bores in any sense of the term, and that it was not made by responsible or competent borers. It goes without saying that the false representations were made without belief in their truth."

With the greatest respect for each of those learned Judges, I find myself wholly unable to take their view of the result of the evidence. To my mind it appears clear that Mr Melville honestly thought he was stating in the journal of bores the information in fact conveyed to him by the borers,

and that the change he made in the entry was made for the very purpose of correcting what he honestly believed to be their misdescription of the substance actually found, so that the journal should set forth the absolute truth. For the reason I have already given, I think that so far from not knowing or caring whether the statements contained in the journal were true or false, he was anxious to state the truth, and took such means as he honestly considered sufficient for the very purpose of ascertaining what the truth was so that he might set it forth with accuracy.

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It would be a strange way of showing good faith to state the information he received as if he believed it to be true when he, in fact, thought the borers were in error, and yet abstain from correcting their error. I do not think that Mr Melville acted recklessly in any reasonable sense of the word; and am therefore of opinion that the respondents failed to prove that he was guilty of fraud of any kind towards them. Accordingly, I think their case fails upon this point, and that this appeal should be allowed with costs.

LORD MACNAGHTEN.—I have had the advantage of reading in print the opinion which has just been delivered, and I entirely agree.

LORD SHAW OF DUNFERMLINE.—I agree with the opinion just delivered by my noble and learned friend Lord Atkinson. The only point argued at your Lordships' bar was whether Mr Melville, the engineer of the Glasgow and South-Western Railway Company was guilty of fraud inducing this contract. My noble and learned friend has explained the circumstances. In agreeing with him I only desire to add this. The Lord Ordinary (Lord Johnston) say that he acquits Mr Melville of intentional fraud. But he adds,—“I cannot acquit him of such recklessness as *aequiparatur dolo*.” The learned Judge also speaks of Mr Melville's “attempts to throw over his subordinates”—of his “not being very successful in his explanations”—of “the very specious persuasions of Mr Melville,” and, in short, language is used in the judgment which, by any man with a regard for his own reputation as an engineer or character as a man, must be regarded as most serious. I content myself with saying that not one of these expressions appears to me to have been justified by the testimony or the conduct of Mr Melville.

Of the charge of fraud preferred against him by the pursuers, it is not for me to pronounce whether it was unscrupulously made; it is sufficient that it is unfounded in fact. I think that the attempt to bring Mr Melville's conduct into the same range as to be equal to fraud also fails; that the plea of fraud is as entirely devoid of legal as it is of ethical warrant.

LORD CHANCELLOR.—I agree. The question is one of fraud which imports dishonesty, and that has not been established.

I concur also with my noble and learned friend Lord Atkinson in not expressing any opinion upon other matters that may or may not be open for litigation and decision between the parties.

ORDERED that the Interlocutors complained of be reversed:
Found and Declared that the Respondents had failed to prove that they were induced to enter into the contract by the fraud

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of the Appellants or of anyone for whom they were responsible: And Cause Remitted to the Court of Session (1) to repel branch (a) of the Respondents' third plea in law, (2) to repel branches (b) and (c) of the same plea in so far as founded or maintained on allegations of fraud, and (3) to hear and dispose of the whole pleas and contentions of the parties, except in so far as repelled in terms of the foregoing directions.

BALFOUR ALLAN & NORTH—PRINGLE & CLAY, W.S.—SHERWOOD & Co.—
JOHN C. BRODIE & SONS, W.S.

No. 15.

MRS GERALDINE ELLEN JOHNSTONE, (Pursuer) Respondent.—

D.-F. Dickson—Constable, K.C.—Lyon Mackenzie.

July 26, 1912.

Johnstone v.
Mackenzie's
Trustees.

MRS GERALDINE ELLEN JOHNSTONE AND OTHERS (James Whitelaw Mackenzie's Trustees), (Defenders) Appellants.—*M'Lennan, K.C.*
—*Mercer.*

Succession—Testament—Construction—Provision to widow of "liferent use and enjoyment" of house—Liferent or occupancy—Incidence of burdens and rates—Fee and Liferent.

A testator directed his trustees on his death to give to his widow the "liferent use and enjoyment" of his house, to pay her an annuity, to set aside a certain sum to provide for the same, to distribute the residue of his estate between his widow and his brothers, and on the death of his widow to divide the price of the house and the annuity fund, with any surplus revenue accrued thereon, among his brothers. Power was given to the trustees to sell the house, with the consent of the widow, and thereafter to pay her the annual income of the price during her life.

Held (rev. judgment of Second Division) that the interest of the widow in the house was a liferent and not a mere right of occupancy, and accordingly that the feu-duty, proprietor's taxes, and landlord's repairs fell to be paid by her and not by the trustees.

Cathcart's Trustees v. Allardice (1899) 2 F. 326, *commented on and doubted.*

Lord Mac-
naghten.
Ld. Atkinson.
Lord Shaw of
Dunfermline.

(IN the Court of Session, 23rd December 1910—1911 S. C. 321.)

The defenders appealed to the House of Lords.

The case was heard on 14th and 15th March 1912.

Argued for the appellants;—The widow was a liferentrix and not a mere occupant, and was accordingly bound to pay feu-duty, proprietor's taxes, and landlord's repairs. That these burdens fell to be borne by an ordinary liferenter under the law of Scotland was indisputable.¹ The fact that the liferent was not a gift direct but was a gift conveyed through the medium of a trust was immaterial²; and the question of who was ultimately liable to bear such burdens did not depend upon the question of who was feudally vested in the property.³ It was really a question of the intention of the testator. There was nothing in the settlement to suggest that the testator intended to take the case out of the ordinary rule. The words "liferent use" and "liferent use and enjoyment" were, and

¹ Ersk. Inst. ii. 9, 56, 60, 61; Bell's Prin., secs. 1061, 1062.

² Campbell v. Wardlaw, (1882) 9 R. 725, (1883) 10 R. (H. L.) 65.

³ Liquidators of City of Glasgow Bank v. Nicolson's Trustees, (1882) 9 R. 689.

had always been, the ordinary terms by which conveyancers in Scotland described the rights of a liferenter.¹ The direction that the residue was to be distributed at the testator's death, without any provision of a fund to meet the burdens, indicated his intention that the liferentrix was to bear the burdens; and the same inference was deducible from the fact that, if the house was sold, as it might be, by the trustees with the widow's consent, the purchase price, the annual income of which she obtained as a *surrogatum*, would be a price realised on the footing that the charges now in question were on the debit side of the property account as a revenue-yielding subject. Moreover, the testator declared the liferent provision to be for her alimentary use and not assignable or affectable by creditors. Such a declaration would be meaningless if the right possessed by her were a mere right of occupancy and not a proper liferent. It was said, however, that the authorities were against the appellants' contention. That was not the case. In *Clark v. Clark and Others*² the testator gave his widow "the use of my house." The word "liferent" was not used, and it was plain that all that she had was a mere right of personally occupying the house which from first to last remained merged in the residue of the estate. In *Rodger's Trustees v. Rodger*³ the widow was given, as here, the liferent use and enjoyment of the house and was a proper liferentrix, who would have been held bound to bear the burdens had it not been expressly provided by the settlement that the use was to be "free of rent, feu-duty, ground annual, taxes, and all other deductions." In *Bayne's Trustees v. Bayne*⁴ as in *Clark*² the residue was to remain in the hands of the trustees until the death of the widow, and the word "liferent" was not used in the gift itself but only afterwards in the settlement when the gift was again referred to, and the Court evidently regarded the case as one of occupancy. The case of *Cathcart's Trustees v. Allardice*⁵ was based upon a misapprehension of the previous decisions and was wrongly decided. *Smart's Trustee v. Smart's Trustees*⁶ followed the decision of the Second Division in the present case and was not, consequently, of independent value. Further, the respondent was barred from seeking relief by having paid the burdens for so many years, and by having consented to the distribution of the estate. In any event the burdens fell to be discharged out of the residue of the estate and not out of the surplus revenue accrued upon the annuity fund.

Argued for the respondent;—The widow was merely the occupant of the house, and as such was not liable for the burdens. Admittedly a proper liferenter was liable for such burdens, but a testamentary provision such as that now in question was not a proper liferent. It was quite distinct from the ordinary heritable right of liferent.⁷ In the present case the trustees, as the registered owners of the property, were liable *primo loco* for rates and burdens, and in order to throw the burden on to the widow they would have to show that under the

¹ Juridical Styles, 1st ed., vol. i., p. 152; *Morris v. Anderson*, (1882) 9 R. 952; *Mackenzie's Trustees v. Kilmarnock's Trustees*, 1909 S. C. 472.

² (1871) 9 Macph. 435.

³ (1875) 2 R. 294.

⁴ (1894) 22 R. 26.

⁵ (1899) 2 F. 326.

⁶ *Infra*, Court of Session, p. 87.

⁷ *Ersk. Inst.* ii. 9, 41; *McLaren on Wills*, 3rd ed., pp. 614 and 618; *Ker's Trustees v. Justice*, (1868) 6 Macph. 627.

July 26, 1912. trust-settlement they had a right of relief against her. The settlement indicated no such intention; on the contrary, it simply directed the trustees to give her the use and enjoyment of the house. Under the settlement she had not the ordinary power of a liferenter to let the subjects liferented, because the truster expressly declared that the provisions were alimentary and not assignable. It was not denied that the words in the present settlement, if occurring in a gift *inter vivos*, would have made the donee the heritable proprietor in liferent, or that it was possible to frame a trust in such a way that it could only be carried out by the trustees divesting themselves of the liferent; but neither of these contingencies was present here. Further, the present case was directly ruled by a series of decisions¹ extending over forty years. Even if these cases had been wrongly decided, they had led to a generally recognised meaning being given in Scotland to such a testamentary direction as the present, and it must be presumed that it was this generally recognised meaning that the testator had in his mind. These considerations had been given effect to in the recent case of *Smart's Trustees v. Smart*.² The direction to the trustees to distribute the residue was really immaterial, because residue obviously meant residue after payment of liabilities of every kind whether expressly mentioned or not. The burdens here, however, were covered by the expression "expenses of executing the trust."³ But, in any event, the surplus revenue of the £20,000 afforded appropriate means for discharging the truster's liability. The case depended solely on Scottish law, which in this matter differed from the law of England.⁴

At delivering judgment on 26th July 1912,—

LORD SHAW OF DUNFERMLINE.—By the trust-settlement of the late James Whitelaw Mackenzie he provided "(Second) That my trustees shall give to my said wife in the event of her surviving me, during all the days of her life, the liferent use and enjoyment of my dwelling-house, number nine Glencairn Crescent, Edinburgh, or of such other house as shall at the time of my death be my residence in Edinburgh, and belong to me, together with the whole household furniture and plenishing therein at the time of my death, including books, pictures, linen, china, plate, plated articles, and others, without however any obligation upon her to replace articles broken, or perishing with the using; and in the event of the said dwelling-house and the whole or any part of said household furniture and plenishing being sold by my trustees, as they are hereby with consent of my said wife empowered to do, they shall pay to her the annual income of the price or prices obtained therefor during all the days of her life: Declaring that the said liferent provisions shall be for the alimentary use of my said wife, and shall not be assignable by her or affectable by the diligence of her creditors."

¹ *Clark v. Clark and Others*, 9 Macph. 435; *Rodger's Trustees v. Rodger*, 2 R. 294; *Kinloch's Trustees v. Kinloch*, (1880) 7 R. 596; *Bayne's Trustees v. Bayne*, 22 R. 26; *Cathcart's Trustees v. Allardice*, 2 F. 326.

² *Infra*, Court of Session, p. 87.

³ *Kirkwood v. Kirkwood's Trustees*, *infra*, Court of Session, p. 613.

⁴ The appellants in their written case had cited *In re Betty*, [1899] 1 Ch. 821; *In re Tomlinson*, [1898] 1 Ch. 232; *In re Kingham*, [1897] 1 L. R. 170; *In re Gjers*, [1899] 2 Ch. 54.

The question which arises in this case is whether Mr Mackenzie's widow July 26, 1912.
(now Mrs Johnstone) is liable for payment of feu-duty, proprietor's taxes, Johnstone v. Mackenzie's Trustees.
and landlord's repairs on this house, 9 Glencairn Crescent, Edinburgh.

The expression "my trustees shall give to my said wife in the event of her surviving me during all the days of her life the liferent use and enjoyment of my dwelling-house," is, as was admitted at your Lordships' bar, a direction in terms which are perfectly apt to give a liferent in the ordinary sense. Even if the question were one of feudal conveyancing, the expression "the liferent use and enjoyment" would appear to be language suitable to express the constitution of a liferent. But, occurring as they do in the course of an ordinary trust-settlement, these words are adopted as language familiar for generations in Scotland and used in setting up a liferent. As we were informed at the bar, they so occur in the Juridical Styles from its earliest edition. Lord Shaw of Dunfermline.

The consequences which attach to such a liferent are also familiar. The subject must be enjoyed *salva rei substantia*. Upon the point of annual charges (on the hypothesis that what is really a liferent has been given) there is little ground for dispute. In the language of Erskine (ii. 9, 61), "Liferenters, as they are entitled to the profits, must also bear the burdens attending the subject liferented; as taxations, duties payable to the superior, ministers' stipends, and the other yearly payments chargeable on the lands, which may fall due during the liferent." Mr More in his Notes to Stair (ccxv.), puts the proposition simply:—"The liferenter is bound to pay all the annual and ordinary burdens which are exigible from the property liferented by him." And in Mr Guthrie's edition of Bell's Principles, section 1061, the language employed is, "The right of the liferenter" (on which the learned editor, Mr Guthrie, interpolates the parenthesis "unless exempted by the terms of the grant") "is subject to the burden of the public taxes, feu-duties, minister's stipend, &c., during the liferent." An old Report of Fountainhall (3 Brown's Supplement to Morison, p. 33) refers learnedly to the *corpus juris* upon the subject, and with some quaintness sums up:—"And, really, it cannot be thought rational, that the fiar shall bear the burdens imposed *intuitu* of land, whereof he is not in possession, but debarred by liferenters. Natural equity provides, *ut eum sequantur incommoda qui habet commoda*; they who reap the emolument ought not to grudge *onus ei annexum*." I have only cited these authorities because of a somewhat full argument presented to your Lordships' House, which appeared at times to suggest that there was doubt in the law of Scotland on the subject of the liferenter's liability. That doubt is without warrant.

Nor does it appear to me that there is any foundation for the proposition that the obligations of a liferenter are less or more according as the liferent is a gift direct or is a gift conveyed through the interposition of a trust. There is no decision which sanctions such a distinction. There seems nothing in the form in which the right is conveyed which should alter the obligations attached to the gift; and I do not see my way to hold that considerations as to the possibility, or otherwise, of the liferent being feudalised by infeftment have any bearing upon the topic under consideration. None of the Judges in the Courts below took such things into account.

The true and only question is whether a liferent right, to which the

July 26, 1912. obligations that I have mentioned would undoubtedly attach, has been here created, or whether, on the contrary, what Mr Mackenzie conferred upon his wife was not a liferent, but a mere right of occupancy of his house. The respondent maintains that it was the latter. In support of that view she appeals with much force to the series of cases enumerated in the opinion of the learned Lord Ordinary.

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Dunfermline.

One of these cases may be at once put on one side. I refer to the case of *Rodger*.¹ In that case the truster in terms directed and appointed that his widow should "have the liferent use and enjoyment of the house in which I reside at the time of my death, free of rent, feu-duty, ground-annual, taxes, and all other deductions." The question, accordingly, of whether the liferentrix stood free of these annual burdens was not left—as unfortunately conveyancers in Scotland have too frequently left it—to be determined by implication or inference, but was settled in express terms by the language of the trust-deed.

In the case of *Clark*² trustees were directed by a testator to give his widow "the use of my house, No. 36 Drummond Place, with the whole furniture and effects contained therein," so long as she remained his widow. The words employed, namely, "the use of my house," were not those usual in the constitution of a liferent. The residue of the estate was not divisible until the widow's death. Lord President Inglis held that "there can be no doubt that the widow, as a mere occupant of the house, has nothing to do with the payment of the feu-duty; and as to the repairs of the house, I do not see what a mere occupant has to do with them either." The case was peculiar in this respect, that the main point of contention seems to have been as to whether the widow was even liable for tenant's taxes, it being maintained that the true tenants were the trustees themselves. This contention was set aside, and the Court held that the widow was liable in tenant's taxes as occupant, but that, upon a construction of the special terms of the trust-deed, her position stopped at occupancy and did not rise to the level of a liferent. As I say, the language of the deed, which was merely to give her the use of the house so long as she remained his widow, was no doubt taken in connection with the fact that the trustees were charged with keeping up the trust, the division of the residue being postponed until the widow's death.

I agree with the learned Lord Ordinary in attaching importance to this latter circumstance. It humbly appears to me that, in regard to the question of the incidence and disbursement of charges as charges upon the estate of a trust, it is a consideration of weight that the annual administration is continued and the residue left in hand. On the other hand, it is a cogent consideration in favour of the opposite view, that the residue is in fact distributed and the fund available for disbursements of trust charges is gone. In this latter case it appears to be not an unfair or improper inference that the testator's meaning was that the annual charges referred to should fall to be borne by the person liferented in the property on which they fall.

In the later case of *Bayne*³ a testator directed his trustees "to make over to" Miss Duckworth "the house at present occupied by me at Craig-

¹ 2 R. 294.

² 9 Macph. 435.

³ 22 R. 26.

view aforesaid, together with the whole furniture, &c., therein, and that July 26, 1912. during all the days of her natural life, and so long as she shall not enter into any marriage after my decease." It will be observed that the word "liferent," although occurring in other parts of the settlement, is not used in the destination itself, nor is the expression employed "liferent use and enjoyment." Lord Young expressed doubts as to the decision, and his leaning to the view "that as the widow gets the whole benefit of the house—not merely to occupy it, but to let it if she pleases—the whole costs and charges connected with it should fall on herself." This doubt seems entirely in line with the institutional and other authorities which I have cited. But the Second Division held that the case was ruled by *Clark*.¹ It is plain that there was considerable difference in the expressions used in the respective deeds. In this case also, as in the case of *Clark*,¹ the residue only became payable at the death of the liferentrix.

Matters, however, advanced a distinct stage further in the case of *Cathcart*,² where, by an antenuptial contract of marriage, the husband conveyed to his wife "the liferent use of any one house he may die possessed of." He died, survived by his wife, and possessed of one house only, and this was burdened to the extent of over two-thirds of its value. It was held that the wife was not liable for the burdens and the landlord's taxes, &c., but that the meaning of the settlement was that the widow had obtained a free gift of the occupation of the house. Lord Young again expressed doubts. Lord Moncreiff held that the decision had to be governed by the preceding cases, and particularly that of *Clark*.¹ The Lord Justice-Clerk decided the case upon its merits in the sense indicated, but held that his view was confirmed by the preceding authorities.

With some regret, and fully admitting the difficulties which confronted the learned Judges of the Court of Session, I venture to doubt whether the previous authorities, and in particular the case of *Clark*¹ were apt as precedents. In the case of *Cathcart*² a liferent in terms was created. In *Clark*¹ it was not so. Nor did the other language in the deeds to be construed in the two cases equate. But if the case of *Cathcart*² is treated as an independent authority amounting to a proposition that a person enjoying "the liferent use" of a particular house is not, *quoad* the obligation attached to such a position, to be treated as a liferenter, then I am humbly of opinion that such a proposition is unsound in law. No reason occurs to the mind for confining the beneficiary to the category of occupant as distinguished from that of liferenter, when the language employed in the settlement or marriage-contract is plain and apt as constituting a liferent right. The doubts of Lord Young, expressed more than once, as to the decisions in which he took part, seem to me to have been well warranted.

It is not necessary in this case to go further and to say whether the cases of *Clark*¹ and *Bayne*³ were in themselves properly decided, or whether the language and provisions of the deeds there construed were so special as to relieve the beneficiary as a mere occupant from the general obligations of a liferenter. Two propositions of general import may, however, be stated. First, the extent of the obligations attaching to a right of this character

¹ 9 Macph. 435.² 2 F. 326.³ 22 R. 26.

July 26, 1912. conferred by deed or settlement is a question to be determined by the intention of the maker, as that intention can be derived from the language which he has employed, and from the provisions which he has made with regard to, *inter alia*, the administration and realisation of his estate.

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Secondly, when the language employed is entirely apt and appropriate for the creation of an ordinary liferent right, it rests upon those who contend that the ordinary obligations which attach to a liferenter should not apply to him in the particular case—it rests upon those putting forward such a proposition of exception to establish it.

Applying these principles to the present case, I now turn to the provisions of Mr Mackenzie's settlement. The scheme of that settlement was this: After the ordinary provision for payment of debts, he gave his widow an annuity of £500 and the liferent of the house. With regard to providing the annuity a sum of £20,000 was set apart, and the language in which that was done, and in which the corpus of the estate was disposed of, is of great importance. It is as follows:—"That my trustees shall, in the event of my said wife surviving me, after setting aside the sum of twenty thousand pounds to provide for the foresaid annuity, pay and convey to her one-half of the whole residue and remainder of my means and estate, and shall pay and convey the remaining one-half to my said brother Walter Mackenzie, to the extent of two-thirds thereof, and to my said brother Robert Mackenzie, to the extent of one-third thereof; and shall, on the death of my said wife, pay and convey to them in the same proportions, the said dwelling-house and household furniture and plenishing, or, if the same shall have been sold, the prices thereof, and the sum set aside to provide the said annuity, and any surplus revenue accrued thereon." It is accordingly clear that the bulk of the residue of the estate was to be paid and conveyed on the death of the testator to one set of beneficiaries, namely, the testator's widow and brothers in certain proportions.

During the widow's life all that remained undistributed were the house and furniture (or their prices if sold), in which she was liferented, and a sum of £20,000 set aside to provide the widow's annuity. These were to be paid and conveyed at her death to another set of beneficiaries, namely, the testator's brothers alone. Not only, however, was the sum set aside to provide the annuity so to be conveyed to the brothers, but, as was also provided by the settlement, "any surplus revenue accrued thereon." This surplus revenue was surplus after payment of the annuity and nothing else, and the right to every portion of such surplus was and is in Messrs Walter and Robert Mackenzie. It appears, accordingly, to be in the highest degree unlikely, and, indeed, quite contrary to the intention of the testator, that any residue of his estate (thus directed to be paid over at his death) was to be in part reserved so as to provide a fund out of which the taxation upon the property liferented by his widow was to be defrayed. In the second place (and with much respect to the Judges of the Second Division, this appears to be particularly clear), the fund of £20,000 was a fund which, along with the surplus of revenue which remained after defraying Mrs Mackenzie's annuity year by year, went to Messrs Walter Mackenzie and Robert Mackenzie; and to divert it, or any part of the annual surplus, to other purposes or to other people seems a plain breach of the duty resting

upon the trustees, and of the rights of Messrs Walter and Robert Mackenzie July 26, 1912. under their brother's settlement. I cannot see my way to hold that an encroachment upon this fund so specifically destined can be made for the purpose of payment of taxation by Mr Mackenzie's trustees upon the house ^{Johnstone v. Mackenzie's Trustees.} ^{Lord Shaw of Dunfermline.} ^{liferented by his widow.} The judgment of the Second Division, holding that it is legitimate to dedicate any portion of the £20,000 and surplus revenue thereon to the payment of such taxation, appears to me to be contrary to the provisions of the deed.

Accordingly, the residue is, in terms of the settlement, distributed, and the £20,000, with the entire surplus revenue therefrom, is specially destined to particular beneficiaries. That being so, and the problem being, "Did Mr Mackenzie intend that his trustees should pay these annual charges or that his widow should pay them?" I think the problem is plainly solved by these two considerations—first, that, if he intended the former, he has left no fund which it would be reasonable to think he assumed could be dedicated to, or utilised for, that purpose; whereas, on the contrary, if his intention was that his widow should pay these charges, there was nothing out of the common in that; he was simply presuming what the law of Scotland would in ordinary circumstances lay down, namely, that she, as liferenter, should have the rights and perform the obligations attaching to such a position.

There is, however, another point which humbly appears to me to shed no inconsiderable light upon the testator's intentions, a point which does not appear to be adverted to in the Courts below. The trustees had power, with the consent of the widow, to sell the house. What, in the event of such a sale, was to happen? She was to be entitled to "the annual income of the price or prices obtained therefrom during all the days of her life." It is clear that the price obtained for the property was a price which would be realised on the footing that feu-duty, landlord's taxation, and all the charges now in question in this case were on the debit side of the property account as a revenue-yielding subject. The widow accordingly, it is provided by the settlement, shall in the event of a sale be truly and in the result debited with this taxation. If, however, there be no sale she is not to be debited with that taxation, but it is to be disbursed—so is the contention—out of the general residue, or out of the revenue of £20,000 specifically destined to the testator's brothers. It would appear to be much more reasonable, and in accord with the intention of the testator, to make the incidence of the taxation where the general law would put it, namely, as a debit against the property and its fruits or their equivalent, a debit to be borne by the liferenter in either case, namely, whether the property was sold or remained unsold.

Although the result has been reached in some respects upon a broader ground than that taken by the Lord Ordinary, I am of opinion that that learned Judge came to a correct conclusion in this case, and that—whether upon the point of the possible dedication of the annuity funds and surplus to the payment of these charges, or upon the point of the effect of the authorities as governing a case of this kind—the decision of the learned Judges of the Second Division cannot be supported.

July 26, 1912. I am humbly of opinion that the appeal should be sustained, and that
the appellants are entitled to costs in both Courts.
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LORD ATKINSON.—I concur.

LORD MACNAGHTEN.—I agree.

INTERLOCUTOR appealed against reversed, and the interlocutor of
the Lord Ordinary restored.

LONG & GARDINER—BONAR, HUNTER, & JOHNSTONE, W.S.—JOHN KENNEDY, W.S.—
CUMMING & DUFF, S.S.C.

CASES

DECIDED IN

THE COURT OF JUSTICIARY.

1911-1912.

FINDLAY KERR DICKSON, Complainer.—*MacRobert*.
JAMES POLLOCK STEVENSON (Procurator-Fiscal, Kilmarnock),
Respondent.—*Munro, K.C., A.-D.—Morton, A.-D.*

No. 1.

Dec. 14, 1911.

Statutory Offences—Motor Car Act, 1903 (3 Edw. VII. cap. 36), sec. 9—Charge of exceeding speed limit—Proof of warning or notice of intended prosecution. Dickson v. Stevenson.

In a prosecution for a contravention of section 9 of the Motor Car Act, 1903 (which imposes a speed limit), the prosecutor must prove that the warning or notice of the intended prosecution required by the section was given to the accused; and a conviction, without such proof, is bad.

FINDLAY KERR DICKSON, studgroom, Mauchline, was charged on a summary complaint in the Sheriff Court at Kilmarnock, with having, on 19th September 1911, upon a public highway in the village of Crookedholm, parish of Kilmarnock, ridden or driven a motor cycle at a speed exceeding ten miles per hour, contrary to the Motor Cars Regulation (County of Ayr) Order, 1910, and the Motor Car Act, 1903, section 9.* HIGH COURT.
Lord Justice-
Clerk.
Lord Dundas.
Lord Guthrie.

The accused pleaded not guilty, but after evidence led was convicted and fined by the Sheriff-substitute (D. J. Mackenzie).

Thereafter he brought a bill of suspension craving the Court to suspend the sentence in which he averred:—"The complainer was not warned of the intended prosecution at the time the offence was committed. On issuing from the west end of the trap aftermentioned, the complainer was stopped by two constables, who then informed him that he was going too fast and would be reported. Said constables, who are subordinate officials, did not warn the accused of any threatened prosecution, and it was not proved nor was any evidence

* The Motor Car Act, 1903 (3 Edw. VII. cap. 36), enacts:—Sec. 9 (1) " . . . A person shall not, under any circumstances, drive a motor car on a public highway at a speed exceeding twenty miles per hour, and within any limits or place referred to in regulations made by the Local Government Board . . . at a speed exceeding ten miles per hour." (2) "Where a person is prosecuted for an offence under this section he shall not be convicted unless he is warned of the intended prosecution at the time the offence is committed, or unless notice of the intended prosecution is sent to him or to the owner of the car as entered on the register within such time after the offence is committed, not exceeding twenty-one days, as the Court think reasonable."

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led to prove that they had authority to determine on a prosecution or to give warning thereof, prior to consideration of their report to their superior officers by respondent. No evidence was led for the prosecution at the trial to the effect that any warning or written notice was given, nor was any admission made by the complainer to that effect. *The receipt of the service copy of the complaint on 2nd October 1911 was the first intimation received by the complainer that a prosecution was to be taken.* This objection was taken by the complainer in the course of the trial and before sentence was pronounced."

Answers were lodged on behalf of the prosecutor, James Pollock Stevenson, in which it was averred:—"Denied that the receipt of the service copy of the complaint was the first intimation received by the complainer that a prosecution was to be taken. Explained that, in addition to being informed by the constables at the time of the offence that he would be reported for prosecution, the complainer was also notified by the respondent that he was to be prosecuted in terms of the copy letter of 23rd September 1911, printed in the appendix hereto. This copy letter was mentioned to the Sheriff when the objection referred to was taken by the complainer, and he did not deny that he had received it. Further, the complaint was served within the twenty-one days mentioned in the Act. *Quoad ultra* admitted." The copy letter produced set forth the offence, the date, the place, and the hour at which it occurred, and stated that it was intended to prosecute the accused.

The case was heard on 14th December 1911. At the hearing counsel for the complainer admitted that the statement in the italicised sentence quoted from the bill of suspension was incorrect.

Argued for the complainer;—Under section 9 (2) of the Motor Car Act it was a condition precedent to a conviction for an offence under the section that it should be proved that the required notice was given. This fact might be established by evidence led by the prosecutor or by the accused's admission made in terms of section 39 of the Summary Jurisdiction (Scotland) Act, 1908.¹ But in this case there was no such proof or admission. The statements made at the time of the alleged offence by the constables were clearly not sufficient notice.² Nor was there any proof of further notice being given. The copy letter, to which the respondent referred, was not produced until the proof on both sides was closed; it did not appear that it had ever been put before the Sheriff-substitute; and all that was averred was that the accused did not deny receiving it, which was not equivalent to an admission. Accordingly the provisions of the Motor Car Act had not been obeyed, and the sentence should be suspended.

Argued for the respondent;—The complainer had received sufficient notice. He was told by the constables that he would be reported for prosecution; and he had received, as he could not deny, the letter a copy of which was now produced. It was not necessary under the Act that the receipt of this letter should be proved; it was sufficient that it was brought to the notice of the Court before sentence was pronounced, and that the Court was satisfied that notice had in fact been given.

LORD JUSTICE-CLERK.—I am of opinion that the conviction here cannot

¹ 8 Edw. VII. cap. 65.

² Hughes v. Nimmo, 1910 S. C. (J.) 45, 6 Adam, 217.

stand. Section 9, subsection (2), of the Motor Car Act, 1903, provides :— Dec. 14, 1911.
 [His Lordship quoted the subsection]. Now, it is admitted that in this case Dickson v.
 nothing was said about warning or notice until the prosecutor had closed Stevenson.
 his case, when the agent for the accused moved the Sheriff to acquit the Lord Justice-
 accused on the ground that there was no evidence before the Court that the Clerk.
 prosecutor had given warning or notice. In these circumstances I am
 satisfied that the prosecutor has failed to prove that which he is required by
 the statute to prove in order to obtain a conviction. The words of the
 statute are very distinct and very peculiar—the accused “shall not be con-
 victed unless” he receives warning or intimation. It seems to me to be
 plainly the duty of the prosecutor to prove at the trial that he gave the
 required warning or intimation, and if, as here, he fails to do so, the accused
 cannot be convicted. Accordingly, I think that the conviction here must
 be quashed.

LORD DUNDAS —I quite agree. The objection to the conviction, which
 is more or less technical, is taken in circumstances which are not favourable
 to the suspender, because he now admits that in point of fact he did get
 due notice in writing of the prosecution ; but none the less I agree that he
 must succeed. I think the plain meaning of subsection 2 of section 9 of
 the Act is that a person shall not be convicted unless it is proved or
 admitted at the trial that he received notice or warning in terms of the
 subsection. Now, there was no such proof or admission here ; and, there-
 fore, I do not see how the Sheriff could be satisfied that the required warn-
 ing or notice had been given. It is true that it is said in the answers that
 a copy of the letter containing notice of the prosecution which was sent to
 the accused “was mentioned to the Sheriff,” and that the accused “did not
 deny that he had received it.” But it was for the prosecutor to prove that
 notice was sent, and not for the accused to deny ; and, accordingly, the fact
 that he did not deny that he received notice cannot be regarded as estab-
 lishing the fact that notice was given. I think the conviction must be
 suspended.

LORD GUTHRIE.—I concur.

THE COURT suspended the conviction.

W. & J. BURNES, W.S.—W. S. HALDANE, W.S., Crown Agent—Agents.

AASULD JENSEN, Appellant.—*A. R. Brown.*
 CHARLES WILSON (Procurator-Fiscal, Aberdeenshire), Respondent.—
Munro, K.C., A.-D.—Gillon, A.-D.

No. 2.

Dec. 14, 1911.

*Statutory Offences—Fishing within “exclusive fishery limits of the British
 Islands”—Sea Fisheries Act, 1883 (46 and 47 Vict. cap. 22), secs. 7, 28,
 and First Schedule—Application of Schedule to Foreigner not a subject of
 a Power signatory to the convention in the Schedule—Complaint—Relevancy.*

*Jensen v.
 Wilson.*

The Sea Fisheries Act, 1883, enacts that no person on board a foreign
 sea-fishing boat shall fish within “the exclusive fishery limits of the
 British Islands”; these limits being defined in the Act as that por-
 tion of the sea within which British subjects have, by international
 law, the exclusive right of fishing or, where such portion is defined by

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any convention with any foreign state, as regards the subjects of that state the portion so defined. By Article II. of a convention between Great Britain and certain states (of which Norway is not one) which appears in a Schedule to, and is incorporated with, the Act, it is provided that the fishermen of each country shall, as regards bays, have the exclusive right of fishing within three miles of a straight line drawn across the bay at a point described.

A Norwegian subject, the master of a trawler registered in Norway, having been convicted on a complaint which set forth that, contrary to the Act, he had fished "within the exclusive fishing limits of the British Islands as defined by Article II. of the Schedule, viz., at a point within three miles of the line drawn across a certain bay—

Held that the accused, not being the subject of a signatory nation, was not bound by the provisions of the convention, and that, accordingly, as the *locus* of the offence was defined in the complaint by reference to these provisions, the complaint was irrelevant; and the conviction *quashed*.

HIGH COURT.
Lord Justice-
Clerk.
Lord Dundas.
Lord Guthrie.

AASULD JENSEN was charged in the Sheriff Court at Aberdeen on a summary complaint at the instance of Charles Wilson, Procurator-fiscal. The complaint was in these terms:—"Aasuld Jensen, residing at Lyngor, Norway, but at present in Aberdeen, you are charged at the instance of the complainer that, being the master of the steam-trawler 'Nestor,' S.D. 12 of Sandefjord, Norway, a foreign sea-fishing boat within the meaning of the Act aftermentioned, you did, on 7th June 1911, enter within the exclusive fishing limits of the British Islands as defined by Article II. of the First Schedule attached to said Act, viz., at a part of the sea known as Dunbeath Bay, off the east coast of Caithness-shire, in a position 3 and six-tenth miles south, two degrees west from low-water mark at Forse Point, Caithness-shire, and within three miles of a straight line drawn across said bay, in the part nearest the entrance, at the first point where the width does not exceed ten miles, namely, from Auchmaster Point on the north-east of said bay to a position half a mile south 69 degrees west from Newport Point on the south side of said bay, and you did, while said steam-trawler remained within said limits, fish or attempt to fish by means of an otter-trawl, contrary to the Sea Fisheries Act, 1883,*

* The Sea Fisheries Act, 1883 (46 and 47 Vict. cap. 22), enacts:—

Sec. 7 (1). "A foreign sea-fishing boat shall not enter within the exclusive fishery limits of the British Islands except for purposes recognised by international law, or by any convention . . . or for any lawful purpose. (2) If a foreign sea-fishing boat enters the exclusive fishery limits of the British Islands . . . (b) No person on board the boat shall fish or attempt to fish while the boat remains within the said limits."

Sec. 28. "The expression 'exclusive fishery limits of the British Islands' means that portion of the seas surrounding the British Islands within which Her Majesty's subjects have, by international law, the exclusive right of fishing, and where such portion is defined by the terms of any convention, treaty, or arrangement for the time being in force between Her Majesty and any foreign state, includes, as regards the sea-fishing boats and officers and subjects of that state, the portion so defined."

The First Schedule (entitled "International Convention for the purpose of regulating the Police of the Fisheries in the North Sea outside Territorial Waters") provides—Article I.:—"The provisions of the present Convention . . . shall apply to the subjects of the high contracting parties." Article II.:—"The fishermen of each country shall enjoy the exclusive

section 7, subsection (2) (b), and said offence being a first offence you are liable to a penalty not exceeding £10, and in default of payment thereof to imprisonment in terms of section 48 of the Summary Jurisdiction (Scotland) Act, 1908." Dec. 14, 1911.
Jensen v.
Wilson.

The accused, having been convicted after a trial by the Sheriff-substitute (Laing), appealed on a stated case.

The case set forth:—"The appellant stated as a preliminary objection that he, being a Norwegian subject, the said steam-trawler being registered in Norway, and Norway not being one of the powers signatory to the International Convention relative to fisheries, dated 6th May 1882, as embodied in the First Schedule to the Sea Fisheries Act of 1883, and further the *locus* of the offence being as alleged, the complaint as laid was irrelevant, or otherwise that on these grounds he was not subject to the jurisdiction of the Aberdeen Sheriff Court. Under reservation of the said objection the appellant pleaded not guilty, and of consent of parties evidence was led."

The case also set forth that the accused was a Norwegian, and that his trawler was registered in Norway; that Norway was not a party to the Convention; that the accused had fished as charged in the complaint; and continued:—

"On these facts I found (1) that the appellant was the master of a foreign sea-fishing boat within the meaning of the Act aftermentioned; (2) that on the date libelled he entered within the exclusive fishery limits of the British Islands as defined by Article II. of the First Schedule attached to the Sea Fisheries Act, 1883, namely, the *locus* mentioned in the complaint; and (3) that he did, while the said steam-trawler remained within the said limits, fish therein by means of an otter-trawl. I accordingly repelled the objection for the appellant and found him guilty of the contravention charged. I imposed a fine of £5, which was paid in Court.

"I refer to the case of *Peters v. Olsen*, (1905) 4 Adam, 608, 7 F. (J.) 86, and *Mortensen v. Peters*, (1906) 5 Adam, 121, 8 F. (J.) 93."

The following question of law was stated, *inter alia*:—" (1) Whether, on the facts admitted and proved, it was relevant to have charged the appellant with the contravention alleged, viz., that he did enter within the exclusive fishing limits of the British Islands, as defined by Article II. of the said Schedule attached to the said the Sea Fisheries Act, 1883, namely, at a part of the sea known as Dunbeath Bay, off the east coast of Caithness-shire, in a position three and six-tenth miles S. 2° W. from low-water mark at Forse Point, Caithness-shire, said position being more than three miles seawards from low-water mark of ordinary spring tides of the nearest point of land, but within three miles of a line drawn across said bay between the points libelled in the complaint?"

A joint minute was presented to the Court in which the parties concurred in asking the Court to set aside the conviction.

The case was heard on 14th December 1911. At the hearing counsel for the respondent stated that as the complaint was based on

right of fishery within the distance of three miles from low-water mark along the whole extent of the coasts of their respective countries as well as of the dependent islands and banks.

"As regards bays, the distance of three miles shall be measured from a straight line drawn across the bay, in the part nearest the entrance, at the first point where the width does not exceed ten miles. . . ."

Dec. 14, 1911. Article II. of the International Convention they did not submit any argument in support of the conviction.

Jensen v.
Wilson.

LORD JUSTICE-CLERK.—This is a somewhat unusual case. We have had, before now, cases where the Crown does not support the conviction brought under review; but in the present case the parties have sought by a joint minute to have the conviction set aside. It is, however, our duty when a judgment has been pronounced by any competent Court not to set the conviction aside except upon satisfactory grounds of law, and we cannot simply give effect to the joint minute without hearing argument against the conviction which is brought under review. Here we have not had anything stated by the Crown in support of the Sheriff-substitute's judgment, and in these circumstances we must deal with the case as best we can.

If I thought that our decision would affect the law as laid down in the cases of *Peters v. Olsen*¹ and *Mortensen v. Peters*,² I should desire a fuller hearing of this case—possibly before a full bench—but being satisfied, as I am, that the ground on which our decision is to be pronounced does not affect the law laid down in these cases, I have no hesitation in proceeding to decide this case.

It is unfortunate that the prosecutor in stating his complaint has tied himself down to Article II. of the First Schedule annexed to the Sea Fisheries Act, 1883, which is of the nature of a convention, and not a statutory enactment. Under that convention all nations who are parties thereto are bound to accept it as the law applicable to their subjects when fishing vessels belonging to any such subject are found in the territorial waters of another country which is also a signatory. In defining the *locus* the prosecutor has founded on the second paragraph of Article II., which is in these terms:—“As regards bays, the distance of three miles shall be measured from a straight line drawn across the bay, in the part nearest the entrance, at the first point where the width does not exceed ten miles.” That is the law applicable to signatory nations and their subjects within the defined limits; but nations who have not become members of the convention, and likewise their subjects, are not bound thereby.

Now, the accused is a Norwegian, and Norway, as the Sheriff-substitute says, was not, on the date libelled, “one of the powers signatory to the International Convention relative to fisheries, dated 6th May 1882, as embodied in the First Schedule to the Sea Fisheries Act of 1883.” Accordingly, what we have to determine is whether, when the complaint is based upon a contravention of Article II., the accused could be convicted on these grounds. Whether he could have been convicted on other grounds I need not consider. Here the complaint is based upon Article II., and on that ground I think, for the reasons which I have stated, that the conviction must be quashed.

LORD DUNDAS.—I agree; and only wish to add a single word. It is this, that owing to the peculiar position of matters, we have heard no argu-

¹ (1905) 7 F. (J.) 86, 4 Adam, 608.

² (1906) 8 F. (J.) 93, 5 Adam, 121.

ment in support of the conviction ; and it may be—I put it no higher—Dec. 14, 1911.
 that a good deal more might be said in favour of it than has been brought Jensen v.
 to our notice. But I am content to say that, on the case presented to us, Wilson.
 sufficient cause seems to me to have been shown for setting aside the con- Lord Dundas.
 viction, and that, on the case presented to us, I think we can do so without
 in any way impinging on the cases to which the Sheriff-substitute has
 referred.

LORD GUTHRIE.—I concur.

THE COURT sustained the appeal, and quashed the conviction.

ALEX. MORISON & Co., W.S.—W. S. HALDANE, W.S., Crown Agent—Agents.

GEORGE PATIENCE, Complainer.—*J. R. Christie.*
 WILLIAM MACKENZIE (Procurator-Fiscal of the Western District of
 Ross and Cromarty), Respondent.—*Sandeman, K.C.*—
Hon. W. Watson.

No. 3.

Dec. 15, 1911.

Patience v.
 Mackenzie.

*Statutory Offences—Hanging “linen clothes or other such article” on road-
 side hedge—Herring nets—Ejusdem generis—General Turnpike Act, 1831
 (1 and 2 Will. IV. cap. 43), sec. 96—Roads and Bridges (Scotland) Act,
 1878 (41 and 42 Vict. cap. 51), sec. 123, and Schedule C.*

The General Turnpike Act, 1831, sec. 96 (as incorporated in the Roads
 and Bridges (Scotland) Act, 1878, sec. 123 and Schedule C) enacts that
 any person who “shall hang or lay any linen clothes or other such article
 on any hedge or fence of” a turnpike road shall be liable in a penalty.

Held that a complaint which charged an accused with contravening
 the section by hanging herring fishing-nets on a roadside hedge was
 irrelevant, as herring fishing-nets did not fall under the category
 “linen clothes or other such article.”

GEORGE PATIENCE, fisherman, Avoch, was charged in the Sheriff HIGH COURT.
 Court at Dingwall on a summary complaint at the instance of Lord Justice-
 William Mackenzie, Procurator-fiscal. The charge in the complaint Clerk.
 was “that on the 6th and 7th days of October 1911, by the side of Lord Dundas.
 the public highway leading from the house at Bridge Street, Avoch, Lord Guthrie.
 in the parish of Avoch, and county of Ross and Cromarty, occupied
 by Donald Gray, carpenter, to the bakery occupied by Alexander
 Macleman, baker, Avoch, you did hang or lay herring fishing-nets on
 the hedge or fence of said road, contrary to 1 and 2 William IV.
 chapter 43, section 96, as incorporated with the Roads and Bridges
 (Scotland) Act, 1878,* whereby you are liable to forfeit or pay any
 sum not exceeding 50s. over and above the damages occasioned
 thereby, and, in default of payment of said penalty of 50s., to im-
 prisonment in terms of section 48 of the Summary Jurisdiction
 (Scotland) Act, 1908.”

* The General Turnpike Act, 1831 (1 and 2 Will. IV. cap. 43), sec. 96
 (as incorporated in the Roads and Bridges (Scotland) Act, 1878 (41 and 42
 Vict. cap. 51), sec. 123, and Schedule C, enacts:—“And be it enacted
 that if any person . . . shall hang or lay any linen clothes or other
 such article on any hedge or fence of any such road ; . . . every person
 offending in any of the cases aforesaid, shall for each and every such offence
 forfeit and pay any sum not exceeding fifty shillings over and above the
 damages occasioned thereby.”

Dec. 15, 1911. The accused pleaded not guilty, but, after evidence led, was convicted and fined 10s. by the Sheriff-substitute (MacWatt).

Patience v.
Mackenzie.

He presented a bill of suspension in which he stated that before he was called on to plead his agent took objection to the relevancy of the complaint on the ground, *inter alia*, that "a herring-net was not included (or embraced) in or *ejusdem generis* with the words 'linen clothes or other such article' used in the 96th section of the Act 1 and 2 William IV. cap. 43," and that this objection had been repelled by the Sheriff-substitute.

He repeated this objection in the bill of suspension, and pleaded, *inter alia*;—(1) The acts set forth in the said complaint not being, upon a sound construction, an offence under the statutes libelled, the said complaint was irrelevant, and the conviction and sentence following thereupon were therefore null and oppressive, and should be suspended as craved. (2) The said complaint not having charged the present complainer with any offence known to the law, was irrelevant, and the conviction and sentence following thereupon should be suspended as craved.

The case was heard on 15th December 1911.

Argued for the complainer;—The complaint was irrelevant. Fishing-nets were neither "linen clothes" nor "other such article." The latter expression must be construed as comprehending such articles only as were *ejusdem generis* with linen clothes,¹ and, so construed, herring-nets could not be brought within its scope. The section must be read with reference to the evil which the Legislature intended to prevent,² and here the object of the section clearly was to prohibit persons from laying articles on roadside hedges which would be unsightly or might frighten animals on the road. But herring-nets were not open to either of these objections, and did not, therefore, fall within the purview of the section. Further, even if the complainer were wrong on this point, the complaint was open to objection on the ground of want of specification.³ The charge should have run: "You did hang or lay linen clothes or other such articles, viz., herring fishing-nets, on the hedge"; or in some form which would have certiorated the accused of the portion of the section which he was charged with contravening.

Argued for the respondent;—The complaint was relevant, and sufficiently specified the offence charged. There was only one sentence in the section libelled which referred to hanging articles on hedges, and consequently the accused could be in no doubt as to the portion of the section to which the charge referred. The words "other such article" would, in themselves, comprehend herring nets, and the fact that these general words were preceded by specific words would not, *per se*, justify the Court in departing from the natural meaning of the former words. All that was meant by the principle of *ejusdem generis* was that, if there was difficulty in giving the general terms their natural meaning, or if there was something in the statute or deed in which they appeared which indicated that they were used in a restricted sense, then they must be construed as including only things which were *ejusdem generis* with the things which were specified by

¹ Murray v. Keith, (1894) 22 R. (J.) 16, 1 Adam, 511.

² Leisk v. Galloway, (1884) 12 R. (J.) 5, 5 Coup. 497; Elliot v. Macdougall, (1899) 1 F. (J.) 64, 2 Adam, 716.

³ Gladstone v. Stevenson, (1902) 4 F. (J.) 66, 3 Adam, 628.

the preceding terms.¹ But this rule of construction did not apply to Dec. 15, 1911. a case, such as the present, where there was nothing to prevent the general words receiving their ordinary interpretation. Assuming, *Patience v. Mackenzie.* however, that the rule did apply, herring nets were within the same class as linen clothes. The class-characteristic was the fabric of the articles, and any articles of textile fabric which could be hung on hedges were comprehended. A lace curtain would fall within the statutory prohibition, and in point of manufacture there was no great difference between such a curtain and a herring net. On a sound interpretation of the section there were three kinds of article mentioned, viz., "linen," "clothes," and "other such article."

LORD DUNDAS.—The suspender is a fisherman residing at Avoch. He was charged in Dingwall Sheriff Court on a complaint, at the instance of the respondent, which libelled that he "did hang or lay herring fishing-nets on the hedge or fence" of a public highway "contrary to 1 and 2 William IV. chapter 43, section 96, as incorporated with the Roads and Bridges (Scotland) Act, 1878." His agent stated certain objections to the relevancy of the complaint, but these were repelled by the Sheriff-substitute, and the accused was thereafter convicted and fined; and this suspension has been brought.

I am of opinion that the conviction must be quashed. The first observation which occurs to one upon the complaint as framed is that some ingenuity (to say the least) would be required to ascertain what part of section 96 is referred to in the charge, there being no direct reference, throughout its length, to herring nets. It is explained that the provision applicable is contained in the clause "or shall hang or lay any linen clothes or other such articles on any hedge or fence of any such road"; and it was urged with, I thought, a good deal of force that the libel should at least have stated that the accused did hang or lay on the fence of the roadway "linen clothes or other such articles, *videlicet*, herring fishing-nets." But it is unnecessary to say more about that; for, even if the complaint had been more explicitly framed, I do not think it could have been made relevant. I do not see how one can, by any reasonable stretch of language, include herring nets in the category of "linen clothes or other such articles."

I have no desire to push the doctrine of *ejusdem generis* to an extreme length. Perhaps there has sometimes been a tendency to carry it too far. But one must, at all events, find some definite relation or connection between the specific act charged and the acts prohibited by the statute. I have not thought (or been told) of any common category to which both linen clothes (or linen and clothes) and herring nets can be referred, unless, it may be, that both can be hung on hedges. Something much closer and more definite would be required to enable one to include "herring fishing-nets" in the words "other such article," as they occur in section 96. I think this complaint is radically irrelevant, and the conviction should be quashed. If the practice of hanging or laying fishing-nets upon the fences

¹ *Anderson v. Anderson*, [1895] 1 Q. B. 749; *The Admiralty v. Burns*, 1910 S. C. 531, *per* Lord Kinnear, at p. 536; *The Queen v. Payne*, (1866) L. R., 1 Crown Cases Reserved, 27.

Dec. 15, 1911. of roads is objectionable and illegal, it must, I consider, be struck at by some other method than that here adopted by the prosecutor.

Patience v. Mackenzie.

LORD GUTHRIE.—I concur. In this case it is immaterial whether the word “linen” in the section is taken as qualifying the word “clothes”—in which case the prohibition in the section applies only to “linen clothes” or “other such article”—or whether, as Mr Sandeman suggested, the two words are to be read separately and as designing two classes of articles, viz., linen articles and articles which are clothes.

LORD JUSTICE-CLERK.—I concur.

THE COURT quashed the conviction.

ALEX. ROSS, S.S.C.—JOHN C. BRODIE & SON, W.S.—Agents.

No. 4. THOMAS CAMPBELL, Appellant.—*J. C. Watt, K.C.—Duffes.*
 Dec. 16, 1911. GEORGE KERR (Burgh Prosecutor, Port-Glasgow), Respondent.—
Murray, K.C.—Hon. W. Watson.

Campbell v. Kerr. *Statutory Offences—Betting—“Public place”—“Unenclosed ground”—Open shed on quay—Street Betting Act, 1906 (6 Edw. VII. cap. 43), sec. 1.*

The Street Betting Act, 1906, makes it an offence for any person to frequent, or loiter in, “public places” for the purpose of bookmaking or betting; and defines “public place” as including “any unenclosed ground to which the public for the time being have unrestricted access.”

On a quay belonging to a harbour trust there was a shed, in the sides of which there were large openings without gates or doors. The public had free access to both quay and shed.

Held that the shed was “unenclosed ground,” and was a “public place” within the meaning of the Act.

Statutory Offences—Betting—Aggravation—Complaint libelling second offence—Procedure—Stage at which previous conviction should be proved—Street Betting Act, 1906 (6 Edw. VII. cap. 43), sec. 1—Summary Jurisdiction (Scotland) Act, 1908 (8 Edw. VII. cap. 65), sec. 34.

The Street Betting Act, 1906, which prohibits betting in public places, imposes a certain penalty for a first offence and a larger penalty for a second offence.

A complaint charged an accused with a contravention of the Act, and that “such offence is a second offence, you having been previously convicted as in the list annexed, whereby you are liable” to the larger penalty.

Held that the previous conviction was libelled as an aggravation and not as a substantive charge, and had been competently proved after the accused had been found guilty of the offence for which he was prosecuted; and that it would have been incompetent to prove it *in causa*.

HIGH COURT. THOMAS CAMPBELL, Port-Glasgow, was charged on a summary complaint in the Police Court of Port-Glasgow at the instance of George Kerr, burgh prosecutor. The charge in the complaint was “that on 2nd August 1911, within the open shed situated on the quay, known as the Steamboat Quay, in the burgh of Port-Glasgow, said open shed being unenclosed ground to which the public for the time being

Lord Justice-Clerk.
 Lord Dundas.
 Lord Guthrie.

have unrestricted access, and as such, being a public place within the meaning of subsection 4 of section 1 of the Street Betting Act, 1906,* you did frequent and loiter in said open shed, situated as aforesaid, for the purpose of betting and receiving bets, contrary to the Street Betting Act, 1906, section 1, and such offence is a second offence, you having been previously convicted as in the list annexed, whereby you are liable to a fine not exceeding twenty pounds, and failing payment, to imprisonment for a period not exceeding sixty days.

“ LIST OF PREVIOUS CONVICTIONS APPLYING TO YOU.

Date.	Place of Trial.	Court.	Offence.	Sentence.
7th July 1910.	Greenock.	Police.	Contravention of Street Betting Act, 1906, section 1.	Fined £10 or 30 days.”

The accused having been convicted, he appealed on a stated case. The case set forth the following facts (in addition to those showing that the accused had betted) as proved :—

“ (3) That the place libelled is an open shed situated on the Steamboat Quay in the burgh of Port-Glasgow, forming the property of the Port-Glasgow Harbour Trust, a public trust. (4) That said open shed measures 165 feet in length, has three openings on the north side measuring respectively 30 feet, 9 feet 6 inches, and 29 feet 6 inches, and three openings on the south side measuring respectively

* The Street Betting Act, 1906 (6 Edw. VII. cap. 43), enacts :—

Sec. 1. “ (1) Any person frequenting or loitering in streets or public places . . . for the purpose of bookmaking, or betting, . . . shall—

“ (a) In the case of a first offence be liable, on conviction under the Summary Jurisdiction Acts, to a fine not exceeding ten pounds ;

“ (b) in the case of a second offence . . . to a fine not exceeding twenty pounds.

“ (4) For the purpose of this section . . . the words ‘ public place ’ shall include any public park, garden, or sea-beach, and any unenclosed ground to which the public for the time being have unrestricted access . . . ”

The Summary Jurisdiction (Scotland) Act, 1908 (8 Edw. VII. cap. 65), enacts :—

Sec. 34. “ Where the accused has been previously convicted of any offence forming an aggravation of the offence with which he is charged, such previous conviction shall be set forth in the complaint, and . . .

“ (2) If the accused pleads not guilty to the charge and is subsequently convicted thereof, the Judge or the Clerk of Court shall, after conviction, ask the accused whether he admits the previous conviction or convictions libelled . . .

“ (4) Where the accused does not admit any conviction so libelled, the prosecutor, unless he withdraws such conviction, shall adduce evidence in proof thereof, either at the first diet or at any adjourned diet. . . .

“ (8) Nothing herein contained shall prevent evidence of previous convictions being led *in causa* where such evidence is competent in support of a substantive charge.”

Dec. 16, 1911. 29 feet 6 inches, 9 feet 6 inches, and 29 feet 6 inches. It is closed along the remaining portions of said sides by fixed wooden partitions, and at the ends by closed-in sheds, and has a slated roof. There are no gateways at any of these openings, and the public can, and do, pass freely in and out at any time. (5) That situated inside said open shed there is a public water-closet and urinal, access to this urinal being obtained from inside the shed. Masts, sails, and fishing-gear are stored on the beams of the roof of said shed by members of the public owning small boats. The shed has not been used for harbour purposes for a long number of years. (6) That the open shed in question is not enclosed by walls or fences, or in any other manner to keep the public out of it. The public have free access to said quay and shed from any of the public streets of the burgh. There are no gateways or barricades to prevent such access. (7) That the said quay and shed are largely frequented by the public, and they have been so frequented from time immemorial. No attempt has ever been made to restrain the public from using them, and in particular on the date in question the public had free and unrestricted access to said open shed. At the time of the apprehension of the appellant there were besides him at least twenty members of the public in said shed."

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Kerr.

The case continued:—

"I accordingly held it proved that said open shed, situated as aforesaid, is unenclosed ground to which the public for the time being had unrestricted access, and that it is therefore a public place within the meaning of subsection 4 of section 1 of the Street Betting Act, 1906, and I found the appellant guilty of the charge.

"The appellant was then asked, as directed by section 34 (2) of the Summary Jurisdiction (Scotland) Act, 1908, if he admitted the correctness of the previous conviction libelled. He refused to do so, and his agent objected to the competency of proving the conviction at this stage, and pled that it should have been proved *in causa*. I repelled the objection, and the previous conviction was thereafter proved as required by section 34 (4) of the last mentioned Act.

"I thereupon imposed a fine of £20, and failing payment ordered the accused to be imprisoned for sixty days."

The questions of law were:—"(1) Was I right in holding that the open shed in question is unenclosed ground to which the public for the time being had unrestricted access, and, as such, a public place within the meaning of subsection 4 of section 1 of the Street Betting Act, 1906? (2) Was I right in repelling the objection to the competency of proving the previous conviction libelled after I had found the appellant guilty of the charge?"

The case was heard on 15th and 16th December 1911.

Argued for the appellant;—(1) The shed in question was not a "public place" in the sense of the Betting Act. It was placed on a quay, which was the private property of the Harbour Trustees; and it could not be described as "unenclosed ground."¹ (2) The offence charged was libelled as a second offence. The previous conviction was essential to the substantiation of that charge, and was not merely an

¹ Reference was made to *Hasson v. Neilson*, 1908 S. C. (J.) 57, 5 Adam, 520; *Lang v. Walker*, 1910 S. C. (J.) 41, 6 Adam, 180; *Breslin v. Thomson*, 1910 S. C. (J.) 5, 6 Adam, 134; *Young v. Neilson*, (1893) 20 R. (J.) 62, 3 White, 487.

aggravation of the offence.¹ It was necessary, therefore, that it should be proved *in causa* and not after the conviction of the accused, as appeared from the Summary Jurisdiction Act, section 34 (8). In *Campbell v. Kerr*.² *H. M. Advocate v. Hunter*³ it was held that the aggravation of theft that the accused was habit and repute a thief must be proved *in causa* by evidence laid before the jury; and the present case was *a fortiori* of that case.

Argued for the respondent;—(1) The shed was “unenclosed ground” in the sense of the statute. The test of whether a place was or was not “unenclosed” was whether *de facto* the public, as public, had access to it.³ In this case the shed had no gates or doors, nor were there any means of excluding the public from the quay on which it was situated; and the urinal would not have been placed in the shed unless the public had access to it. In view of these facts it was clear that the shed fell within the definition of “public place.” (2) The previous conviction was libelled as an aggravation, and not as a substantive part, of the charge. Under section 34 of the Summary Jurisdiction Act the procedure followed in the case was correct.⁴

LORD JUSTICE-CLERK.—This case turns on the question whether or not a certain shed was “unenclosed ground,” or rather, whether it was competent for the magistrate who tried the case, after hearing the evidence and finding proved the facts which we have here stated, to hold that it was “unenclosed ground.” I think that the magistrate was right in so holding, in spite of Mr Crabb Watt’s ingenious argument to the contrary.

The fact that the shed was on a quay can make no difference. The quay itself was public ground, and on it there was this erection, with a roof and certain fixed wooden partitions, which partially closed it in, but left large openings in front and in rear. It was left open, it was out of use for harbour purposes, and the public were in the habit of using it freely. It was in every respect a place open to the public, and I think it comes within the description of “unenclosed ground.” I do not see that the fact of its having a cover over it makes any difference. There are many places in public grounds so roofed in in order to form a shelter from the rain, but there can be no doubt that such a shelter is unenclosed ground so long as the public are able to pass into it and under the roof, and to range freely over the park in which it is placed.

The only other question was whether it was competent for the magistrate to proceed as he did to repel the objection to the competency of proving the previous conviction libelled after he had found the appellant guilty of the charge. The appellant here contends that as the previous conviction was stated against him in the complaint, it had to be proved before the case for the prosecution was closed. I think differently. I think the magistrate was bound to make up his mind, first, whether the offence was proved,

¹ *Hefferan v. Wright*, 1911 S. C. (J.) 20, 6 Adam, 321.

² (1890) 17 R. (J.) 57, 2 White, 501.

³ *Woods v. Lindsay*, 1910 S. C. (J.) 88, *per* Lord Justice-General, at p. 91, 6 Adam, 294, at p. 298; *Walker v. Reid*, 1911 S. C. (J.) 41, 6 Adam, 358.

⁴ Reference was also made to the Prevention of Crimes Act, 1871 (34 and 35 Vict. cap. 112), sec. 19.

Dec. 16, 1911. **Campbell v. Kerr.** and only after he had found the accused guilty of the offence was it his duty to proceed to consider the previous conviction, which was libelled, not as a substantive charge, but as an aggravation rendering the accused liable to a heavier punishment. As it was merely a question of greater or less punishment, the Judge here was just in the same position as when, under the Criminal Procedure Act of 1887, a previous conviction is libelled as an aggravation. There, if it is to be proved, it must be proved separately by a separate inquiry before the same jury, and a separate verdict returned. And section 67, which prescribes this procedure, is made to apply to summary prosecutions by section 71. In my opinion the Judge in this case could not have proceeded in any other way than he did. If he had done so there would have been good ground for overturning the conviction.

LORD DUNDAS.—I agree upon both points, and have nothing to add.

LORD GUTHRIE.—I concur.

THE COURT answered the questions of law in the affirmative, and dismissed the appeal.

J. G. BRYSON, Solicitor—CAMPBELL & SMITH, S.S.C.—Agents.

No. 5. WILLIAM COWIE AND OTHERS, Petitioners.—*Sandeman, K.C.*—*A. M. Mackay.*

Feb. 24, 1912. **GEORGE OUTRAM & COMPANY, LIMITED, AND ANOTHER, Respondents.**—*Clyde, K.C.*—*Hon. W. Watson.*

Cowie v.

George

Outram & Co.,

Limited.

Administration of Justice—Application to restrain publication of statements tending to prejudice course of justice—Contempt of Court—Newspaper.

During a strike at Glasgow acts of violence were committed, in connection with which certain persons were apprehended and charged with having been part of a riotous mob which forced the Allan Line shed at Princes Dock. Prior to their trial the *Glasgow Herald* newspaper published a letter commenting on the occurrences, and calling on the magistrates to take steps to prevent their repetition. The letter contained this passage:—"Instances have occurred which clearly demonstrate the determination of the men to carry out their leaders' advice, notably that in which the Allan Line sheds at Princes Docks were rushed and the 'Sicilian' boarded, when a number of men were arrested, and subsequently remitted to the Sheriff."

The accused persons presented a petition to the High Court, setting forth the letter, and craving the Court to prohibit the newspaper from publishing any statement relative to the acts with which the petitioners were charged, or anything prejudicial to their case.

Held that, there being nothing in the letter complained of but a statement of facts already known to the public, it was not prejudicial to the petitioners' case; and petition *refused*.

HIGH COURT. WILLIAM COWIE AND OTHERS, who had been apprehended and charged with forming part of a riotous mob which had committed acts of violence, and who had been admitted to bail, presented a petition to the High Court of Justiciary, craving the Court "to prohibit the editor and publisher and proprietors of the *Glasgow Herald* from publishing or circulating any statement relative to the acts of violence or other deeds with which the petitioners are charged as aforesaid, or

Lord Justice-Clerk.

Lord Dundas.

Lord Salvesen.

Lord Guthrie.

anything of a nature prejudicial to the petitioners' case, or doing anything whereby such statement may be published or circulated until the proceedings now in dependence shall be brought to a conclusion."

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The petition stated:—"On or about the 9th of February 1912 the petitioners were apprehended, and on 12th February 1912 a petition at the instance of James Neil Hart, writer, Glasgow, Procurator-fiscal of the Sheriffdom of Lanarkshire, was served upon them, stating that they did, on 9th February 1912, at Plantation Quay, Mavisbank Quay, General Terminus Quay, and Springfield Quay, and Princes Dock, all Glasgow Harbour, form part of a riotous mob, which, acting of common purpose, did force open blinds or running doors of the Clyde Shipping Company's shed at Plantation Quay aforesaid, and did destroy several barricades and force open the blinds or running doors of the Allan Line sheds at Princes Dock aforesaid, and did obstruct and assault while in the execution of their duty George P. Crawford, lieutenant, Northern District, Auchterlonie Williamson, lieutenant, St Rollox District; James Fitzpatrick and Alexander Cameron, constables, both Central District; and Morris M'Bridge, sergeant, Marine District, all of the Glasgow Police, by beating them with their fists and with sticks.

"The petitioners were thereafter admitted to bail. The said committal and liberation on bail were both reported in the issue of the *Glasgow Herald* newspaper, dated Saturday, 10th February 1912. Notwithstanding the apprehension and committal foresaid the *Glasgow Herald* continued to publish articles and correspondence dealing with the said dockers' strike and with alleged acts of violence which it represented to have taken place in the course thereof. These articles and correspondence are in their nature and tendency calculated to seriously prejudice the defence of the petitioners. In particular, on or about Thursday, 15th February 1912, a letter over the *nom de plume* of 'Civis' was published in the correspondence column of said newspaper in the following terms:—"Glasgow Harbour Dispute.—Sir,—I am sorry to see that our local labour troubles at the Harbour are not yet at an end, and that a stoppage of work is again threatened. In common with all law-abiding citizens I hope that the scenes of riot which disgraced our Harbour and City last week will not be allowed to be repeated, and that the Magistrates will see that the law is not again openly set at defiance. May I also express my surprise that the men who publicly incited their ignorant followers to personal violence should be allowed to be at large. These men were directly responsible for the open resistance of the police, for the utter lawlessness which we saw last week. While I am pleased to see that a considerable number of the rioters were promptly laid by the heels, and hope they will receive exemplary punishment, I ask why the chief offenders should be allowed to go scot free. I sincerely trust that should we have any further direct incitements to violence and intimidation, our Magistrates will resolutely do their obvious duty.—I am, &c., CIVIS."

"The said letter in its terms clearly refers to the petitioners, and was so understood by the readers of the said newspaper, and it assumes the petitioners guilty of the said crime with which they stand charged. On or about Thursday, the 15th February 1912, the agents for the petitioners, Messrs St Clair Swanson & Manson, wrote to the proprietor and publishers and to the editor of the said *Glasgow*

Feb. 24, 1912. *Herald* a letter setting forth that the said letter was in its terms calculated to seriously prejudice the petitioners' defence, and asking them to give an undertaking that no further matters of a similar import would be published in the *Glasgow Herald* pending the trial, failing which an application to your Lordships would be presented. In reply to said letter a reply addressed to the petitioners' Glasgow agent, Mr W. G. Leechman, writer, Glasgow, was received from the editor of the said newspaper in the following terms:—'Glasgow, Feb. 15/12.—Dear Sir,—With reference to a letter received by me from Messrs St Clair Swanson & Manson on the subject of "Civis" letter *re* the Glasgow Harbour Dispute, I am quite willing to undertake that no matter similar to that complained of in "Civis" letter will be published in the *Glasgow Herald* pending the trial of men apprehended in connection with the harbour dispute.—Yours truly, F. HARCOURT KITCHIN, Editor.'

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"The petitioners accepted the said undertaking for the time as being given by the proper and responsible party, but in breach of said undertaking there was published in the issue of the *Glasgow Herald*, of date 20th February 1912, a letter in the following terms:—'Police Protection at the Docks.—Feb. 19. Sir,—I was a member of the deputation from the provision trade which had the honour of being received to-day by the Magistrates' Committee. I wish it to be clearly understood that I have no complaint to make against the Committee, but express the opinion held by all of us when I say that we felt in tendering us from their very fully occupied time even the brief ten minutes' reception they were extending to us kind consideration. You can understand, however, how astonished the members of the deputation felt when after two of the members had spoken, and only the half of our tale had been told, the Committee rose in a body and politely bowed us out. I address this letter to you, Mr Editor, in the hope that you will publish same to-morrow, as I observe from the evening papers that the Chief Constable in his assurance to the Magistrates that there is ample police protection provided at the Docks controverts the statement of facts which it was my particular privilege to have placed before the Committee this morning had the opportunity been afforded me.

"Inflammatory speeches have been made inciting to all manner of violence workmen who are not of the highest order of intelligence, and who might be excused if in a time of excitement they were unable to distinguish between right and wrong. But not only have these speeches been made, instances have occurred which clearly demonstrate the determination of the men to carry out their leaders' advice, notably that in which the Allan Line sheds at Princes Docks were rushed and the "Sicilian" boarded, when a number of men were arrested and subsequently remitted to the Sheriff. Further, messages have been sent by the strikers' Committee to traders intimating that trouble would ensue if they attempted to lift their goods.

"The fact of the matter is that the mob law has established itself above civic law, that the reign of terror holds sway, and that freeborn citizens are constrained to forego their just and lawful rights to their great material and pecuniary loss. The Magistrates are or ought to be aware of this. The Chief Constable's assurance is only idle talk.

"Traders have carefully avoided taking sides in this dispute. We pass no opinion on the merits of the points at issue. We assert but our most primitive and fundamental right in claiming that we ought

to be allowed to play our own little part in saving ourselves from Feb. 24, 1912.
loss, and it may be from ruin.

“It should be borne in mind that so far as the discharge and delivery of cargo of a ship is concerned it is in no way part of a ship-owner's duty. It is and always has been recognised to be the cargo owner's work and responsibility. It is well known that at the present moment a powerful Committee, representative of the leading Trades Associations in the City, is in existence for the express purpose of endeavouring to have all these duties at present discharged (on behalf of consignees) by the Shipping Companies transferred to some other authority which will be more directly under the control of traders.—
I am, &c., D. F. LOCHHEAD.’

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Limited.

“The said letter clearly refers to the said dockers' strike and to the men concerned therein, and in particular to the petitioners, and implies their guilt of criminal violence, and it is seriously prejudicial to their defence in the criminal proceedings pending against them.

“The name of the proprietors and publishers of the *Glasgow Herald* is George Outram & Company, Limited, and the name of the editor is F. Harcourt Kitchin. It is humbly submitted that the continued publication of these articles or correspondence would be seriously injurious to the petitioners, and would tend seriously to prejudice their defence, and that there is a serious menace unless the crave hereof is granted that the said letters published on 15th February and 20th February 1912, as aforesaid, may be followed by others of the same or a similar injurious character.”

The case was heard before the High Court on 24th February 1912, when counsel were present on behalf of George Outram & Company, Limited, the proprietors and publishers of the *Glasgow Herald*, and F. Harcourt Kitchin, the editor.

Argued for the petitioners;—The Court would always interfere to prevent the publication of anything which tended to prejudice the case of a person who had been committed to trial.¹ In the present case the letter complained of not only suggested that the petitioners were guilty of acts of violence, but was also calculated to raise up a strong feeling against them, so that, if they were convicted, they would receive a more severe sentence than they might otherwise have done. Decree should be pronounced in terms of the prayer of the petition.

Counsel for the respondents were not called upon.

LORD JUSTICE-CLERK.—If men are apprehended and charged with an offence, and their names are published in the newspapers, and that matter is referred to by a citizen in a newspaper, abstractly speaking it may be said that that might have some effect on their defence, and that it is better to avoid publicity in these matters. This letter which is now complained of had a particular object, an object not directed towards these individual men at all, but directed to stir up the magistrates to see that what had taken place in the past, in the way of violence committed by strikers on the men who were at work at the docks, was necessarily highly injurious to the traders who have no connection with the dock at all except that their

¹ Henderson v. Laing, (1824) 3 S. 384; M'Lauchlan v. Carson, (1826) 5 S. 147; Smith v. Mitchell, (1835) 14 S. 172; Smith v. Ritchie & Co., (1892) 20 R. (J.) 52, 3 White, 408; St Mungo Manufacturing Co. v. Hutchison, Main, & Co., Limited, (1908) 15 S. L. T. 893.

Feb. 24, 1912. goods are there. That was a perfectly legitimate object, and to restrain the citizens who were suffering in consequence of a strike which is said to be accompanied by violence—which everybody knows has been accompanied by violence—to restrain them from publicly stating their views as to what the magistrates should do to prevent that happening again is an idea which, I think, cannot possibly be given effect to. On the other hand, if, in doing that, they use words and language which may directly tend to prejudice the defence of persons who are about to be under trial, I think that ought most certainly to be restrained. Now, the thing in this letter which is complained of—I put it to Mr Sandeman, and with his usual frankness he admitted it, and it is quite evident that it is so—is that the men arrested may be affected in their legitimate interests at the trial and prejudiced in their defence by these words, “notably that in which the Allan Line sheds were rushed and the ‘Sicilian’ boarded.” That is a statement of a fact which had taken place. Then comes the only statement which can connect the petitioners with it—“when a number of men were arrested and subsequently remitted to the Sheriff.” That is a mere statement of fact, and in no way tends to prejudice the case against these individual men, and the purpose for which it is made is obvious. The purpose is to show that these things which happened at that dock at the discharge of the “Sicilian” were of such a character that the public authorities were forced to arrest on the spot a certain number of persons, and to bring them before the proper authorities on a charge of having offended against the law by rioting. The purpose is to call upon the magistrates to see that these occurrences—which everybody knows took place—shall not be repeated, but shall be prevented by the proper authority. I can see nothing in it tending to prejudice these persons at all. I do not see that the cases quoted to us have any bearing upon this one, and upon the whole matter I am satisfied that there has been no ground shown for interfering here. It is always desirable that newspapers should be careful, after an event has taken place, not to use their privileged position to do anything that may prejudice others. On the other hand, they must and ought to have the liberty to express their opinions and the opinions of their readers as regards what should be done in the future to prevent unlawful proceedings such as those spoken of in the letter complained of.

LORD DUNDAS.—I am of the same opinion, and for the same reasons. I should like to repeat and adopt the words of your Lordship in the chair in the case of *Smith*,¹ where you said that, apart from any question of contempt of Court, “it is clear that a prisoner has a right to ask the Court to secure him against anything which may prejudice the public mind so as to endanger his prospect of obtaining a fair trial.” If I thought that anything of that kind had occurred here, I should have been for interfering, but I do not think that anything of the sort has been made out.

LORD SALVESEN.—I concur.

¹ 20 R. (J.) 52, 3 White, 408.

LORD GUTHRIE.—I agree. But I think it right to point out that there Feb. 24, 1912.
 is a marked distinction between the two letters, because if there had been Cowie v.
 in the second letter what the first letter contains I should have doubted George
 whether there was not ground for interfering. The first letter says: "I Outram & Co.,
 am pleased to see that a considerable number of the rioters were promptly Limited.
 laid by the heels, and hope that they will receive exemplary punishment."
 That comes very near assuming that the charge, which was still *sub judice*,
 was well founded. But in the second letter I cannot find anything of that
 kind. The passages to which the Lord Justice-Clerk referred about rushing
 the "Sicilian" and the remitting of the men to the Sheriff would be
 nothing in themselves. It is the collocation of the two which gives any
 ground for complaint. I cannot help thinking that, looking to one being
 a statement of fact and the other a statement that certain charges have
 been made which may turn out to be right or not, it would have been
 better that no reference had been made to the men having been arrested
 and remitted to the Sheriff, but I do not think that that comes in any way
 near to being a reason for granting the prayer of the petition.

THE COURT refused the prayer of the petition.

ST CLAIR SWANSON & MANSON, W.S.—WEBSTER, WILL, & Co., W.S.—Agents.

JOHN J. M'INTYRE (Procurator-Fiscal, Glasgow), Appellant.—

No. 6.

Clyde, K.C.—Gentles.

WILLIAM THOMSON, Respondent.—*M'Kechnie, K.C.—J. G. Jameson.*

Mar. 12, 1912.

Statutory offences—Managing a brothel—Manager found "in" a "building or part of a building" used as a brothel—Common stair leading to brothel—Glasgow Police Act, 1866 (29 and 30 Vict. cap. cclxxiii.), sec. 142.

M'Intyre v. Thomson.

The Glasgow Police Act, 1866, sec. 142, enacts that any building, or part of a building, used for the purpose of harbouring prostitutes for the purpose of prostitution, may be entered under a magistrate's warrant; and "every person found therein who manages, or assists in the management of, such business" shall be subject to certain penalties.

In a prosecution under the above section it was proved that on the date libelled the accused, who managed as a brothel a house situated on the first floor of a common stair, admitted a man and woman to the house for the purpose of prostitution but did not himself enter the house, and that he was then met by two constables on the stair-landing outside the door of the house with the key of the door (which he had locked) in his possession.

Held that the accused was found "in" the house in the sense of the section.

THIS was an appeal on a stated case from the decision of the Magistrate in a summary prosecution in the Police Court of Glasgow at the instance of John J. M'Intyre, Procurator-fiscal, against William Thomson. The charge against the accused was "that on the 20th day of November 1911, you, being a person found in a house at No. 6 West Russell Street, Glasgow, used ordinarily or shortly before the date above libelled for the purpose of harbouring prostitutes for the purpose of prostitution, did manage and use said house, or assist in managing the same, for said purpose, and did harbour, and knowingly suffered to be harboured, in said house for said purpose one prostitute,

HIGH COURT.
 Lord Dundas.
 Lord Salvesen.
 Lord Guthrie.

Mar. 12, 1912. viz., Kate Dougan, of 81 Bernard Street, Glasgow; contrary to the Glasgow Police Act, 1866, sections 137 and 142.* . . .
 M'Intyre v. Thomson.

The accused pleaded not guilty, and, after evidence had been led, the Magistrate found the charge not proven "in view of the fact," as stated in the case, "that the accused was not *de facto* found in the house at the time libelled."

The case set forth that the following facts were proved:—"That the house in question is situated at No. 6 West Russell Street, one stair up, and consists of two rooms and kitchen; that it had been conducted as a brothel for three weeks prior to the date libelled; that during that period and on the date libelled the accused, though not the occupier of the house, managed same as a brothel; that on the date libelled the accused went up the stairs from the street accompanied by the said Kate Dougan and a man, Hugh M'Lean, dockyard worker, 142 Blackburn Street, Glasgow; that the accused opened the door and admitted the said Kate Dougan and the said Hugh M'Lean, but did not enter the house himself; that the accused then locked the door from the outside; that constable George Ogilvie, No. 143 'E' Division, Glasgow, and constable Robert Innes, No. 144 'E' Division, Glasgow, who had been watching the house, then came up the stairs and met the accused on the stair-landing near to the door of the house and asked him to show them who was in the house; that at first the accused denied that there was anyone in the house, and refused to open the door, but latterly he opened the door and admitted them into the house; that on entering the house the constables found the said Kate Dougan and the said Hugh M'Lean in one of the rooms; that they both admitted in presence of accused that they had come there for the purpose of having sexual intercourse, and that accused admitted them into the house."

The questions of law were:—" (1) Was the accused on the facts stated a person found in a building within the meaning of the

* The Glasgow Police Act, 1866 (29 and 30 Vict. cap. cclxxiii.), enacts:—
 Sec. 142. "The provisions hereinbefore contained with respect to entering unlicensed or improper places of resort under a warrant of the magistrates shall apply to any building or part of a building ordinarily or shortly before the date of entry under such warrant used for the purpose of harbouring prostitutes for the purpose of prostitution; and by virtue of such warrant it shall be lawful for any constable to take into custody and convey to the police-office, in order to be brought before the magistrate, the occupier of such building or part of a building, or any person found therein who either temporarily or permanently manages, or assists in the management of, the business conducted therein; and the proprietor and occupier of such building or part of a building, and every person found therein who manages, or assists in the management of, such business shall be subject to the same penalties and provisions as are hereinbefore enacted with respect to the proprietor and occupier of, or to any person who manages, or assists in the management of, the business conducted in, any other unlicensed or improper place of resort."

Sec. 136 of the Act provides for entry, under warrant of a magistrate, of any "building or part of a building or other place" believed to be kept for certain purposes, among which the purpose of prostitution is not included; and for taking into custody all persons found therein: and sec. 137 provides that every proprietor who keeps any building or any part of a building for any of such purposes, and every person "who aids or assists or takes any part in the management thereof," shall be liable to a penalty.

section libelled? (2) Should I, on the facts stated as proved, have Mar. 12, 1912.
convicted the accused?"

The case was heard on 12th March 1912, when the authorities M'Intyre v.
Thomson.
noted below were referred to in the arguments.¹

LORD DUNDAS.—[After stating the terms of the complaint]—The sections of the statute to which we have been referred are certainly not happily framed, and it is not very easy to understand why the language should have been exactly what it is. But at all events it is admitted by the prosecutor's counsel that in order to get his conviction he would have to prove that Thomson was a person found in a house as libelled. Now, the facts which were here found by the Magistrate, and which of course are final, disclose that the house is one stair up, and consists of two rooms and kitchen; that it had been conducted as a brothel for a period of three weeks prior to the date libelled; and that during that period the accused managed it as a brothel. Further, that the accused went upstairs on that day with the woman named in the complaint and a man, and let them into this house. He did not go in himself, but locked the door; and then the police-constables, who had been watching, came up the stairs and met the accused on the stair-landing near to the door of the house. They asked him to show them in; he at first declined, but finally did so, and on entering the constables found the man and woman inside, who admitted that they had come for an immoral purpose. The Magistrate says, that in view of the fact that the accused was not *de facto* found in the house at the time libelled, he found the charge not proven. The question therefore is, Was the accused found in that house within the meaning of the Act?

The word "found" is a flexible term, and it is quite clear, I think, that it must be interpreted in a reasonable sense and not applied too rigidly, otherwise the statute would be perfectly nugatory. We must read it in a reasonable sense, having regard to the nature of the offence which is libelled. Now, the place where this man was undoubtedly found was on the stair-landing just outside the door of the house. He was the manager of this brothel; he was in charge of the place, and had the key of the door. Now, this being so, was he "found in the house"? I cannot help thinking that he was. The place where the police came on him was the necessary and only access to the premises, and although other persons, no doubt, have common rights in a passage of this sort, it seems to me that none the less was he in the house in the circumstances stated in the case. I do not think we derive any help from the few cases that were cited, except indeed that we have the benefit of the views stated by the Lord Justice-General in one case, viz., that you must construe words of this sort in a reasonable sense, having regard to the offence charged.

I need say no more, for I desire to deal with this case as we find it, and I do not wish to discuss other cases which may arise hereafter, and which on their facts may be more difficult. In this case I hold that the accused

¹ *For the appellant*:—Martin v. M'Intyre, 1910 S. C. (J.) 72, 6 Adam, 252; Woods v. Lindsay, 1910 S. C. (J.) 88, 6 Adam, 294. *For the respondent*:—Wright v. Smith, (1903) 6 F. (J.) 18, 4 Adam, 316; Yorkshire Fire and Life Insurance Co. v. Clayton, (1881) 8 Q. B. D. 421, at p. 424.

Mar. 12, 1912. M'Intyre v. Thomson. was a person found in a house as libelled, and within the meaning of the statute. I think we should answer the first question put to us by a finding to that effect and not by a direct answer, as the question is not too happily framed. There is no need to answer the second question, because the procurator's counsel very properly indicated that he merely wished a direction in law, and did not ask us to remit the case back in order that the accused might be dealt with for the particular offence.

Lord Dundas.

LORD SALVESEN.—I am of the same opinion. The sole question in the case is whether, it having been found as matter of fact that the respondent managed this brothel, he was found "in" the house within the meaning of the section, when he was in fact found on the landing at the head of the stair which led to the house. Now, if this had been the only house that was reached by that stair and landing, I think it would have been very difficult to say that he was not found within the house, and indeed counsel for the respondent was unable to put his case so high as that. Then, does it make any difference that certain other persons who occupy houses or flats in the same tenement, have in common with the respondent, a right to use that stair and landing? I think it makes no difference, and that within the meaning of this section the respondent was found in the house which the Magistrate has held was managed by him for an improper purpose. I therefore agree that we should pronounce the finding which your Lordship in the chair has suggested.

LORD GUTHRIE.—I agree. No reason has been suggested why the keeping or managing of a brothel should not have been added to the offences which are mentioned in section 136, in which case it would have fallen under section 137, and no such question as we have here would have arisen. But for some reason a distinction has been made, and the element of the manager of the brothel being found in the building or part of the building has been introduced, and we must give reasonable effect to these words of the section. The main purpose evidently was to strike at the manager, but that is not enough; we must find that the manager was found in the building or part of the building. The first clause of the section, which refers to the obtaining of a warrant applicable to a building or part of a building, seems to me not unimportant. It is perfectly clear that a warrant of this kind—while it would not entitle the person holding it to enter other houses let to other people in the stair—would certainly entitle him to force the outer door, if there was such a door and it was fastened, at the foot of the common stair, as well as to force the actual door applicable to this particular house. I think it is reasonable to hold that this house had two doors, an inner door and an outer door, and without deciding what other premises, pertinents of this house, such as a common lavatory, may be covered by the section of the statute, it seems to me that we should hold that the landing of this house, as to which the accused had certain rights which are not in the least comparable with those he had in the pavement outside, was a part of the house here in question.

THE COURT found in answer to the first question that the respon-

dent, on the facts stated, was a person found in a house, as charged in the complaint, within the meaning of the statute libelled.

Mar. 12, 1912.
M'Intyre v.
Thomson.

CAMPBELL & SMITH, S.S.C.—R. D. CAMPBELL M'KECHNIE, Solicitor—Agents.

JOHN NIMMO, Appellant.—*Duffes*.

THE LANARKSHIRE TRAMWAYS COMPANY, Respondents.—*Wark*.

No. 7.

Statutory Offences—Tramways Act, 1870 (33 and 34 Vict. cap. 78), sec. 51 Mar. 13, 1912.
—*Passenger travelling without paying requisite fare—Proof of fraud.*

The Tramways Act, 1870, sec. 51, enacts that any person who "having paid his fare for a certain distance knowingly and wilfully proceeds in any" tramway car "beyond such distance, and does not pay the additional fare for the additional distance" shall be liable to a penalty

Nimmo v.
Lanarkshire
Tramways Co.

Held that a person cannot be convicted of an offence under this section unless it appears that he acted with fraudulent intention.

Tramway—Statutory cars for workmen at reduced fares—Right to charge other passengers ordinary fares—Hamilton, Motherwell, and Wishaw Tramways Act, 1900 (63 and 64 Vict. cap. cxxi.), sec. 75.

A tramway company was bound by its private Act to run cars for workmen at reduced fares specified in the Act.

Opinion (per Lord Salvesen and Lord Guthrie) that the Act did not warrant the company in discriminating in the matter of fares between workmen and other passengers who were allowed to travel in cars for workmen.

JOHN NIMMO, teacher, Barrhead, was charged in the Justice of the Peace Court of Lanarkshire on a summary complaint at the instance of the Lanarkshire Tramways Company. The charge against the accused was "that on 10th July 1911, you did travel on a car of complainers from Wishaw Cross to Ladysmith Street, Wishaw, and having only paid your fare to Ladysmith Street aforesaid, you knowingly and wilfully proceeded in such tramway car to Motherwell Cross, in the parish of Dalzell, and did not pay the additional fare for said additional distance, contrary to section 51 of the Tramways Act, 1870,* which, by section 2 of the Hamilton, Motherwell, and Wishaw Tramways Act, 1900, is incorporated with that Act, whereby you are liable to a penalty not exceeding Forty shillings, as set forth in said section."

HIGH COURT.
Lord Dundas.
Lord Salvesen.
Lord Guthrie.

The accused pleaded not guilty. No proof was led, the following minute of admissions being lodged in terms of section 39 of the Summary Jurisdiction (Scotland) Act, 1908:—"The accused, John Nimmo, maintains that he regularly journeyed on Monday mornings

* The Tramways Act, 1870 (33 and 34 Vict. cap. 78), enacts:—Sec. 51. "If any person travelling or having travelled in any carriage on any tramway avoids or attempts to avoid payment of his fare, or if any person having paid his fare for a certain distance knowingly and wilfully proceeds in any such carriage beyond such distance, and does not pay the additional fare for the additional distance, or attempts to avoid payment thereof, or if any person knowingly and wilfully refuses or neglects, on arriving at the point to which he has paid his fare, to quit such carriage, every such person shall, for every such offence, be liable to a penalty not exceeding forty shillings."

Mar. 18, 1912. of each week during the past two years (except during the usual periods of school vacation) by complainers' cars from Wishaw to Motherwell Cross in order to entrain from Motherwell *via* Glasgow to Barrhead, where he has been employed as a teacher, by the train connection leaving Motherwell Station at 6.50 A.M. The time occupied by travelling from Wishaw to Motherwell Cross is about half-an-hour.

Nimmo v.
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Tramways Co.

"The complainers do not run their ordinary passenger-cars from Wishaw to Motherwell until 7.30 A.M., and accused, as also had other ordinary travellers (the complainers allowing ordinary passengers to travel on their workmen's cars), had regularly travelled on the Monday mornings referred to up till the 10th day of July 1911 mentioned in the complaint in the complainers' workmen's cars, which are run under the provisions of section 75 of the Hamilton, Motherwell, and Wishaw Tramways Act, 1900,* to the terms of which section and the Act itself the Court are respectfully referred. Accused up till said date had been regularly charged and had paid the toll authorised to be charged under said section of the Act for the journey between Wishaw and Motherwell, namely, 1d.

"Upon the said 10th day of July 1911 the accused, on way to his employment, boarded complainers' workmen's car at Wishaw, tendered and paid a penny for his fare to Motherwell, but on arriving at the stage at Ladysmith Street, Wishaw—which is the completion of the ordinary fare distance from Wishaw, and to which fare stage only the tram ticket on this day was, unnoticed by accused, punched—the conductor on complainers' car informed the accused that he would require to pay another penny for the completion of his journey to Motherwell, as the accused was not a workman, and his instructions were to charge the ordinary fare of 2d. for passengers other than workmen on workmen's cars for the journey between Wishaw and Motherwell. The accused informed him that he had regularly been charged and had paid the workmen's car rate only, which he believed to be the proper legal charge, refused to pay any additional sum for his journey, but gave the conductor his name and address. The

* The Hamilton, Motherwell, and Wishaw Tramways Act, 1900 (63 and 64 Vict. cap. cxxi.), enacts:—Sec. 75. "The Company at all times after the opening of the tramways or any part or parts thereof for public traffic shall and they are hereby required to run a reasonable number of carriages each way every morning in the week, and every evening in the week (Sundays, bank, or other public holidays excepted) at such hours not being earlier than five nor later than nine in the morning; or earlier than four in the evening respectively as the Company think most convenient for artisans, mechanics, daily labourers, clerks, and shop assistants, at tolls or charges not exceeding one halfpenny per mile. Provided that upon complaint by any Local Authority as to the hours appointed by the Company for the running of such carriages or as to the insufficiency of the accommodation provided by the Company under this section, the Board of Trade may, after hearing both parties and taking into consideration all the circumstances of the case, make such order with regard to the times of running and the number of carriages to be run as they may think just, and may also make such order as they may think fit as to the payment of the costs of any inquiry under this section. Provided also that the liability of the Company under any claim to compensation for injury or otherwise in respect of each passenger travelling by such carriages shall be limited to a sum not exceeding £100."

accused thereafter continued his journey to Motherwell Cross and left the car there. This complaint was subsequently served upon him." Mar. 13, 1912.
Nimmo v.
Lanarkshire
Tramways Co.

The accused having been convicted appealed to the High Court on a stated case.

The case (after quoting the terms of the minute of admissions as given above) set forth:—"In discussing the merits the respondents' agent pointed out (and it was admitted by appellant's agent) that in each workmen's car there were displayed in view of passengers (1) a table of the fares chargeable, and (2) a board indicating that such cars were for 'workmen.'

"After the Court had heard the respondents' agent, the appellant's agent discussed the merits and objected to the Court exercising jurisdiction in the case in respect that there was *prima facie* a question of civil right or title raised in the cause, namely, whether the respondents were entitled to exact from ordinary passengers allowed by the respondents to travel in their workmen's cars, run in terms of section 75 of said Hamilton, Motherwell, and Wishaw Tramways Act, 1900, fares exceeding the rates therein specified, and that the case consequently fell to be decided by proceedings in a civil Court.

"The Court repelled this plea, and (on the grounds that appellant was admittedly not one of the classes for whom the workmen's car in question was run, and that he continued his journey beyond the stage to which he had paid his fare after being challenged by the conductor of the car, and refusing to pay the additional fare for the additional distance) the justices held that the complaint had been proved, and found the appellant guilty as libelled, and (on account of the lengthened period during which the appellant had been allowed to travel in respondents' workmen's cars at the workmen's rates without being challenged by the conductor) the justices imposed no penalty, but admonished and dismissed the appellant."

The questions of law were:—" (1) Had the Court jurisdiction to decide the cause? and if so (2) Did the facts admitted justify a conviction of the contravention charged?"

The case was heard on 13th March 1912.

Argued for the appellant;—The Justice of the Peace Court should have declined jurisdiction in this prosecution. The question involved in the case was whether, under the respondents' private Act, the appellant was entitled to travel at the workmen's rate in workmen's cars; and that question could be determined only in a civil action and not in a summary prosecution.¹ But, apart from this, the conviction was wrong. The appellant was right in maintaining that he was entitled to travel at the reduced rate; and, secondly, there could be no conviction under the Tramways Act, 1870, section 51, unless fraudulent intention on the part of the accused was proved,² and here the facts showed conclusively that there was no fraud intended. Reference was made to the Tramways Act, 1870, section 45.

Argued for the respondents;—There was no ground for the suggestion that the Justice of the Peace Court had no jurisdiction. In cases such as *Meiklejohn v. Fisherrow Harbour Commissioners*³ or *Barlas v.*

¹ Maxwell on the Interpretation of Statutes (4th ed.), 149; *White v. Feast*, (1872) L. R., 7 Q. B. 353.

² *Thom v. Caledonian Railway Co.*, (1886) 14 R. (J.) 5, 1 White, 248.

³ (1902) 4 F. (J.) 41, 3 Adam, 556.

Mar. 13, 1912. *Chalmers*,¹ where there was a competition of heritable title, the jurisdiction of a summary criminal Court was ousted; but there were no questions unsuitable for such a Court in the present case.² The Court, having jurisdiction, had rightly convicted the appellant, for it was clear that he was not entitled to the benefit of workmen's rates; and intent to defraud need not be proved. *Thom's case*³ was not in point, as it was decided on the terms of section 96 of the Railways Clauses (Scotland) Act, 1845.⁴

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LORD SALVESEN.—The facts of this case have been ascertained by a joint minute under which they were to be accepted as if they had been duly proved in terms of section 39 of the Summary Jurisdiction (Scotland) Act, 1908; and the question is whether the accused was rightly convicted of a contravention of section 51 of the Tramways Act, 1870, which is incorporated in the Hamilton, Motherwell, and Wishaw Tramways Act of 1900.

Now, the offence which was charged against him was that he did travel on a car of the complainers, and having only paid his fare to Ladysmith Street, he knowingly proceeded on said car to Motherwell Cross, and did not pay the additional fare.

It is quite clear to my mind that if he had done that with intent to get the benefit of the extra mileage at the expense of the Company, and well knowing that he was not entitled to it, he would have been guilty of the contravention charged against him. But these are not the facts here. The appellant is a teacher, who for two years had been in the habit of travelling by this early morning car which the Company run, in terms of section 75 of their own Act of Parliament, which requires them to run trams at such hours in the morning as are most convenient for artisans, mechanics, daily labourers, clerks, and shop assistants. Now, the appellant on the occasion in question was asked to pay an additional fare of a penny, and he declined to do so. He gave his name and address, and stated that he considered he was entitled to go to the end of his journey without paying an additional fare, he having paid as much as any workman would have paid for the same distance. The element of fraud, therefore, seems to me to be totally absent. It is not suggested that he was intending to cheat the Tramway Company of their rights. He was maintaining, as every citizen is entitled to do, a civil right on his part, and I think it was a somewhat harsh proceeding to bring him before a Court primarily of criminal jurisdiction and have him convicted in the same way as if he had been travelling with intent to defraud the Company. The case of *Thom*,³ to which we were referred, seems to settle that a contravention of this kind is not really made out unless the person charged is proved to have had a fraudulent or criminal intent. That being absent in this case, I am of opinion that the Magistrates ought not to have convicted.

It is unnecessary that we should decide the other questions, which are of general application. All I shall say with regard to Mr Duffes's contention

¹ (1876) 3 R. (J.) 26, 3 Coup. 279.

² *Scott v. Thomson*, (1887) 14 R. (J.) 45, 1 White, 398.

³ 14 R. (J.) 5, 1 White, 248.

⁴ *Apthorpe v. Edinburgh Street Tramways Co.*, (1882) 10 R. 344, was also referred to.

upon section 75 is that, as at present advised, I think the appellant was Mar. 13, 1912.
 right in the view which he took of his legal liability. It may be that the ^{Nimmo v.}
 Tramway Company could have refused to have taken him as a passenger on ^{Lanarkshire}
 a workmen's car: I express no opinion upon that point. But having ^{Tramways Co.}
 admitted him on to this workmen's car, they need to make out that they ^{Lord Salvesen.}
 have statutory warrant for discriminating in the matter of fares between
 persons who are within the enumerated classes and those who are not.
 Now, as matter of construction, I do not think the section is capable of
 being so construed. The provision is that the Company are to run certain
 cars, not for artisans and so on only, but at such hours as are most con-
 venient for artisans, mechanics, daily labourers, clerks, and shop assistants;
 and then it is provided that all tolls or charges on such cars are not to exceed
 a halfpenny per mile. I see no warrant for the Company discriminating
 between one passenger and another, more especially as the Company main-
 tains that the limitation of liability contained in the same section applies to
 all who may use these workmen's cars. That is the view which I at present
 entertain on the point; but, of course, that will not form *res judicata* in
 any civil proceedings which the Company may choose to institute in the
 way of declarator or otherwise. But it makes it very clear that we cannot
 say that this appellant was guilty of any offence when he was simply main-
 taining, on reasonable grounds, his rights as a citizen, as he conceived them
 to be, under certain Acts of Parliament which define the rights of the under-
 takers of the tramway system in question.

For these reasons, and without expressing any opinion on the question of
 civil jurisdiction, on which the argument was not seriously pressed, I am
 for sustaining the appeal and holding that the second question should be
 answered in the negative.

LORD GUTHRIE.—I agree. There are three questions raised here in the
 two queries in the case, the first question being, Had the Court jurisdiction
 to decide the case? and the other two questions being raised by the second
 query, namely, Could the appellant be properly convicted unless it appeared
 that his action was fraudulent? and, secondly (this being his argument on
 the statute of 1900), Was he entitled to do what he did, and to refuse the
 extra payment which was asked from him? The question of jurisdiction
 was, I think, cleared up in the end by a citation of authorities which seemed
 to show that there was no case where, on a question of construction of a
 statute not involving any question of heritable right or competing title, the
 Justiciary Court came to the conclusion that the matter could be dealt with
 only by way of declarator.

On the question of fraud I entirely agree with your Lordship, and I think
 that the rubric of section 51 of the Tramways Act, 1907, although not
 authoritative, is quite accurate, namely, "Penalty on passengers practising
 fraud on the promoters."

On the last question I also agree with your Lordship, although it is not
 necessary to come to any final conclusion upon it. It raises a very large
 question directly affecting general tramway interests and indirectly general
 railway interests. It was Mr Wark's contention that you should look only
 at the origin and object of the Act; but, on the other hand, I do not find any

Mar. 13, 1912. provision in the Act to the effect that, in the case of cars which are meant for workmen, if the Tramway Company choose to allow other people to board them they will be, in the event of an accident, under a restriction of liability and entitled to differentiate between such cars and those expressly mentioned in the section. It seems to me that these are in the same position as if they were labelled " $\frac{1}{2}$ d. a mile cars," and no such distinction may be made. But, as your Lordship has said, the ground connected with the necessity for fraud is sufficient for the decision of this case.

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Lord Guthrie.

LORD DUNDAS.—I agree that in the circumstances stated the appellant was not guilty of any offence, and therefore we should answer question 2 in the negative, and that is enough to dispose of the case. It is unnecessary to answer the first question.

As regards the construction, scope, and meaning of section 75 of the local Act of 1900, that is a matter which may form the subject of proceedings hereafter and elsewhere, and, for myself, I express no opinion upon it.

THE COURT answered the second question in the negative, found it unnecessary to answer the first question, and sustained the appeal.

DRUMMOND & FRASER, S.S.C.—PATRICK & JAMES, S.S.C.—Agents.

No. 8. THE WARDENS AND COMMONALTY OF THE MISTERY OF THE FISHMONGERS OF THE CITY OF LONDON AND ANOTHER, Complainers (Appellants).
Mar. 14, 1912. —Clyde, K.C.—Pringle.

Fishmongers
of London v.
Stiven.

WILLIAM STIVEN, Respondent.—Hon. W. Watson.

Fishing—Salmon Fisheries (Scotland) Act, 1868 (31 and 32 Vict. cap. 123), sec. 21—Possession of salmon in close time—Defence that salmon taken with rod and line—Onus of proof.

The Salmon Fisheries (Scotland) Act, 1868, sec. 21, renders liable to a penalty any person who shall "have in his possession any salmon taken" during the "annual close time." It has been decided that "annual close time" refers only to net-fishing, and that there is no offence if the salmon was taken by rod and line at a time when rod-fishing was open.

Held that proof of possession within the close time is *prima facie* proof of the offence, and that the onus of establishing capture by rod and line rests on the accused.

HIGH COURT. WILLIAM STIVEN, fishmonger, Dunfermline, was charged in the Sheriff Court there on a summary complaint at the instance of the "Wardens and Commonalty of the Mistery of the Fishmongers of the City of London" and Robert Pringle, W.S., Edinburgh. The charge against the accused was that on 12th October 1911, "at the shop occupied by you in Randolph Street, Dunfermline aforesaid, you had in your possession a salmon taken within the limits of the Salmon Fisheries (Scotland) Act, 1868 (31 and 32 Victoria, chapter 123), between the commencement of the latest and the termination of the earliest annual close time which was in force at the time, contrary to section 21 of the said Salmon Fisheries (Scotland) Act, 1868.* . . ."

* The Salmon Fisheries (Scotland) Act, 1868 (31 and 32 Vict. cap. 123), enacts:—Sec. 21. "Any person who shall buy, sell, or expose for sale, or

The accused pleaded not guilty, and, after a trial, the Sheriff-sub-stitute (Umpherston) found the charge not proven. Mar. 14, 1912.

The complainers appealed on a stated case, which set forth:—

Fishmongers
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“The following facts were admitted or proved at the trial, namely:—

“(1) The respondent was in possession, at the shop occupied by him as a fishmonger and poulterer in Randolph Street, Dunfermline, in the county of Fife, of one salmon upon the 12th day of October 1911, being a date between the commencement of the latest and the termination of the earliest close time which was in force at that date for the whole of Scotland.

“(2) The respondent had purchased the said salmon in ordinary course of trade from George Davis, fisherman, Kincardine.

“(3) The respondent had instructed the said George Davis never to send salmon to him which had not been legally caught. He did not know where Davis got the said fish or how it had been caught.

“(4) The said salmon was purchased by the said George Davis on Wednesday, 11th October 1911, from a man named Hunter, both Davis and Hunter being then in their respective boats on the River Forth. George Davis did not ask, and was not informed by, Hunter where or how the fish had been caught. On said date the River Forth and most other rivers in Scotland were open for fishing by rod and line.

“I found the charge in the said complaint not proven, in respect that the accused took all necessary precautions to see that any fish possessed by him was not illegally taken.”

The questions of law were:—“(1) Was the respondent bound to prove that the said salmon was taken beyond the limits of the Act, meaning thereby outwith Scotland? (2) Was I entitled to hold the offence charged not proven?”

The case was heard on 14th March 1912.

Argued for the appellants;—The Sheriff-substitute's decision was wrong. All that the appellants required to prove under their complaint was that the respondent was in possession of the salmon as libelled; they did not require to prove how the salmon was taken, and, although the respondent would not be liable if the salmon was caught by rod and line,¹ the burden of proving that the salmon was caught in this way rested on him.²

Argued for the respondent;—Section 21 of the Salmon Fisheries Act, 1868, put the onus on the accused to show that the salmon was taken outside the limits of the Act. The burden thus expressly placed on the accused could not be enlarged. The defence here was that the

have in his possession, any salmon taken within the limits of this Act between the commencement of the latest and the termination of the earliest annual close time which is in force at the time for any district, shall be liable to a penalty not exceeding £5, and to a further penalty not exceeding £2 for every salmon so bought, sold, or exposed for sale, or in his possession; and any salmon so bought, sold, or exposed for sale, or in his possession shall be forfeited; and the burden of proving that any such salmon was caught beyond the limits of this Act shall lie on the person selling or exposing the same for sale, or having the same in his possession.”

¹ Blair v. Shepherd, (1871) 2 Coup. 28, 43 Scot. Jur. 380.

² Stevenson v. M'Levy, (1879) 6 R. (J.) 33, 4 Coup. 196; Chalmers v. MacGlashan, (1886) 13 R. (J.) 17, 1 White, 1; M'Attee v. Hogg, (1903) 5 F. (J.) 67, 4 Adam, 190; H. M. Advocate v. Fleck, Scotsman newspaper for May 30, 1910.

Mar. 14, 1912. salmon was caught by rod and line, and it lay on the complainers to show that this was not so,¹ and this they had failed to prove.

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Fishmongers
of London
v. Stiven.

LORD SALVESEN.—I think this is a very clear case. The complaint is brought under section 21 of the Act 31 and 32 Vict. cap. 123, and the complaint is that the respondent had in his possession a salmon taken within the limits of the Salmon Fisheries (Scotland) Act, 1868, between the commencement of the latest and the termination of the earliest annual close time which was in force at the time, contrary to section 21. I think the meaning of that section is not really doubtful, although the collocation of the various sentences of which it is composed might have been better arranged. The essence of the offence is being in possession of a salmon between the commencement of the latest and the termination of the earliest close time. That has been interpreted to mean the close time for net fishing, and accordingly that must be read into the Act now in consequence of judicial decisions to that effect. The words “taken within the limits” appear to me to be almost unnecessary in view of the qualification which follows, and which entitles a person, who is in possession of a salmon within the period of time mentioned, to prove that the salmon of which he is in possession was not taken within the limits in Scotland to which the Act applies, which again has been interpreted to mean the whole of Scotland. If you have possession within the particular period, the offence is *prima facie* committed.

It is quite true that the Courts have also held that, in addition to the defence which is expressly mentioned, the accused may elide the operation of the statute by proving that the salmon of which he is in possession has been caught by rod and line during the period that the privilege of rod and line fishing continued in the district in which it was caught. I think it is quite clear that the onus of proving a special defence of that kind is upon the accused, just as the onus of proving that the salmon has been taken outside of Scotland is upon the accused. It is a special defence which, the Courts have held, may be implied from the statute taken as a whole; but it is a defence which the accused must establish. If it were otherwise, it would seem to me that the whole of this provision would be nugatory, because it would be upon the prosecutor in each case to prove by what method the salmon was taken, and, unless he could do that, he would not be able to get a conviction against the person who had exposed it for sale. That is plainly not what the statute means, because the essence of the offence is the possession of a salmon during the close time. Accordingly I think the Sheriff has erred, and I propose that we should answer the first question in the affirmative and the second question in the negative.

The LORD JUSTICE-CLERK and LORD GUTHRIE concurred.

THE COURT sustained the appeal, and found that, on the facts stated in the case, the Sheriff-substitute should have convicted the respondent.

R. PRINGLE, W.S.—J. STEWART, S.S.C.—Agents.

¹ *Wilsone v. Harvey*, (1884) 12 R. (J.) 12, 5 Coup. 518; *Chalmers v. M'Glashan*, 13 R. (J.) 17, 1 White, 1.

THE BRITANNIC ASSURANCE COMPANY, LIMITED, Appellants.—

No. 9.

*Munro, K.C.—D. Anderson.*JAMES HENDERSON, LIMITED, AND OTHERS, Respondents.—*Macquisten.*

Mar. 14, 1912.

Sheriff—Small-debt procedure—Review—Small Debt (Scotland) Act, 1837 (7 Will. IV. and 1 Vict. cap. 41), sec. 31—Wilful deviation from statute which prevents substantial justice being done—Multiplepoinding—Competency.

Britannic Assurance Co., Limited, v. James Henderson, Limited.

The Small Debt (Scotland) Act, 1837, sec. 31, permits appeal from the decision of the Sheriff in small-debt actions on certain grounds only, including "such deviations in point of form from the statutory enactments as the Court shall think took place wilfully, or have prevented substantial justice from having been done."

A small-debt action of multiplepoinding was brought in name of an insurance company by a creditor of a deceased policy-holder, the fund *in medio* being the sum due under the policy. The summons did not comply with section 10 of the Small Debt (Scotland) Act, 1837, which enacts that the "common debtors" shall be cited, the only parties cited being creditors of the deceased. The representatives of the deceased had not confirmed, and were not cited. The Sheriff-substitute, although aware of the fact that the statute had not been complied with, repelled an objection to the competency of the action based on that fact, and pronounced a decree of ranking and payment.

Held that an appeal against this interlocutor was competent, as the Sheriff-substitute's intentional disregard of the statute was a deviation therefrom, which had taken place "wilfully," and which also prevented substantial justice from being done in respect that a decree in the action would not afford the insurance company complete exoneration.

Held also that the multiplepoinding was incompetent, and the Sheriff-substitute's interlocutor *recalled*.

ON 6th June 1911 James Henderson, Limited, carriage-hirers, Glasgow, brought a small-debt action of multiplepoinding* in the Sheriff Court at Glasgow in name of the Britannic Assurance Company, Limited, as pursuers and nominal raisers. The summons bore that the nominal raisers were the holders of £17 contained in a policy with them on the life of the deceased Alexander Gray, who resided in Glasgow; and it called as defenders Dr J. A. Aitken, Glasgow, the Household Supplies Company, Limited, Glasgow, and

HIGH COURT.
Lord Justice-Clerk.
Lord Salvesen.
Lord Guthrie.

* The Small Debt (Scotland) Act, 1837 (7 Will. IV. and 1 Vict. cap. 41), enacts:—

Sec. 10. "Where any person shall hold a fund or subject which shall not exceed the value of eight pounds six shillings and eightpence, which shall be claimed by more than one party under arrestments or otherwise, it shall be competent to raise a summons of multiplepoinding in the Small-Debt Court . . . which summons and procedure thereon shall be agreeable to the form in Schedule (E) annexed to this Act, and the claimants and common debtors, and also the holder of the fund or subject, if the process be raised in his name by any other party interested, shall be cited in manner directed to be followed in actions of forthcoming raised under this Act. . . ." In Schedule E is given a form of summons in which the common debtor is cited.

Sec. 31, so far as material, is quoted in the rubric.

The Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. cap. 51), sec. 42, extends the provision of the Small Debt Act to causes of which the value does not exceed £20.

Mar. 14, 1912. the deceased's mother, Mrs Margaret Gray, Glasgow, all of whom were creditors of the deceased; but it did not cite or contain any reference to a common debtor.

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Britannic
Assurance Co.,
Limited, v.
James
Henderson,
Limited.

The facts of the case were stated in the note of the Sheriff-substitute (Fyfe) as follows:—"Alexander Gray, now deceased, was assured with pursuers' company under a policy dated 14th May 1900. Gray having died, there is a small sum of about £14 payable under the policy. Gray has left a widow, but she is in America, and she will not move to collect the money. Then he has left a document which may, I think, be regarded as a will in favour of his mother, giving her as a special legacy the sum payable under the policy, but she will not act, for she would have the cost of confirmation to face and the preferable claims for deathbed and funeral expenses will obviously more than swallow up the fund. In these circumstances the funeral undertaker, in order to recover his account out of the insurance money, brings this action of multiplepounding in the Small-Debt Court."

The policy contained a clause, which will be found quoted in the Sheriff-substitute's note, *infra*. p. 33, providing for the discharge of the Company on payment being made to certain specified representatives of the assured.

The Britannic Assurance Company, Limited, having objected to the competency of the action, the Sheriff-substitute repelled the objections,* and thereafter pronounced an interlocutor ranking the

* "NOTE.—[After stating the facts as above]—Henderson, the funeral undertaker, is the real raiser. The action is in the name of the Assurance Company as pursuers and nominal raisers. The convenience of this proceeding is obvious, but the Assurance Company challenges its competency. I am exceedingly averse to holding that the procedure is incompetent, because the system of industrial assurance is very wide spread, and the sum payable under such policies being generally small, the Small-Debt Court is a most convenient tribunal for discharging the Assurance Company and allocating the amount due under such a policy amongst relatives or creditors or others entitled to it. But, of course, competency cannot be sacrificed to convenience, and if it were the case, as the pursuers contend, that the Assurance Company would not be exonerated under a decree upon this summons, then I could not hold that the process is competent, for the first and leading object of any multiplepounding process is to exoner the holder of the fund. It does not, however, appear to me that there is any doubt that a decree in this action will exoner the pursuers, and if they are exonerated they have no interest to oppose the action.

"No creditor has arrested the fund in the hands of the Assurance Company, and no creditor could do so, for there is no common debtor as regards this fund. One peculiarity of the present summons is that all reference to the common debtor has been deleted, and I have some doubt as to whether, speaking generally, an action of multiplepounding can ever be a competent process where there is no common debtor, and still graver doubt as to whether under the Small Debt Act the elimination of the common debtor from the statutory form of summons does not vitiate the process.

"I do not attach any importance to the fact that no arrestments have been used, for the old ideas about double distress are not now entertained, and wherever the holder of a fund is distressed by competing claims being made upon it—that is to say, wherever there is more than one party with an ostensible claim—I think an action of multiplepounding is a competent process.

"On the other hand, small-debt procedure is a subject of statutory enact-

real raisers and the compearing defenders, and decerning against the Assurance Company for payment to them of the fund *in medio*. Mar. 14, 1912.

Against this interlocutor the Assurance Company appealed to the Circuit Court at Glasgow on a note of appeal which set forth the following grounds of appeal:—“(a) Incompetency. The appellants under the policy referred to in the summons are bound to pay the sum assured to the ‘representatives, executors, administrators, or permitted assigns’ of the assured. The claimants are neither representatives, executors, administrators, nor assigns of the assured, and have, therefore, no claim against the appellants. There is accordingly no double distress, and the appellants would not be discharged of their obligation in the policy. (b) Wilful deviation in point of form from the statutory enactments. The summons is not in conformity with Schedule E and section 10 of the Small Debt Act, 1837. There must be a

Britannic Assurance Co., Limited, v. James Henderson, Limited.

ment, and section 10 of the Small Debt Act of 1837 is peremptory in its terms. A multiplepinding action in the Small-Debt Court is directed to be raised in the form of Schedule E which includes the common debtor as a party, and it is an express direction of the statute that the common debtor shall be called as a party. Probably, however, the breadth of view which subsequently to 1837 the law has come to take of the matter of double distress may also be reasonably accorded now to the question of the common debtor. If it is competent, as in the general case I think it now is, to use a process of multiplepinding to exoner the holder and distribute any fund to which there are rival claims, then I think section 10 of the Small Debt Act may be read in the light of the modern view of double distress, and so read, that section seems to me to make this action competent.

“I think it is clear that under section 10 of the Small Debt Act it would have been competent for the Assurance Company itself to have raised an action of multiplepinding, for the only requirement of section 10 is that the fund is in some way claimed by more than one party. If it would have been competent for the Assurance Company itself to raise this action, then I think it is competent for any claimant also to do so unless he is excluded under special contract.

“It is suggested that the policy here is such a special contract excluding creditors. The policy bears that ‘production by the said Company of a receipt for any moneys payable hereunder signed by any person being either an executor or administrator or the husband or wife or a relation by blood or connection by marriage of the assured shall be a discharge to the Company for the same, and shall be final and conclusive evidence to all intents and purposes that such sum has been duly paid to and received by the person or persons lawfully and rightfully entitled to the same, and that all claims and demands whatsoever against the Company in respect of this policy have been fully satisfied.’ In the present case nobody will confirm, so there is no executor to grant a discharge to the Company. The widow will not do so, and no blood relation is in a position to do so. But I do not think that that exhausts the possibility of the Company getting a discharge.

“It would be most unfair to creditors to hold that the Assurance Company is not bound to pay the money to anybody, merely because none of the parties mentioned in the policy is in the position to grant a discharge for it. Of course it is quite true that a creditor could get himself confirmed as executor *qua* creditor of the deceased Alexander Gray, and what the Assurance Company wants is to be sure that whoever takes up this money is in a position to grant a good and valid discharge which can be afterwards pled against any claimant, such as the widow or the mother or anybody else. If it were worth while perhaps the strictly formal course would be

Mar. 14, 1912. common debtor, but there is no common debtor in the summons, the words 'common debtor' in the statutory form of the summons having been deleted."

—
Britannic
Assurance Co.,
Limited, v.
James
Henderson,
Limited.

The appeal was heard at the Circuit Court in Glasgow on 28th February 1912 by Lord Dundas, who certified it for hearing by the High Court at Edinburgh.

The case was heard before the High Court on 14th March 1912.

Argued for the appellants;—The grounds of appeal fell within those specified in section 31 of the Small Debt Act of 1837, and, therefore, the appeal was competent. Section 10 of that Act was imperative, and, as the Sheriff-substitute had consciously disregarded its provisions, there was wilful deviation from a statutory enactment. Also the course followed involved serious injustice to the appellants, because they would be ordained to pay the fund *in medio* without obtaining a proper discharge. On the merits the multiplepounding was clearly incompetent. The fund belonged to the executor of the deceased, and the claims of creditors were merely riders on his claim.¹ The action was really an attempt to distribute the estate of a deceased person without an executor being appointed. The Sheriff-substitute

for the funeral undertaker to take proceedings in the Commissary Court to be decerned as executor-creditor of the deceased Alexander Gray, but the cost of this would greatly diminish if not swallow up the estate which consists only of the small sum payable under this policy. In the circumstances I have come to the conclusion, although not without some hesitation, that the present summons is competent. I reach this view mainly upon the broad ground that it would have been competent for the Assurance Company itself to bring an action, and that where it is competent for the holder of a fund to raise an action, it is also competent for a claimant upon that fund to raise an action in the holder's name.

"Apart from the technical view where the fund is a small sum payable under an industrial insurance policy (the main purpose of which is to provide a fund to meet funeral expenses) it would be most inequitable that such a creditor as a funeral undertaker should be forced to go to the expense of confirming as executor-creditor when there is a ready means in the Small-Debt Court of distributing the insurance fund. The form of the small-debt decree exonerates the pursuer and nominal raiser, and all the other parties are 'prohibited from molesting the pursuer thereanent in all time coming.' I think, therefore, that the fear of the present pursuers that they may afterwards be annoyed by somebody else claiming the fund is rather visionary, and, if any claimant did appear, the production of decree in the present process would be an immediate and sufficient answer to any possible claim. I can conceive of no more useful purpose which the Small-Debt Court machinery can be put to than to save a small estate like this from being squandered in the expense of more formal proceedings by creditors of the deceased, and even if there is any technical doubt about the competency, the nominal raisers can be in no way prejudiced by the fact that this action has been raised by a creditor rather than by the holder of the fund. It is against public policy to force a creditor to take a more expensive course to recover his debt when a less expensive course is open to him, and when the adoption of that less expensive course cannot prejudice the holder of the fund.

"In the whole circumstances I am not prepared to sustain the nominal raisers' plea that the action is incompetent. The amount payable under the policy is I understand agreed upon as £13, 19s. I have accordingly ordered claims in the usual way."

¹ Glen's Trustees v. Miller, 1911 S. C. 1178.

was in error in assuming that the appellants could have brought the action. Mar. 14, 1912.

Argued for the respondents;—The appeal was incompetent. Wil-
ful deviation from a statute in the sense of section 31 of the Small Debt Act was capricious deviation.¹ There had been no such deviation here, and there was no real risk of injustice to the appellants. Considerations of expediency were all in favour of the Sheriff-substitute's action. But assuming appeal were permitted there was no ground for holding that the action was incompetent. There was no common debtor who could be called, and therefore the statutory requirement that the common debtor should be called did not apply. In circumstances similar to the present, actions of multiplepoinding had been entertained.²

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LORD GUTHRIE.—This case, although dealing with a small sum of money and coming from the Small-Debt Court, raises a general question of some importance. What the Sheriff has done in finding the action competent by his interlocutor of 21st June 1911 is objected to on two grounds: first, that, contrary to section 31 of the Small Debt Act of 1837, the Sheriff wilfully deviated from the statutory form; and, second, that, contrary to the said section, what the Sheriff did prevented substantial justice being done. It was put as a separate point that there was no double distress. This is not an independent point. We cannot interfere if the Sheriff has found double distress in fact when there was none, or even if he has wrongly held in law that double distress was not required. This objection can only prevail if we think that the absence of double distress has led to substantial injustice being done. It seems to me that both objections are well founded.

In the multiplepoinding the Assurance Company, who had the policy on the life of the deceased, amounting to £17, were called, and also certain people who were creditors of the deceased. One of these happened to be his mother, but she was not called as one of the representatives of the deceased, but on account of some claim—apparently a good claim—which she had for nursing him in his last illness. The result is that nobody was called who had any adverse claim or who had any knowledge which would enable them to question the creditors' claims to which I have referred. It so happened that there was enough money to satisfy all the claims. In these circumstances the Assurance Company, who are the appellants here, say that if the Sheriff is right in his view they will not be in the position, which they ought to be in, of having a decree that would enable them to be safe in the future against subsequent claims either by other creditors who are not called, or by the representatives of the deceased disputing the soundness of the present creditors' claims. The only interest the Assurance Company have to raise this question is to get a discharge good against all the world.

Now, it is said that whether the Sheriff was right or wrong, or however much he was wrong, this question cannot be raised. It appears to me that

¹ Paterson & Sons v. Robinson, (1895) 22 R. (J.) 45, 1 Adam, 576; Allison v. Balmain, (1882) 10 R. (J.) 12, 5 Coup. 137; Wilson v. Glasgow Tramways Co., (1878) 5 R. 981; Lees's Small-Debt Handbook, p. 96.

² Royal Bank of Scotland v. Price, (1893) 20 R. 290; Catanach v. Gordon, (1744) M. 12,253.

Mar. 14, 1912. under the Small Debt Act of 1837, section 31, that view is not well founded.

Britannic Assurance Co., Limited, v. James Henderson, Limited.
Lord Guthrie. The statute entitles this Court to inquire into what has been done in the Small-Debt Court if it appears that there has been a wilful deviation from the statutory form, or if what has been done has prevented substantial justice from being done. It is not denied that there has been deviation from the statutory form; but it is said that that deviation has not been wilful. It seems to me that the view taken by Lord Kinnear in one of the cases referred to is well founded where he interpreted the word "wilful" to mean "of set purpose." If that is the proper view, it is quite clear that the Sheriff, with his eyes open, deviated from the statutory form, and justified his doing so on the ground of convenience and public policy—grounds which might have been extremely proper for the Legislature to have considered and to have acted upon, but which were not open to the Sheriff to consider, and, if he has considered and given effect to them, we are bound to put the matter right.

He says expressly: "It is an express direction of the statute that the common debtor shall be called as a party." Mr Macquisten pointed out that, so far as the schedule was concerned, there might be room for difference of opinion; but he did not dispute, what the Sheriff expressly affirms, that the statute, in section 10, distinctly states that the common debtor shall be cited. But then it is said that in this case the deviation was unavoidable, because there was no common debtor. The Sheriff has not given effect to that, although he has pointed out that the widow refused to grant a discharge to the Company, and that there was no blood relation in a position to do so. It appears to me clear that there is a common debtor. The estate belonged to the deceased and was part of his *hæreditas jacens*. The policy by which the appellants were bound to walk provides that the proceeds were to be paid to the "representatives, executors, administrators, or permitted assigns" of the assured. I do not see any difficulty in the summons being made to comply with the statute and calling, whether they were willing to appear or not—that is no concern of those who framed the summons—the representatives of the deceased.

Mr Macquisten figured cases where there might be no common debtor; but these would raise questions with which we have nothing to do here. If there is a common debtor, then the question simply is, Was the Sheriff-substitute entitled to pass a summons in which the common debtor was eliminated from the statutory form? He says himself that he has some doubt as to whether there can be a competent process where there is no common debtor; and he says he has "still graver doubt as to whether under the Small Debt Act the elimination of the common debtor from the statutory form of summons does not vitiate the process." It seems to me that that doubt is well founded, and that the Sheriff should have held that, the statutory form having been deviated from, he was bound to hold the summons incompetent.

If so, that is sufficient for the determination of the case. But I further think that the Assurance Company are quite entitled to maintain that what the Sheriff has done has prevented substantial justice; because he has put them in a position which might not in this particular case lead to any harm, but which, in another case, which would be ruled by this case, might lead

to the Company being put into a very serious position in paying away Mar. 14, 1912. money to poor people from whom it would be improbable that they could get it back. That being so, the question of there being no double distress becomes a practical question productive of substantial injustice. I cannot agree with what the Sheriff says in his judgment, where he seems to say that, if you have a number of claims you have a case where a multiplepounding is competent, whether there be any competition or not between these claims. In that sense he holds competing claims to be identical with several claims. That is clearly wrong; and therefore that is another ground for sustaining the appeal.

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Lord Guthrie.

In these circumstances I think we must give effect to the appellants' contention, and refuse to sustain what the Sheriff has done.

LORD SALVESEN.—I entirely agree. The effect of what the Sheriff-substitute has done is to constitute an action of multiplepounding in the Small-Debt Court as a mode of distributing the estate of a deceased person. Now that is not merely a novel but, as I think, an entirely incompetent proceeding. There is legislation which provides for the distribution of estates of solvent persons and for making up a title to such estates; and where the estates are small, provision is made for the expenses being kept at a minimum. I never heard of an action of multiplepounding being used in order to supersede the necessity of executry administration, but that is what the Sheriff-substitute has, in effect, done by sustaining this action of multiplepounding; and he has done so in a case where he has thought fit to leave out of the proceedings entirely the only persons who are interested in the division of the estate of the deceased, to wit, those who would be entitled to it in consequence of the death. That makes it possible for us to interfere with his decision; because, as Lord Guthrie has pointed out, in order to reach that result he has committed a wilful deviation from the forms prescribed by the Small Debt Act.

I have no hesitation in agreeing with the view that he has also committed substantial injustice; because I do not think that a decree in a multiplepounding, so called, to which certain creditors only are cited, would exonerate the holders of the fund as in a question with other persons who are not parties to that multiplepounding. Accordingly, I agree with Lord Guthrie in the result at which he has arrived.

LORD JUSTICE-CLERK.—I am entirely of the same opinion.

THE COURT sustained the appeal, recalled the judgment of the Sheriff-substitute appealed against, and decerned.

SIMPSON & MARWICK, W.S.—HYSLOP & SHAW, W.S.—Agents.

No. 10.

Mar. 14, 1912.

Taylor v.
Nicol.

ROBERT TAYLOR, Complainer.—*T. G. Robertson.*
 GEORGE NICOL (Burgh Prosecutor, Stirling), Respondent.—
C. H. Brown.

Police Offences—Street—Burgh—Regulation of traffic—Bye-law—Order—Ultra vires—Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), sec. 385.

Under sec. 385 of the Burgh Police (Scotland) Act, 1892, the magistrates of a burgh may make "bye-laws and issue notices and orders," *inter alia*, "regulating the traffic, or any particular traffic, in streets within the burgh." The Act further provides that such bye-laws shall be confirmed by the Sheriff and the Secretary for Scotland, but contains no such provision with regard to notices and orders.

Held that an "order," made by magistrates in pursuance of this section, by which omnibuses were forbidden to turn in certain streets of the burgh was invalid, in respect that, as the regulation was intended to be permanent, it could be competently made only by bye-law.

Baikie v. Charleson, (1901) 3 F. (J.) 54, 3 Adam, 323, *followed*.

HIGH COURT. ON 13th December 1911 Robert Taylor was charged in the Police Court at Stirling on a summary complaint at the instance of George Nicol, burgh prosecutor. The charge was that "on 9th December 1911, in Barnton Street, in the burgh of Stirling, you did contravene the Order made by the Magistrates of the royal burgh of Stirling for the regulation of street traffic, dated the 28th day of March 1910, under the powers conferred on them by the Burgh Police (Scotland) Act, 1892, section 385 (1),* in so far as you, while acting as driver of motor char-à-banc M. S. 74, the property of Messrs Robert Taylor & Son, carriage-hirers, Bannockburn, and then plying for hire between Stirling and Bannockburn aforesaid, did turn said motor char-à-banc in Barnton Street aforesaid, instead of as prescribed by Order at that part of Viewfield Place opposite the County Buildings in the burgh of Stirling aforesaid, whereby you are liable to a penalty not exceeding forty shillings, and, in default of payment, to imprisonment in terms of the Summary Jurisdiction (Scotland) Act, 1908, section 48."

The accused, having been convicted and admonished, brought a bill of suspension in which he averred:—(Stat. 2) "On 28th March 1910 the Magistrates of Stirling made an Order in the following terms:—'The Magistrates of the royal burgh of Stirling, by virtue of the Burgh Police (Scotland) Act, 1892, section 385 (1), hereby order that no omnibuses plying for hire, whether driven by motor power

* The Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), enacts:—Sec. 385. "The magistrates may from time to time make bye-laws and issue notices and orders—(1) Regulating the traffic, or any particular traffic, in streets within the burgh; (2) Diverting temporarily out of any street or streets traffic of every kind, or such particular kinds of traffic as may be specified in any such order or notice; (3) Prescribing the streets in or through which particular kinds of traffic shall not be permitted, or where permitted the hours within which they are permitted; (4) Prohibiting or regulating public processions . . ."

Under sec. 318 bye-laws under the Act (with certain exceptions not here material) require to be confirmed by the Sheriff and the Secretary for Scotland; and sec. 319 provides for the advertisement of notice of the intention to apply for confirmation and for the hearing of objections. There are no such provisions in regard to notices and orders.

or horses, and approaching from Port Street, King Street, or Station Road, shall be turned in the streets known as Murray Place and Barnton Street, within the burgh of Stirling, and that the turning place for such omnibuses shall be at that part of Viewfield Place opposite the County Buildings. Every person committing a breach of this Order shall be liable to a penalty not exceeding forty shillings.' Thereafter the said Order was published in Stirling, and on or about 5th April 1910 copies of it were sent by the Town-Clerk of Stirling to the various carriage-hirers in the burgh, with a request that they should instruct their men 'to give careful attention.' (Stat. 3)

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"The said Order purports to make, and is interpreted by the respondent and the Magistrates of Stirling as making, permanent regulations for street traffic in Stirling. Moreover, the regulations therein contained constitute an unreasonable and unnecessary interference with the business of carriage-hirers in Stirling. There are places within the area dealt with by the Order, other than 'that part of Viewfield Place opposite the County Buildings,' where there is ample room for omnibuses to turn without danger to or obstruction of the other street traffic. No opportunity was given to any private citizen in Stirling to object to the said Order or the regulations contained therein. If the Magistrates of Stirling, in making permanent regulations for street traffic in the burgh, had proceeded by way of bye-laws duly confirmed by the Sheriff, the complainer would have had an opportunity of objecting, and would have objected to any regulations such as are contained in the said Order."

Answers were lodged by the respondent, George Nicol, in which he averred, *inter alia*, that the regulations in the Order were reasonable and necessary for the safety of the public, and were within the powers conferred on the Magistrates by the Burgh Police (Scotland) Act, 1892, section 385 (1).

The complainer pleaded, *inter alia*;—The conviction and sentence complained of ought to be suspended *simpliciter*, in respect—(1) That the complaint is irrelevant. (2) That the said Order of the Magistrates is not authorised by the statute by virtue of which it bears to have been made, and is *ultra vires* and illegal.

The respondent pleaded, *inter alia*;—(1) The bill of suspension should be refused in respect that the Order complained of was made in conformity with section 385 (1) of the Burgh Police (Scotland) Act, 1892, and within the powers conferred upon the Magistrates thereby.

The case was heard on 14th March 1912.

At the hearing *Baikie v. Charleson*¹ having been cited for the complainer, counsel for the respondent submitted that that decision did not rule this case, as the Order there considered fell under subsection (3) of section 385 of the Burgh Police Act, and was a prohibition of traffic, whereas the Order complained of here fell under subsection (1) and merely regulated, and did not prohibit, traffic.

LORD JUSTICE-CLERK.—Mr Brown has said all that could be said with force and effectiveness; but I think it all tends to show the barrenness of his case. It was decided in *Baikie's case*¹ that the opening words of section 385 are used distributively. We have in subsection (2) an illustration of

¹ (1901) 3 F. (J.) 54, 3 Adam, 323.

Mar. 14, 1912. the kind of thing to which a notice or order is applicable, viz., "diverting temporarily out of any street or streets traffic of every kind, or such particular kinds of traffic as may be specified in any such order or notice." I can conceive many situations in which for temporary purposes orders are more appropriate, if for no other reason than that their purpose would be frustrated if the delay involved in submitting a bye-law for the approval of the Sheriff had to be incurred. Here there is no doubt that the Order in question is of a permanent character, even although it may be abrogated at any time. It is permanent in the ordinary sensible meaning of that word. Its permanent character is shown by the fact that it has already been in force for upwards of a year. The question is—Does what has been done fall within the category of bye-laws, for which the confirmation of the Sheriff is required?

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Lord Justice-
Clerk.

Mr Brown's argument would allow magistrates to evade the right of appeal to the Sheriff to which the members of the public are entitled. I cannot assent to this. Every regulation of a permanent character—as distinguished from one of a character restricted as to time, and for a temporary reason—which interferes with the liberty of the public, can be made effective only by a bye-law submitted to the Sheriff and confirmed by him after objectors, if any, have been heard. I cannot conceive a clearer case than this in which a permanent regulation falls within the category of things which must be done by bye-law. Though *Baikie's* case¹ was under subsection (3) of the section the principles of that case point to the regulation in this case being appropriate to be carried out by bye-law.

LORD SALVESEN.—I concur. I think that this case is ruled by *Baikie v. Charleson*,¹ and I agree with the reasoning which led the Judges in that case to find that a prohibition of any particular kind of traffic can only be effected by bye-law. I hope that in future, magistrates, acting in virtue of their powers under section 385, will keep in view, when making regulations which are intended to be of a permanent character, that they must obtain the sanction of the Sheriff to the proposed regulation, and so allow people affected by it to have an opportunity of being heard on their objections.

LORD GUTHRIE.—I concur.

THE COURT passed the bill and suspended the conviction and sentence.

D. MACLEAN, Solicitor—FRASER, STODART, & BALLINGALL, W.S.—Agents.

¹ 3 F. (J.) 54, 3 Adam, 323.

JAMES MUIR, Complainer.—*Morison, K.C.—D. Jamieson.*
 JAMES NEIL HART (Procurator-Fiscal, Glasgow), Respondent.—
Sol.-Gen. Anderson—R. C. Henderson.

No. 11.

June 18, 1912.

Review—Advocation—Interlocutor finding libel relevant—Competency of Muir v. Hart.
advocation.

A person charged under an indictment in the Sheriff Court having, before the diet fixed for trial of the case, brought an advocation of the Sheriff-substitute's interlocutor at the first diet repelling objections to the relevancy of the libel, on the ground that it disclosed no crime and was also wanting in specification—

Held (per the Lord Justice-Clerk, Lord Dundas, Lord Mackenzie, and Lord Guthrie, *diss.* Lord Johnston and Lord Salvesen) that the advocation was incompetent, and the bill *refused*.

Opinion (per the Lord Justice-General) that the advocation was competent, but that it was inexpedient for the Court to entertain it.

Jameson v. Lothian, (1855) 2 Irv. 273, *followed*.

On 11th January 1912 James Muir was served with an indictment under which he was cited to appear in the Sheriff Court at Glasgow on 18th January, for the first diet, and 2nd February 1912, for the second diet. The charges against the accused were (1) that, being accredited clerk to Messrs M'Lean & Company, stockbrokers, Glasgow, he falsely represented to his employers that he had authority from certain persons to purchase shares for them, and entered into contracts for the purchase by his employers on their behalf of the said shares, and that, his employers being in the belief induced by him that these shares were purchased for these persons, he represented to them that he would pay to these persons certain profits which had accrued on the shares, and did thus induce his employers to pay to him certain sums in respect of these profits, which sums he appropriated to his own use, and did thus defraud his employers thereof; and (2) that, certain shares being held by his employers for behoof of a client, he falsely represented to them that he had authority from that client to uplift profits which had accrued on these shares, and did thus induce his employers to pay to him sums in respect of these profits, which sums he appropriated to his own use, and did thus defraud his employers thereof.*

* The indictment was in the following terms:—"James Muir, 7 Hillhead Gardens, Glasgow: you are indicted at the instance of The Right Honourable Alexander Ure, His Majesty's Advocate, and the charges against you are, that you being on the dates after mentioned accredited clerk to the firm of R. A. M'Lean & Company, stockbrokers, 44 West George Street, Glasgow, and authorised to deal and act for them on the Glasgow Stock Exchange, and you having, as said clerk, at said Stock Exchange, entered into (1) a contract with James Kirkwood & Sons, stockbrokers, 75 St George's Place, Glasgow, on 14th January 1907, for the purchase of 50 shares of the British South Africa Company (Chartered) by the said R. A. M'Lean & Company on behalf of Thomas R. Forsyth, 8 Princes Square, Glasgow; and (2) a contract with Norman Macleod Glen, stockbroker, 45 Renfield Street, Glasgow, on 5th July 1909, for the purchase of 200 shares of the Tanganyika Concessions, Limited, by the said R. A. M'Lean & Company on behalf of Robert Gilchrist, 47 Sherbrooke Avenue, Pollokshields, Glasgow, said two transactions being 'for the account'; and you having falsely represented to the said R. A. M'Lean &

June 13, 1912. At the calling of the libel at the first diet the complainer objected to the relevancy of both charges on the grounds “(1) that said charges do not disclose a crime at common law; and (2) that the statements in said charges were entirely wanting in specification.” The Sheriff-substitute (Scott Moncrieff) pronounced an interlocutor repelling the objections, and thereafter, the accused having pleaded not guilty, pronounced an interlocutor continuing the case to the second diet.

Muir v. Hart.

The accused then brought a bill of advocacy and suspension in which he craved the Court to suspend the judgments and to quash the proceedings, or otherwise to advocate the proceedings, to recall the interlocutors, and to remit the libel to the Sheriff at Glasgow or his substitute, with instructions to dismiss the same. In the bill, after setting forth the objections taken in the Sheriff Court, he averred:—“The complainer maintains that certain portions of said indictment are unintelligible, and that it is impossible for him, owing to the vague and contradictory allegations made in the indictment, to understand what the charges made against him are. The productions made increase the complainer’s difficulties. It is not possible for the complainer to discover whether the transactions referred to ever were

Company that the said Thomas R. Forsyth and Robert Gilchrist respectively had authorised and instructed the said contracts, and having thus induced the said R. A. M’Lean & Company to believe that the said contracts were so authorised and instructed, and were transactions for behoof of the said Thomas R. Forsyth and Robert Gilchrist respectively; and you having made the said contracts without the authority and instructions of the said Thomas R. Forsyth and Robert Gilchrist, whereby the said R. A. M’Lean & Company, being liable for the price of the said shares, did suffer loss to the amount of £8, 19s. 2d. on the said shares of the British South Africa Company (Chartered), and to the amount of £736, 14s. 4d. on the said shares of the Tanganyika Concessions, Limited, when said shares were sold on their discovering that the purchases were not authorised, you did, in the office of the said R. A. M’Lean & Company, at 44 West George Street aforesaid, on the respective dates set opposite the names of the said Thomas R. Forsyth and Robert Gilchrist in the schedule hereto annexed, the said R. A. M’Lean & Company being then in the belief induced by you that the said shares had been purchased on behalf of the said Thomas R. Forsyth and Robert Gilchrist respectively, represent to Robert Andrew M’Lean, partner of said firm of R. A. M’Lean & Company, and Walter Johnstone Wilson, cashier to the said firm, that you would pay to the said Thomas R. Forsyth and Robert Gilchrist respectively the profits then accrued in respect of the said respective shares, and did thus induce the said Walter Johnstone Wilson, on behalf of the said R. A. M’Lean & Company, to pay to you the sums specified in the second column of the said schedule opposite to the said dates in the first column thereof in respect of said profits, amounting in all to the sum of £100, which sums you appropriated to your own use, and did thus defraud the said R. A. M’Lean & Company thereof; further (2), the said R. A. M’Lean & Company having, on the dates after mentioned, held 100 shares of said British South Africa Company, in name or for behoof of Hugh Young, 13 Glebe Street, Glasgow, you did on 15th September and 12th November 1909, in said office, falsely represent to the said Robert Andrew M’Lean and Walter Johnstone Wilson that you had authority from said Hugh Young to uplift the profits then accrued in respect of said last-mentioned shares, you having in point of fact received no such authority, and did thus induce the said Walter Johnstone Wilson, on behalf of the said R. A. M’Lean & Company, to pay to you in respect of said profits (1) on 15th September 1909 the sum of

completed and carried through, or where or how the alleged false representations were made, or in what manner the alleged losses arose or were incurred, or how Messrs M'Lean & Company came in right of the alleged profits of which they are said to be defrauded, or how and by what means the said profits accrued. In these circumstances the complainer respectfully submits that it is unjust and oppressive that he should be tried before a jury on said indictment, which as regards both charges is in substance and in form unprecedented."

The complainer pleaded, *inter alia* ;—(2) The libels complained of being irrelevant, the complainer is entitled to a warrant suspending the said interlocutors, in terms of the prayer of the bill, with expenses as craved.

The bill came before the Court (consisting of the Lord Justice-Clerk, Lord Dundas, Lord Salvesen, and Lord Guthrie) on 12th January 1912, when the respondent objected to the competency of the advocacy. The Court remitted the case to a full bench, before which it was heard on 24th February 1912.

Argued for the respondent ;—Advocation in regard to the relevancy of a libel was incompetent. If this advocacy were competent, then an advocacy in regard to the Sheriff's decision at the first diet in a High Court case would also be competent. As the law stood before 1853, an advocacy of an interlocutor finding the libel relevant was not possible, because the relevancy was dealt with on the day of the trial and immediately before the jury were sworn to try the case¹; and this was the procedure both in the High Court and in the Sheriff Court.² The present practice of having two diets was introduced by the Sheriff Courts (Scotland) Act, 1853,³ and in 1855 an advocacy in circumstances similar to the present was held incompetent in *Jameson v. Lothian*.⁴ The Criminal Procedure Act of 1887⁵ made no alteration in this matter on the practice under the earlier statute; section 28, indeed, specially referred to the existing practice. The

£30, and (2) on 12th November 1909 the sum of £10, which sums you appropriated to your own use, and did thus defraud the said R. A. M'Lean & Company thereof.

“ By Authority of His Majesty's Advocate,
“ (Signed) JAMES N. HART,
“ Procurator-Fiscal.

“ SCHEDULE REFERRED TO.

Column I.	Column II.	Column III.
12 June 1909. 7 April 1910. 12 May 1910.	£20 £50 £30	Said Thomas R. Forsyth. Said Robert Gilchrist. Said Robert Gilchrist.

“ (Signed) JAMES N. HART,
“ Procurator-Fiscal.”

¹ Hume on Crimes, ii. 284-304; Alison's Criminal Law, ii. pp. 371-4; Moncreiff on Review, p. 5.
² Alison's Criminal Law, ii., at. p. 39.
³ 16 and 17 Vict. cap. 80, sec. 35.
⁴ (1855) 2 Irv. 273.
⁵ 50 and 51 Vict. cap. 35, secs. 25, 26, 28, 29, 32, 40, 41, and 42.

June 18, 1912. authority of *Jameson*¹ was, therefore, in no way impaired.² The decision in that case was supported by considerations of expediency; for to allow advocations from interlocutors on relevancy would be to enable the accused in all cases to protract the procedure in the cause on, it might be, the most trivial grounds,

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Argued for the complainer;—The High Court had inherent power to interpose at any stage of a prosecution in order to prevent injustice, and this was a typical instance of the case in which that power should be exercised, for the ground of advocacy was that the accused was charged on a libel which set forth no crime known to the law of Scotland. The authoritative treatises stated that advocacy was the proper mode of bringing interlocutory judgments under review.³ It was true that the accused might bring a suspension after the trial was concluded; but it was unfair to subject him to the anxiety and expense of a trial, and to the stigma of a conviction, on an indictment which might afterwards be found to be irrelevant. The decision in *Jameson v. Lothian*¹ proceeded on the terms of section 35 of the 1853 Act, under which it was imperative that the second diet should be held at the date fixed unless the prosecutor deserted the diet *pro loco et tempore*. But the provisions of the 1887 Act, and especially of sections 25 and 42, were in marked contrast with those of the 1853 Act; and further, the 1853 Act had been repealed by the Statute Law Revision Act, 1892. The case of *Jameson*¹ did not therefore bind the Court, and the question was open for decision on its merits.

On 20th March 1912 the Court intimated that the bill was refused, but that the opinions would be delivered on a subsequent date. On 13th June 1912 the following opinions were delivered:—

LORD JUSTICE-CLERK.—The question raised as regards the competency of the present bill of advocacy and suspension is undoubtedly one of importance. For if such a proceeding as is taken here by the complainer is one that the Court of Justiciary must entertain, there is no doubt that a decision to that effect must have most important results as regards prosecution on indictment in the Sheriff Court. It must be noticed at the outset that what the complainer desires should be done is a thing not known in all previous history of Sheriff Court jury trial procedure. Up to the time of the passing of the Act of 1853 (16 and 17 Vict. cap. 80), there was no possibility of an advocacy from the Sheriff Court as following on an interlocutor affirming relevancy by the Sheriff, even upon the supposition that Sheriff and jury proceedings could be advocated, during the course of the procedure from the serving of criminal letters until sentence whether on a plea of guilty or on a verdict affirming the libel by the jury. For if the finding of relevancy was duly pronounced by the Sheriff then, unless in his discretion he saw cause to allow the diet to be deserted, the jury were balloted at once from the waiting panel, and the case proceeded in ordinary course. There was therefore no opportunity of which the accused could avail himself to stay proceedings and to bring the procedure which had taken place up to that point under review of the High Court of Justiciary. Anything that might have occurred could only be made ground of com-

¹ (1855) 2 Irv. 273.

² Macdonald's Criminal Law (3rd ed.), 532.

³ Hume on Crimes, ii. 510; Alison's Criminal Law, ii., at p. 26.

plaint after trial if the trial resulted in conviction and sentence. I do not suppose that this was ever held to be doubtful, and certainly there is no trace in any of the books, whether treatises or reports of trials, of any attempt having been made to obtain a stoppage of procedure with a view to High Court review of an interlocutor of relevancy. It must therefore be taken that, until the passing of the Act of 1853, the existing law and practice was that interlocutors in the Sheriff Court upholding relevancy could not be attacked at that stage and procedure to trial stopped by the serving then of a note of advocacy and suspension. There was no law making it competent, or decision declaring it competent, and there was no practice establishing it as legal and therefore competent.

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It was in that state of matters that the Act of 1853 was passed. It is an Act the title of which set forth an intention "to facilitate procedure in the Sheriff Courts of Scotland." The clause dealing with procedure in criminal cases in the Sheriff Court, namely the 35th, was plainly one to make procedure more convenient by ordering that there should be two diets of compearance, the first on short *induciae*, and the second on longer *induciae*, the *induciae* for the two diets giving the same time before trial as there was under the former law. By this means much convenience was obtained. Where an objection to the relevancy was given effect to at the first diet, or the accused tendered a plea of guilty after the relevancy had been sustained, the case on the criminal letters which had been served came at once to a conclusion. There was no crowd of jurymen nor of witnesses, assembled at inconvenience to themselves and at expense to the State, whose services could not be used. And if the relevancy was sustained no evil could result to the accused, for the time still to run was available for preparation, and gave the same total number of days as under the old system. There was no indication given in the clause that any new rights were to be conferred upon the accused. On the contrary, the statute ordered that "if at the first diet the accused shall plead not guilty, the trial of such party shall take place on the second diet of compearance set forth in the will of the libel."

It is significant that the statute makes no reference in any way to any part of the procedure to be taken before the accused is called upon to plead at the first diet. There is not a word about objections to relevancy, or how such objections if made are to be dealt with. It is at the point of calling on the accused to plead that the statute takes up the procedure as it existed and introduces innovation. There is no indication of any intention that procedure shall be other than that which it had always been when the accused was duly brought before the Court to be dealt with on criminal letters. Innovation only takes place after a plea has been taken and recorded, except in so far as the diet for disposal of relevancy and taking of the plea is held at an earlier date after service than had previously been the case.

Now, it seems to me to be very difficult to hold that, without any words being found in the statute referring by way of enactment to that part of the procedure which deals with relevancy, there should be a total change inaugurated, by which procedure to trial should be barred merely because of the fact that there are two diets and that an interval must pass before

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(after a plea) the trial by jury can proceed; in other words, that the accused should by inference be held to have been given by the statute a right to bring his case at that stage before the Court of Justiciary, thereby preventing the case proceeding to the second diet as ordered by the statute. Can it be said that there is to be found in the words of the Act anything which would authorise a transfer of the case to this Court, if such a transfer would not have been permissible under the law and practice which existed before the passing of the Act of 1853? It certainly would be in direct contradiction of the title, for instead of facilitating procedure it would open the door to free exercise of the privilege to hinder and protract proceedings. For, if it is the right of the accused to initiate an advocacy at this stage, it must be the right of every person accused who is advised to have an objection to relevancy stated on his behalf, or who desires delay apart from there being any sound objection to be stated. And the question must be looked upon in that light. Prior to 1853 it was neither the law nor the practice that criminal letters procedure could be brought to this Court at the relevancy stage. So far as the records go no such case of removal ever occurred, nor indeed was any attempt made to remove such a case from the Sheriff at that stage. The question, therefore, arises quite sharply—Is there anything to be found in the Act of 1853 which authorises such a proceeding to be taken? I confess I can find nothing. It is true that the enactment appointing two diets might make it more easy to do such a thing than it was before, but that is a very different thing from the proposition that the law as altered allows it.

Had this question arisen for the first time, my view therefore would have been that as regards what the complainer proposes to do in this case there is no law, as there is no practice, to support it. But I am supported in this view by the case of *Jameson v. Lothian*,¹ when this very question was brought before a bench of five Judges, and was decided on the competency, as I think this case ought to be decided. From that day to this no similar case has been brought before the Court. Neither has any such attempt been made under the Act of 1887, to which I shall refer presently. Thus no advocacy such as this has been attempted for more than fifty years. I say nothing as to what might be done in any special case, such as was suggested in *Jameson's* advocacy,¹ where action might be taken at an early stage of procedure, if, as Lord Justice-Clerk Hope said, something was done “which outraged all the principles of the liberty of the subject,” or if, as Lord Ivory said, there was “an objection to the jurisdiction *junditus*.” Such a case, if it ever occurs, must be dealt with as it presents itself. My attention has been called to two cases *Craig*² and *Macrae*,³ in both of which advocacy was successful. But, in my opinion, these cases have no bearing upon the present. They were both cases in which the Judge in the inferior Court refused to allow the case to proceed, and brought the proceedings to an end at his own hand, when he had no ground in law for doing so. In short, he did what according to proper order he had no right to do, and so brought the case before him

¹ 2 Irv. 273.

² *Craig v. Galt*, (1881) 4 Coup. 541.

³ *Macrae v. Cooper*, (1882) 9 R. (J.) 11, 4 Coup. 561.

to an untimely conclusion, erroneously depriving the prosecutor of his right June 18, 1912.
to proceed. This present case does not resemble these cases in any way. Muir v. Hart.
Here we are asked to intervene, not because by any action of the Judge
there has been a stoppage of proceedings before him, not because there has Lord Justice-
been any fundamental nullity by which the course of justice has been Clerk.
stopped. Nothing has been done which can be impugned as not being
according to practice, or that in itself stopped procedure under the indictment. All has been regular and according to statute. All that is said is
that the Sheriff has formed a wrong opinion on a point of relevancy. In
my opinion we have no duty or right to interfere at such a stage. It has
never been done, and therefore not to do it now is in no way interfering
with but is upholding law and practice in accordance with the statute of
1853, which expressly directs the trial to proceed at the second diet, and
that the trial is to be followed out according to law, unless the diet shall
be further adjourned or deserted according to the existing law and practice.

In all that has been said the matter has been dealt with with regard to procedure under the Act of 1853, for it was only as regards that Act that any question could arise as to existing law and practice in the Sheriff Court up to the year 1887 (when the Criminal Procedure Act was passed), and as the case quoted occurred in 1855 it necessarily related to the former Act, and to that Act only. I notice in passing that an Act was passed in 1868¹ by which the principle of two diets was applied to the High Court of Justiciary for the first time. But the adoption of the procedure was optional, and the procedure was cumbrous, and the Act became a dead letter, so far as practice was concerned, in a few years after it was passed by the Legislature.

It remains to consider whether there is anything in the Act of 1887 which should tend to alter or modify the law upon the matter in question. By that Act the procedure on indictment for trial before this Court was altered, so as to conform to the system of having two diets of compareance not optional but compulsory. And it in some respects modified the procedure in Sheriff Court cases, causing all trials in the Sheriff and Jury Court to be on indictment at the instance of the Lord Advocate, the whole procedure being codified to apply to both Courts. It is unnecessary to specify what the changes were. Suffice it to say that as regards the Sheriff Court there was no alteration which could in any way affect the question now before the Court. By section 28, where the case is one to be dealt with in the Sheriff Court only, the Sheriff is directed to proceed according to the existing law and practice, which includes hearing any objections to relevancy, and disposing of them. The existing law and practice was of course that embodied in the Act of 1853, and in such law and practice as existed when it was passed and was not repealed or modified by it. And, as has been pointed out, the law and practice as regards the dealing with relevancy was not altered or modified by that Act. I have therefore no difficulty in holding that no change was made by the Act of 1887 which can in any way affect the decision in the case of *Jameson*,² which was in my opinion a sound decision under the Act then in force.

As regards the case of *Jameson*,² I think it right to point out that the

¹ 31 and 32 Vict. cap. 95.

² 2 Irv. 273.

June 18, 1912. bench which sat to consider it was a large bench according to the constitution of the Court at that time, when the Court of Justiciary was limited to the Lord Justice-General, the Lord Justice-Clerk, and five Commissioners of Justiciary. Five was then quite a usual bench to consider cases which it was desirable should not be heard by a mere quorum, and was in proportion a fuller bench than that now sitting, all the thirteen Judges being now members of the High Court.

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It was pointed out at the debate that the provision of the Act of 1853 was repealed under the Statute Law Revision. This was, of course, because the procedure of the Act of 1887 took the place of that of the Act of 1853. But by section 28 of the Act of 1887 the law and practice existing before 1887 is imported as applying to the first diet under the 1887 Act in Sheriff Court procedure. The repeal of the 1853 Act in Statute Law Revision could not take away the operation of the Act of 1887 directing observance of the existing law and practice at the date of the passing of the latter Act. Whatever existed then and was declared to be adopted became part of the system as then codified and modified, and in so far as in any particular it was not modified it was confirmed as the statutory mode of procedure by the power of the later Act, and Statute Law Revision could not affect it.

I have only to say in conclusion that while I thought it right that this question, because of its importance, should be submitted to a fuller bench, it was not because after the first debate I had any doubt what the answer to be given to the complainer's contention should be, but solely that the answer might be fully authoritative and final.

LORD DUNDAS.—I concur.

LORD JOHNSTON.—By this bill of advocation and suspension the complainer seeks to suspend a warrant of apprehension, and to advocate the proceedings against him in the Sheriff Court at Glasgow under a criminal libel, on the ground that the warrant is illegal and the libel not relevant. It is objected for the Crown that the bill is incompetent at the present stage of the proceedings, in respect that it was taken on the disposal of an objection to the relevancy at a first or pleading diet. The objection is founded on the decision of the High Court, by a full bench, in the case of *Jameson v. Lothian*¹ in 1855. Having regard to the eminence of the Judges who then formed the Court, I have the greatest hesitation in suggesting a departure from the precedent which that decision affords. But it was pronounced only two years after the Sheriff Court Act, 1853, which first introduced the system of a pleading diet distinct from the diet for trial, had come into force; and another statute, that of 1887, has been passed since its date, still further simplifying criminal procedure, which I think imposes on us the duty of reconsidering the question.

The obvious object of the Sheriff Court Act, 1853, section 35, in introducing the double diet of compareance was simply to avoid the expense and inconvenience of citing witnesses and summoning a jury in cases where the panel, when brought to trial, was found prepared to plead guilty. The provision was confined at first to the Sheriff Court. The statute said nothing

¹ 2 Irv. 273. . .

about the disposal of preliminary objections, such as to the relevancy. But June 18, 1912. it followed, as matter of necessity, that such objections must have been entertained and disposed of by the Sheriff before the panel could be asked to plead at the pleading diet. I venture respectfully to maintain that the same views of expediency, founded on considerations of expense and convenience, dictated the desirability of a preliminary objection, such as to the relevancy, so raised and dealt with by the Sheriff, being finally disposed of without the trial having first to run its course, a jury to be empanelled and witnesses not merely cited but examined, before the preliminary point could be taken to review, and that the introduction of the pleading diet afforded an opportunity of this being done, which had not before existed. For I quite concede that under the old system, when trial followed at the same diet immediately on the repelling of any preliminary objection, the right to advocate when such preliminary objection was repelled, and so to interrupt the trial, was not recognised, and as I think rightly from the same considerations of expense and convenience, in respect that witnesses and jury were assembled, and that it was more expedient to assume the Sheriff's judgment to be sound and to proceed with the trial, than to stay procedure and to dismiss jurymen and witnesses until the Sheriff's judgment was reviewed, with the probability of having to recall them to a subsequent diet.

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But in the case of *Jameson*,¹ after the introduction of the pleading diet a bill of advocacy of a Sheriff's judgment finding the libel relevant at the pleading diet was unanimously dismissed, without considering it on its merits. However, though the term "incompetent" is used in the rubric of the case, I do not think that the judgment warrants it. Lord Ardmillan uses the term emphatically. But both the Lord Justice-Clerk (Hope) and Lord Ivory do not discountenance the possibility of the Court staying a Sheriff proceeding with a trial in extreme cases, which makes it difficult to understand how it could be absolutely incompetent so to stay him proceeding in any case. But both Lord Ivory and Lord Cowan rather proceed on the view that it would be in the highest degree inexpedient, and would defeat the object or destroy the advantage of the recent statute so to do; while Lord Handyside was altogether somewhat doubtful on the point at issue. It is evident, then, that the term "incompetent," as used in reference to the matter before the Court, meant no more than that advocacy before trial was not recognised by or in accordance with existing practice, not that there was any inherent impossibility or illegality in it, or that if the Court had thought fit to entertain the advocacy there would have been any want of jurisdiction at that stage to dispose of it. The Court, even discounting the apparent omission of the Lord Justice-Clerk (Hope) to note that the Act of 1853 did not apply to summary prosecutions, seem largely to have been influenced by the idea that to admit advocacy at such stage would have been to open the gates to a flood of advocations, with the result of a great delay in the administration of justice.

For this there was in 1855 some justification. The old form of indictment with its major and minor premisses, &c., was still in use, and was a fruitful source of discussion on the relevancy, often maintained successfully

¹ 2 *Irv.* 273.

June 13, 1912. by a panel's counsel. But the system of pleading diet was further extended in 1887 by the Criminal Procedure Act of that year to High Court cases; and what is of more importance, the Act included another reform, viz., the abolition of the old complicated form of indictment which was such a fruitful source of irrelevancy. Under the practice since 1887 objection to the relevancy of a criminal indictment has been as rare as it formerly was common. And I do not think that, had the Court of 1855 been sitting to-day, they would have had the same apprehension of advocations being brought in the great majority of cases, to the delay of justice, if advocacy after the pleading diet were allowed. There are still cases of an exceptional nature—and the present is one of them—in which there may be difficulty about the relevancy of an indictment. The former rule of practice was founded on expediency, and expediency dictates the change in the changed circumstances occasioned by the statutes of 1853 and 1887.

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The present case is a good example of the inconvenience which must ensue from adherence to the rule of a former system of procedure. I indicate no view that the libel in question is irrelevant, but there is certainly room for discussion on it. Should it happen ultimately to prove irrelevant, then a trial of an exceptionally difficult nature, involving the methods of business on the Stock Exchange and questions of accounting, will in the end prove abortive. Surely it is more practical and expedient to determine at the stage of the first diet whether it should proceed, and for that purpose to postpone the diet for trial.

To refuse advocacy at the stage in question would, as appears to me, be to obliterate the process of advocacy from our criminal procedure, and to make suspension the sole mode of review of proceedings in an inferior Court. Advocacy can only be resorted to *pendente processu*, and was introduced for the very purpose of correcting errors in procedure of the inferior Court Judge at a stage prior to final sentence. Suspension, with or without liberation according to the form of the sentence, can only be brought of a sentence, and is the only process by which such can be reviewed, though on the ground of error in law or procedure only, and not of fact. The one is the advocacy of a process for correction of procedure before sentence—the other is the suspension of a sentence after the process is concluded.

It is for these reasons that I have ventured to maintain that the judgment in *Jameson's case*¹ ought not to be regarded as binding in the somewhat altered circumstances. The considerations which these circumstances present have led me to the conclusion that to refuse this advocacy as incompetent would be to reject the opportunity, which the passing of the Acts of 1853 and 1887 has afforded, of facilitating procedure, and instead to perpetuate inconvenience and expense.

LORD SALVESEN.—The important question which this case raises is whether it is competent to bring under review a deliverance pronounced by a Sheriff at the first or pleading diet holding an indictment relevant; and another deliverance on the same day, after a plea of "not guilty" had been tendered, continuing the case to the second diet for trial. On this question

¹ 2 Irv. 273.

of competency we must take it that the objection of the complainer is well founded, viz., that the facts set forth do not disclose a crime at common law. If it be incompetent for this Court to entertain a bill of advocacy at this stage, the case must go to trial, with the result that at the best for the complainer he must incur the expense of a trial, and at the worst that he may be convicted on an irrelevant indictment. In the latter case, no doubt, he has his remedy by way of suspension of the conviction; but an injury will have been done him which the quashing of the conviction will only partly repair, and in respect of which he will have no civil action of damages against those who are responsible for the prosecution. It is familiar procedure in the Court of Session that where a defender maintains that the action against him discloses no relevant case we hear and decide this matter on the pleadings, and do not (as I understand the rule to be in England) send the case for trial. This practice is found to be convenient and to save much expense to the parties which would otherwise be wasted, and the question is whether in the case of an indictment at common law there is any reason why a different practice should prevail in the criminal Courts?

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The leading grounds upon which the argument of incompetency was maintained is that under the practice which existed prior to the Act of 1853 objections to the relevancy of an indictment were disposed of on the same day on which the trial was fixed to proceed. If these objections were repelled by the presiding Judge the case went straightway to trial, and it was therefore impossible to have a bill of advocacy presented in time to stop the trial. By the Act referred to, however, a change was made upon that practice, it being enacted (section 35) that in the prosecution of all criminal offences which were not to be tried summarily, there were to be two diets of appearance, at the first of which the panel was to be called upon to plead, and if he pled not guilty the trial was to take place at the second diet, which was to be not sooner than nine clear days after the first diet. An interval was thus provided which made it possible for the accused party, if he maintained that the libel was irrelevant, to present a bill of advocacy and suspension to the High Court, and thereby bring the Sheriff's judgment on the relevancy under review. The question of the competency of such a procedure was raised in the case of *Jameson v. Lothian*¹ about two years after the Act of 1853 had come into force. The Court, which consisted of the Lord Justice-Clerk and four other Justiciary Judges, held that such a proceeding was incompetent, and the point does not appear to have been raised in precisely the same form since that decision was pronounced.

When this case came before a sitting of the High Court, which, as it happened, consisted of four Judges of the Second Division, we were of opinion that the question was so important that it was desirable that the decision in the case of *Jameson*¹ should be reconsidered by a full bench. Had I been of the opinion, which I understand is held by some of your Lordships, that a full bench could not reconsider the decision in *Jameson's* case,¹ I should certainly not have been a party to subjecting the complainer

¹ 2 Irv. 273.

June 18, 1912. to the expense of a second discussion, and, notwithstanding what has been
Muir v. Hart. said, I think a full bench consisting of the two heads of the Court and
Lord Salvesen. five Lords of Justiciary is quite entitled to review the decision of a Court
of five Judges presided over by the Lord Justice-Clerk. I do not think
such a tribunal has the authority of a full bench ; and even if it had, I do
not think such a sanctity attaches to a decision of our predecessors that for
us it should have the force of statute, having in view that during the sixty
years that have elapsed since that decision was pronounced there has been
a great change in our methods of procedure and in the attitude of the bench
in dealing with crime. It is not on these lines we are accustomed to deal
with decisions pronounced in the Court of Session, although it is less
important in such cases, where an error may at any time be rectified by the
House of Lords, than it is where we are sitting as a Court whose judgments
cannot be reviewed. I can see no distinction as to the competency of
reviewing a previous judgment, whether it has been pronounced by a Court
of three Judges, or five Judges, or even of seven Judges. Yet it is not at
all unknown that a Court of three Judges has deliberately reversed the
decision of an equal number, who for the time being constituted the High
Court, and whose decision in the particular case had complete finality.

Being, therefore, as I conceive, free to consider the decision in *Jameson's*
case,¹ I proceed to examine the grounds of that decision. There is appa-
rently a full report of the observations made by each Judge in deciding the
case, but I cannot say that any of their reasons commend themselves to my
mind. The Lord Justice-Clerk commences by saying,—“I do not mean to
enter on the question whether such extreme cases may not occur as may
induce this Court to stop an inferior Judge from proceeding with a cause
pending before him.” If this be so, then there is no procedure known to
our law which can be used for that purpose except a bill of advocation
such as we have here. But if a distinction may be made in an extreme
case, why is it to be assumed that the case before us does not fall within
that category? We have had no argument on the merits ; and we are
bound at this stage to assume that the objection is well founded—that the
indictment does not disclose a crime at common law. His Lordship goes
on to say,—“But I must say that the notion of stopping, in the manner
here attempted, a criminal trial before the Sheriff, between the interlocutor
of relevancy and the next diet of the cause, appears to me most extraordi-
nary. This Court is not to try the cause, but we are asked to prohibit the
Sheriff from going on with it.” I confess that it strikes me in exactly the
opposite way. I think it would be extraordinary that we should allow a
man to be tried on a criminal complaint which did not disclose that any
crime had been committed. Cases may easily be figured where a crime is
statutory, but where there is a limitation in the statute which prevents pro-
ceedings being taken under it. If such a crime be charged at common law,
is this Court powerless to prevent the trial proceeding although eventually
it is plain that a conviction, if obtained, would be immediately quashed?

The Lord Justice-Clerk goes on to say,—“Were the procedure here
attempted found competent we should have advocations in the great

¹ 2 Lev. 273.

majority of such cases, and great delay of justice would be the result." An June 13, 1912. argument based on inexpediency is no doubt quite legitimate in considering competency; but the alleged inexpediency appears to me to be visionary. *Muir v. Hart.* It is a poor compliment to pay to the framers of our criminal indictments that in the great majority of cases such indictments are open to objections to relevancy; and I cannot imagine that any Judge of this Court would grant the necessary warrant for service if it appeared that there was no stateable question to try. Apart from this an accused has nothing in the ordinary case to gain by delaying proceedings by means of unfounded appeals. He only adds a further period of confinement to that which may be imposed upon him at the end of the day. *Lord Salvesen.*

Lord Ivory's opinion is, in my judgment, not more convincing. He said,—“I think if the case were one of declinature of the jurisdiction of the inferior Court where the objection was to the jurisdiction *funditus* there might perhaps be something to say for the competency of this proceeding. But where the matter is a mere question of relevancy, I think it is sufficient for us, that to admit the course proposed would be in the highest degree inexpedient, and would altogether defeat the object of the Sheriff Court Act.” Now, if it is competent, as the learned Judge indicates, to present a bill of advocation against an interlocutor repelling a plea of “No jurisdiction,” I cannot see any ground why it should be incompetent to do so where the complaint is that the indictment discloses no crime. In the former case, just as in the latter, the Court would be taking the course which the Lord Justice-Clerk described as “most extraordinary” of stopping a criminal trial before the Sheriff between the interlocutor of relevancy and the next diet of the cause. A question of jurisdiction may be just as difficult or as easy to determine as one of relevancy; and, although it is not so often raised, the objection of inexpediency seems to be equally applicable. No other reasons are added by the other Judges who concurred (one of them, Lord Handyside, doing so with some difficulty) except that Lord Cowan pointed out what is probably the strongest plea, that a bill of advocation would not have been competent because impossible under the old system, and had not been expressly declared to be competent by the statute of 1853.

We were not referred to any authority, apart from the decision in the case of *Jameson*,¹ which supports the view that advocation of an interlocutor pronounced by a Sheriff finding the libel relevant is incompetent. The institutional writers seem to take it for granted that such a process is competent. Thus Hume says (p. 509) that there are three forms of process in which decrees of the inferior Courts may be submitted to the revisal of the Lords of Justiciary, namely, advocation, suspension, and appeal, and he goes on to point out that advocation is the proper remedy before a trial has taken place, just as suspension is that which applies after conclusion of the trial in the inferior Court to hinder execution of the sentence. With regard to advocation he says,—“This form of redress seems to be universally applicable with the exception only of the sentences of the Court of Admiralty, with respect to which all advocation is absolutely forbidden by the

¹ 2 Irv. 273.

June 18, 1912. statute of 1681, cap. 16." It is true he does not expressly mention that
 Muir v. Hart. advocacy is competent in order to review a finding upon relevancy, but
 LordSalvesen. he says that "the manner of the process seems to have been thus. That
 on a bill offered to the Lords of Privy Council, or Council and Session, an
 order was made and intimated enjoining the inferior Judge not to proceed."
 This was before the Court of Justiciary was established ; and shortly after
 that Court came into existence Hume says,—“The Lords of Justiciary
 attained to the quiet and exclusive possession of the right of passing bills
 of advocacy for themselves in all cases which fall properly within their
 charter.” Further, there are two recent decisions which seem not entirely
 consistent with the case of *Jameson*.¹ In *Craig v. Galt*² the Sheriff had
 dismissed a criminal libel at the instance of a private prosecutor with con-
 currence of the public prosecutor, because of the non-production, the day
 before the first diet at which the case was called, of an article libelled as to
 be produced at the trial. The complainer thereupon brought a bill of
 advocacy and contended that “in criminal cases before the Sheriff pro-
 ductions did not require to be lodged till the day before the trial, and
 that the trial was now regarded in practice as being at the second diet.”
 The Court were of opinion that the Sheriff had erred ; and they sustained
 the advocacy, recalled the interlocutor complained of, and remitted to the
 Sheriff to proceed according to law. Now, under the old practice, as there
 was only one diet, it is plain that the objection would have been a good
 one ; but it was held to be bad, not because of any new act of adjournal
 regulating the time for production of documents, but because of the intro-
 duction of two diets, and the practice which had followed upon that intro-
 duction. In the subsequent case of *Macrae v. Cooper*³ the Sheriff had
 deserted the diet *simpliciter* in a criminal trial, because at the first diet the
 prosecutor was not personally present, although a person holding a commis-
 sion from him was in attendance. On a bill of advocacy being presented,
 the Court advocated the cause, reversed the judgment of the Sheriff, and
 remitted to him to proceed according to law.

It would thus appear that where at the first diet an interlocutor is pro-
 nounced adverse to the prosecutor, it is competent for him to bring a bill
 of advocacy, and for the Court to remit to the Sheriff who has finally
 decided the cause to proceed with the trial. If that be so, I can see no
 reason in principle why the same privilege should not be accorded to the
 accused ; and there is nothing, so far as I know, either enacted by statute
 or in our mode of administering justice in criminal causes which requires
 that we should discriminate thus unfairly between the remedies open to the
 prosecutor and those open to the accused.

On the question of the expediency of advocating a deliverance sustaining
 the relevancy of a libel I have already pointed out the advantage to the
 accused of not having to undergo a trial on an irrelevant indictment. From
 the public point of view the expediency is even more obvious. If a mis-
 take has been made in framing an indictment on which the accused has
 been tried and convicted, the conviction may be quashed by the High
 Court. The mistake may have been a formal one, and the conviction just

¹ 2 Irv. 273.² 4 Coup. 541.³ 4 Coup. 561.

on the facts proved at the trial, but the accused person having tholed an June 18, 1912. size cannot again be indicted. If, however, the same decision had been pronounced in an advocacy on relevancy the prosecutor would have an opportunity of serving a new and relevant indictment which would obviate the risk of a guilty person escaping all punishment because of a formal and technical defect in the original indictment.

Muir v. Hart.
Lord Salvesen.

On the whole matter, therefore, I am of opinion that this advocacy is not merely competent, but that it is expedient in the interests both of the accused and of the administration of justice, and that we should entertain it.

LORD MACKENZIE.—I agree with the opinion of the Lord Justice-Clerk.

LORD GUTHRIE.—I concur in the result of the Lord Justice-Clerk's opinion. But I think it right to say that, at the first hearing of this case, I was inclined to agree with Lord Salvesen both as to competency and as to expediency. I have not changed my opinion on expediency. It seems to me an anomaly that the question raised in this advocacy (namely, whether an indictment, which is said to contain no charge of any crime by the law of Scotland, should be allowed to go to trial) cannot be brought before this Court. With our simplified forms and accelerated procedure, I do not believe that it would be found worth while to bring frivolous advocations. On the whole, I think a right of appeal on relevancy, such as the complainer contends for, would be in the interests of justice, although it may be that it would involve closer scrutiny by us in passing bills than has ordinarily been the custom.

But, on the question of competency, I have come to be of opinion that the Lord Justice-Clerk is right, and that this advocacy must be held incompetent. The statute of 1887, by sections 28 and 29, distinguishes sharply between the case where the second diet is to be in the Sheriff Court, and the case where it is to be in the High Court of Justiciary. Section 28 enacts that "where the case is one the second diet of which is to be in the Sheriff Court, the Sheriff shall proceed according to the existing law and practice." Therefore, the only question is, what was the law and practice existing in 1887. As to the practice, it is admitted that there is no known case of a question of relevancy being held competently brought by advocacy before the High Court. As to the law, that seems to me to have been settled by the case of *Jameson v. Lothian*,¹ decided fifty-seven years ago, and followed in practice ever since. In my opinion that case was decided on the question of competency, as well as on grounds of expediency. It is true that the Lord Justice-Clerk reserves the question of what might happen in a certain extreme case which he puts; but he makes it clear that, if a remedy for such a case exists, it would not be by way of advocacy.

LORD JUSTICE-GENERAL.—As your Lordships are aware, by the constitution of this Court, I have no vote in the deliberations of your Lordships, unless the other members of the Court are equally divided, and, at the last consultation, before we gave judgment in this case, I put it to your Lord-

¹ 2 Irv. 273.

June 13, 1912. ships to vote "Yea" or "Nay" upon the question of competency. Upon that occasion the votes were equal and, consequently, I had to give my casting vote. I make this explanation because I am left in a little doubt by the opinion which has been last delivered as to whether my brother Lord Guthrie has or has not changed his mind since the last consultation. The learned Lord Justice-Clerk's opinion is based not upon inexpediency but upon absolute incompetency—although I doubt not that if his Lordship were outvoted on that matter he would then vote for inexpediency.

Muir v. Hart.
—
Lord Justice-General.

Upon the question of competency my opinion can be put very shortly. After all, what has first to be considered is whether this Court has power of review in the matter at all, because there are certain matters in which we have no power of review—for instance, we never do review the verdict of a jury on the facts. As regards that matter, I do not think there is any doubt. Nobody doubts that the Court has power of review where a person is convicted in an inferior Court upon an irrelevant indictment. Once you have got that length, it seems to me that the question of the competency of advocacy or suspension is a question of what is the convenient and appropriate form of process and nothing else. Prior to 1853 advocacy was not applicable, because it was not practicable—you could not advocate under the old system of trial by jury in the Sheriff Court, and, consequently, nobody ever heard of an advocacy of the indictment before 1853. When the practice of the double diet was introduced in 1853 it became possible to advocate, and, accordingly, that was attempted in the case of *Jameson v. Lothian*.¹ The decision in that case was against the practice of advocacy on the question of relevancy; but I confess that I agree with what Lord Salvesen has said, namely, that when you come to read the judgments narrowly, although the word "competency" is used, the decision is not really a decision upon competency, it is really a decision upon expediency. The moment that it is said, as the Lord Justice-Clerk there says, "I do not mean to enter upon the question whether such extreme cases may not occur as may induce this Court to stop an inferior Judge from proceeding with a case depending before him," it seems to me that you decide in favour of competency. And, accordingly, both upon that ground, and also upon the ground that after all, once it is settled that we have the power to review, the question of advocacy or suspension is a mere question of appropriate procedure, I think this advocacy is competent.

As your Lordships are aware, I gave my vote at consultation in favour of competency. When I put the question to your Lordships whether it was expedient to allow advocacy in circumstances such as these, there was a majority of your Lordships against allowing it, and therefore I had no vote. But, in accordance with ordinary practice, I shall state my opinion.

My opinion here is against allowing the advocacy at this stage, and again I put it upon very simple grounds. I hold *Jameson's* case¹ to have been a decision to that effect, and I cannot see that, so far as the Sheriff Court is concerned, any change whatsoever has been made by the Act of 1887. I am aware, of course, that there are certain sections of the Act of 1887 which supersede sections of the Act of 1853, which sections indeed

¹ 2 Irv. 273.

have since, I understand, been decently interred by the Statute Law Revision Committee. But in substance the matter is left entirely where it was. Now, if that is so, it seems to me that it would be necessary for those who desire to introduce a change to show that there had been some inconvenience or difficulty arising from the working of the law since the decision in *Jameson*¹; but nobody has been able to say anything of the kind. I look upon this, after all, as a practical question depending on the balance of convenience. It is quite easy to put cases—as Lord Salvesen did—in which there might be undoubtedly a certain hardship to the individual. There is almost no system in which you cannot figure a case of hardship to the individual, and I can quite see that, if a man is convicted upon what afterwards turns out to be an irrelevant indictment, the individual is prejudiced to a certain extent in his pocket and perhaps also in his reputation by the fact that he did not get rid of the charge at an earlier stage instead of having to wait for a suspension. But is that a very practical consideration? Lord Salvesen said he did not think that in the vast number of indictments in our system of prosecution any large number were irrelevant. A really irrelevant indictment is a very rare thing. And, on the other hand, if we upheld the expediency we should afford an obvious opportunity to the person who is desirous of getting delay. I think that those considerations balance each other, and that it is inexpedient to change the practice of over a quarter of a century which has been found to be a practice that has done nobody any harm. Therefore my vote, if I had to give it, would have been in accordance with the view of the majority of your Lordships.

Muir v. Hart.
Lord Justice-General.

I just wish to say one word more. Lord Salvesen said that he did not suppose a Judge would sign a bill of advocacy if he thought it was a mere pretext for delay, and I understand that Lord Mackenzie—although he did not actually express it—would be in favour of allowing an advocacy at this stage if some check could be devised. I may say that at consultation we considered the question of allowing an advocacy at this stage with leave of the Sheriff, i.e., an advocacy on what might be called a *probabilis causa* view. But the large majority of your Lordships came to be of opinion that that was beyond our powers, and that we could not give a power of that kind to the Sheriff. Such a power might be given to us by statute if it were thought expedient, but at present we have not got the power.

THE COURT refused the bill.

DOVE, LOCKHART, & SMART, S.S.C.—W. S. HALDANE, W.S., Crown Agent—Agents.

¹ 2 Irv. 273.

No. 12. JOHN JAMES M'INTYRE (Police Court Procurator-Fiscal, Glasgow),
 Complainer (Appellant).—*Clyde, K.C.—A. Crawford.*
 June 21, 1912. BERTRAND MORTON *alias* EDWARD GUERIN, Respondent.—*Duffes.*

M'Intyre v.
 Morton.

*Statutory Offences—Frequenting public place with intent to commit felony—
 “Place adjacent to a street or highway”—Hotel—Vagrancy Act, 1824
 (5 Geo. IV. cap. 83), sec. 4—Prevention of Crimes Act, 1871 (34 and 35
 Vict. cap. 112), sec. 15.*

The Vagrancy Act, 1824, sec. 4, as amended and applied to Scotland by the Prevention of Crimes Act, 1871, sec. 15, includes among those who are liable to imprisonment as rogues or vagabonds “every suspected person or reputed thief frequenting . . . any street or any highway, or any place adjacent to a street or highway, with intent to commit felony.”

Held that the entrance hall and staircase of the Central Station Hotel in Glasgow, which opened directly on to a public street, was a place adjacent to a street or highway in the sense of these sections.

HIGH COURT.
 Lord Justice-
 General.
 Lord Kinnear.
 Lord Mac-
 kenzie.

ON 20th January 1912 Bertrand Morton *alias* Edward Guerin was charged in the Central Police Court at Glasgow on a complaint at the instance of John James M'Intyre, Procurator-fiscal, which set forth that “you are charged at the instance of the complainer that, being a suspected person and reputed thief, you did, on the 27th day of October 1911, frequent and loiter about in the Central Railway Station Hotel, being a place adjacent to a street, namely, Gordon Street, Glasgow, with intent to commit felony, *videlicet*:—Theft, contrary to section 4 of the Vagrancy Act, 1824, as amended and extended to Scotland by the Prevention of Crimes Act, 1871, section 15, and as further amended by the Penal Servitude Act, 1891, section 7, whereby you are liable to imprisonment for a period not exceeding three calendar months with hard labour. And further, being a suspected person and reputed thief, you did, on the 16th day of January 1912, frequent and loiter about in the Central Railway Station Hotel, being a place adjacent to a street, namely, Gordon Street, Glasgow, with intent to commit felony, *videlicet*:—Theft, contrary to section 4 of the Vagrancy Act, 1824, as amended and extended to Scotland by the Prevention of Crimes Act, 1871, section 15, and as further amended by the Penal Servitude Act, 1891, section 7, whereby you are liable to imprisonment for a period not exceeding three calendar months with hard labour.” *

* The Vagrancy Act, 1824 (5 Geo. IV. cap. 83), which does not apply to Scotland, provides, sec. 4, that certain classes of persons shall be deemed to be rogues and vagabonds within the meaning of the Act, and shall be liable to imprisonment, including, *inter alios*, “every person being found in or upon any dwelling-house, warehouse, coachhouse, stable, or outhouse, or in any inclosed yard, garden, or area, for any unlawful purpose: Every suspected person or reputed thief frequenting any river, canal, or navigable stream, dock, or basin, or any quay, wharf, or warehouse near or adjoining thereto, or any street, highway or avenue leading thereto, or any place of public resort, or any avenue leading thereto, or any street, highway, or place adjacent, with intent to commit felony.”

The Prevention of Crimes Act, 1871 (34 and 35 Vict. cap. 112), sec. 15, after quoting the above provision, enacts:—“And whereas doubts are entertained as to the construction of the said provision, and as to the nature

On 23rd January 1912 the Stipendiary Magistrate (Neilson) found the charge not proven, and, at the request of the Procurator-fiscal, stated a case for the opinion of the High Court. June 21, 1912.
M'Intyre v.
Morton.

The case stated :—"The case was called before the Central Police Court, Glasgow, on 20th January 1912, when respondent, who was not represented by an agent, pled not guilty. My attention was not called to any question of relevancy, and I allowed the case to go to proof. Proof was led, but at the end of the hearing, on my referring closely to the terms of the statutes founded upon, I thought it necessary to adjourn the case until 23rd January, and ultimately determined to give an opportunity to the Procurator-fiscal and to any law-agent who might appear for respondent to discuss a point of law and fact which had emerged. On 23rd January I heard the Procurator-fiscal and the law-agent for respondent, after which I found the charge not proven.

"The following are the facts proved :—The respondent is a suspected person and reputed thief. On 16th January 1912 he frequented and loitered about in the Central Railway Station Hotel, one entrance to which is situated in Gordon Street, Glasgow. He was observed examining the hotel register, which is kept lying in the entrance hall on the ground floor, looking at the keyboard where the keys of unoccupied rooms and keys of rooms left by residents in the hotel were hung, and at the telegraph board. Several times he went up and down the main stair. He was also in the smoke-room, lounge-room, and lavatory on the first floor or entresol of the hotel. He was in the hotel for about an hour, but he did not reside there, and did not know anyone residing there. Although while in the hotel he did no act in itself illegal or overtly indicative of an unlawful purpose he gave no satisfactory explanation of his being in the hotel. His movements were such as to rouse the suspicions of the hotel servants, and in consequence detective-officers were sent for and on his leaving the hotel he was followed to Dennistoun, Glasgow, where he was apprehended."

of the evidence required to prove the intent to commit a felony: Be it enacted, firstly, the said section shall be construed as if instead of the words 'highway or place adjacent' there were inserted the words 'or any highway, or any place adjacent to a street or highway'; and, secondly, that in proving the intent to commit a felony it shall not be necessary to show that the person suspected was guilty of any particular act or acts tending to show his purpose or intent, and he may be convicted if from the circumstances of the case, and from his known character as proved to the Justice of the Peace or Court before whom or which he is brought, it appears to such Justice or Court that his intent was to commit a felony; and the provisions of the said section, as amended by this section, shall be in force in Scotland and Ireland. For the purposes of this section, in Scotland the word felony shall mean any of the pleas of the Crown, any theft, which in respect of aggravation, or of the amount in value of the money, goods, or thing stolen, may be punished with penal servitude, any forgery, and any uttering of any forged writing."

The Penal Servitude Act, 1891 (54 and 55 Vict. cap. 69), sec. 7, enacts that sec. 4 of the Vagrancy Act, as amended by sec. 15 of the Prevention of Crimes Act, "shall be read and construed as if the provisions applying to suspected persons and reputed thieves frequenting the places and with the intent therein described, applied also to every suspected person or reputed thief loitering about or in any of the said places and with the said intent."

June 21, 1912.

M'Intyre v.
Morton.

The magistrate further stated:—"If the *locus* of the offence is construed as within the particular provision of the statute libelled, I shall have to say that it appeared to me from respondent's proved character and from the whole circumstances of the case that his intent was to commit felony in some form of theft from the hotel. The matter of *locus*, however, was vital, as the competency and effect of the evidence depended upon it.

"The provision when in its original form as part of section 4 of the Vagrancy Act appears to have been open to the interpretation that the words 'place adjacent' might mean only place adjacent, not to street or highway, but to a dock, wharf, or place of public resort. In the Prevention of Crimes Act, 1871, section 15, the amendment of the Vagrancy Act designed to clear away this doubt did not in terms deal with the sense of 'place,' but raised any street or highway into a substantive *locus* under the provision and made the word 'adjacent' mean adjacent to a street or highway.

"On the facts, the Glasgow Police (Further Powers) Act, 1892, section 25, covering buildings as well as streets and places adjacent to buildings, would have precisely applied, but upon the charge neither that Act nor the clause of the Vagrancy Act, applicable to a person found upon a dwelling-house for an unlawful purpose, was available. The question was whether under the Vagrancy Act, as amended in the phrase 'any street or any highway or any place adjacent to a street or highway,' the term 'place adjacent to a street' included a large hotel.

"Earlier in the section libelled the phrases 'street, road, highway, or public place' and 'street, road, highway, or other open and public place' seemed to me to compel the interpretation of 'place' as *ejusdem generis* with street, and to exclude a building such as a hotel. For the words 'place adjacent' occurring later in the particular provision founded upon, the same interpretation appeared to me to be imperative, equally in view of the history of the amendment and the general ineptness of the alteration to include buildings, and in respect of the immediate context, the generic absence of buildings from the particular provision as a whole, and the contrast instituted, not only by explicit mention of 'dwelling-house' in the clause immediately preceding, but also by the careful distinction between buildings and places of a different character observed in the whole section of the Vagrancy Act.

"Had I been able to conclude that the Central Station Hotel was a 'place adjacent to a street' within the meaning of the clause libelled, I would have convicted on the second count. But having regard to the considerations above set forth upon the merits, I held that the hotel was not such a place, and, therefore, I found the whole charge not proven."

The following questions were submitted for the opinion of the Court:—" (1) Was the complaint relevant? (2) No preliminary objection to relevancy having been raised, and the case having gone to proof, was I right in holding on the merits the charge not proven? or (3) Ought I to have held it proved that the Central Station Hotel was a 'place adjacent to a street' within the meaning of the clause libelled? and (4) Ought I to have found the respondent guilty of the second charge libelled?"

The case was heard before the High Court on 21st June 1912.

Argued for the appellant;—The doctrine of *ejusdem generis* which

had been the stumbling-block to the magistrate was quite inapplicable. The Central Station Hotel was "a place adjacent to a street or highway" in the ordinary sense of these words, and was accordingly covered by the statute. Further, it was just such a place as the statute was meant to protect, the object of the section being to include all public places in which it was possible for persons to loiter with intent to commit felony. The protection afforded by the statute was not confined to places which were at all times open to the public. In any case this hotel, if it were not a "place adjacent to a street or highway," was a "place of public resort" in the sense of the statute. Similar words in other statutes had been held to apply to a railway station platform,¹ and to a railway carriage²; and the provisions of the section had been held to apply to a private house in which an auction sale was being conducted.³ They should *a fortiori* be applied to this station hotel.

June 21, 1912.

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Argued for the respondent;—The magistrate had decided rightly. The expression "any place adjacent to a street or highway" must refer to an open place of the nature of a street to the exclusion of the interior of a building. In any case, there could be no conviction of intent to commit felony, because the crime of theft had not been effectively included in the definition of felony in section 15 of the Prevention of Crimes Act. Theft was not a plea of the Crown; and no theft in Scotland was punishable by penal servitude "in respect of aggravation, or of the amount in value of the money, goods, or thing stolen."

LORD JUSTICE-GENERAL.—From the facts which the learned stipendiary magistrate supplies, it appears that the respondent here was a suspected person and reputed thief, that he loitered about the Central Station Hotel, which is near Gordon Street, Glasgow, that he was observed in the entrance-hall of the hotel, going up and down the main stair, and in the smoke-room, lounge-room, and lavatory of the hotel. Then the learned stipendiary goes on to say: "If the *locus* of the offence is construed as within the particular provision of the statute libelled, I shall have to say that it appeared to me from respondent's proved character and from the whole circumstances of the case, that his intent was to commit felony in some form of theft from the hotel." He would then have found the charge proven, but he did not do so, because he did not consider that the Central Station Hotel could be called "a place adjacent to a street or highway," inasmuch that he thought "a place adjacent" must be *ejusdem generis* with "street or highway," and that this Central Station Hotel was not *ejusdem generis* with "street or highway."

I do not come to that conclusion. In the first place, I think that this is not a question to which the doctrine of *ejusdem generis* can be applied. The object of the statute is to prevent the loitering about places of public resort with an intent to commit felonies. Be it observed that there is nothing said as to where the felony is to be committed or the intent to commit the felony is to be formed. I can see no reason why felonies which

¹ Woods v. Lindsay, 1910 S. C. (J.) 88, 6 Adam, 294.

² Langrish v. Archer, (1882) 10 Q. B. D. 44.

³ Sewell v. Taylor, (1859) 29 L. J., M. C. 50.

June 21, 1912. are to be committed in a public place only should be struck at. A felony
M'Intyre v. may be meant to be committed in a private place, and a very good illustration of it, to wit, burglary, would always be committed in a private place.
Morton.
Lord Justice-General. The mischief struck at by the statute is loitering about public places with a view to, so to speak, departing from them for a criminal expedition. In order, then, to prevent a too meticulous consideration of whether a place is public or not, the words "any place adjacent to a street or highway" are added. That seems to me to mean that a man may still be held to be loitering upon a street or highway if, not being actually upon a street or highway, he is somewhere very near to the street or highway—always presuming that the intent is made out against him and that he is a person of the class described in the section. But if that is so, the doctrine of *ejusdem generis* has nothing to do with it. Even if it had, I do not think it would have availed the respondent here, because if you take the *ejusdem generis* doctrine, you must be able to find something which is *ejusdem generis* with the genus as disclosed by all the enumerated instances, not as disclosed by the last of them only, and if amongst the enumerated instances you find a "place of public resort," and if this place is a place of public resort, it is obviously *ejusdem generis* with the enumerated instances.

I must not omit to deal with an argument which Mr Duffes brought before us, because it would seem, if I did so, that I did not pay attention to it. He argues that this statute does not apply to Scotland at all, because it is said in the 15th section of the Prevention of Crimes Act that "for the purposes of this section in Scotland the word felony shall mean any of the pleas of the Crown, any theft, which in respect of aggravation, or of the amount in value of the money, goods, or thing stolen, may be punished with penal servitude." Well, I think he has shown that the gentleman who drew that section had not a very correct notion of Scots law, but I do not think it helps Mr Duffes here, because it says any theft which may be punished by penal servitude, and according to Scots law every theft is so punishable.

On the whole matter, I think we ought to answer the questions by saying that, as the learned stipendiary has come to the conclusion on the facts that the respondent was there with intent to commit a felony, he ought to have convicted.

LORD KINNEAR.—I quite agree. I can see no ground for the difficulty which the learned magistrate found from the necessity of construing the words of this statute as set forth in the charge as being *ejusdem generis* with other words in the same statute. The rule of *ejusdem generis* has been applied where a series of particular instances having some common characteristic is followed by general words which may reasonably be supposed to cover omitted instances of the same kind. But the words under construction do not bring other places within the scope of the statute in general terms so as to suggest some implied limitation. They are just as specific as the preceding words descriptive of place, and they define the new place not by its resemblance but simply by its proximity to a street or highway. The hall of a large hotel opening to a public street on one side and to a railway station on the other does not appear to me to be so different in

character from the other places of public resort specially mentioned that “a June 21, 1912. suspected person or reputed thief” may frequent it without coming within the intention of the statute. M'Intyre v. Morton.

But I agree also that, if there were any limitation of these words by a reference to the kind of place which the statute must be supposed to regard as being a probable *locus* of the mischief it was to prevent, I should say that this hotel in Glasgow was just the kind of place. Lord Kinnear.

LORD MACKENZIE.—I agree.

THE COURT pronounced this interlocutor:—“Sustain the appeal: Find in answer to the questions in the case that as the stipendiary magistrate found in fact that the respondent was a reputed thief, and that he was in the Central Hotel, Glasgow, on the dates libelled with intent to commit a felony in some form of theft, the stipendiary magistrate ought to have convicted the respondent.”

CAMPBELL & SMITH, S.S.C.—JAMES G. BRYSON, Solicitor—Agents.

THE DALMELLINGTON IRON COMPANY, LIMITED, Appellants.—
Horne, K.C.—Fenton.

No. 13.

PETER FRASER MACKENNA (Procurator-Fiscal, Ayr), Respondent.—
Sol.-Gen. Anderson—R. C. Henderson.

June 21, 1912.

Statutory Offences—Coal-mine—Failure to provide “facilities for check-weigher”—“Shelter from weather”—Shelter not artificially heated—Coal Mines Regulation Act, 1887 (50 and 51 Vict. cap. 58), sec. 13 (2)—Coal Mines (Weighing of Minerals) Act, 1905 (5 Edw. VII. cap. 9), sec. 1 (4). Dalmellington Iron Co., Limited, v. Mackenna.

Under the Coal Mines Regulation Act, 1887, sec. 13 (2), and the Coal Mines (Weighing of Minerals) Act, 1905, sec. 1 (4), colliery owners are bound, under a penalty, to afford facilities to the check-weigher, including a “shelter from the weather.”

Held that the fact that the owners of a colliery provided no means for the artificial heating of the check-weigher's weigh-house did not constitute a failure to provide him with “a shelter from the weather.”

THE DALMELLINGTON IRON COMPANY, LIMITED, were charged in the Sheriff Court at Ayr, on a complaint at the instance of Peter Fraser Mackenna, Procurator-fiscal, with the consent of the Home Secretary, which set forth:—“You are charged at the instance of the complainer that continuously between 4th January and 15th February 1912, at No. 3 Coalpit, Sundrum Colliery, parish of Coylton, Ayrshire, of which pit you are the owners, you did not afford to Michael Colrain, Kayshill, Drongan, check-weigher at said pit, proper facilities for enabling him to fulfil the duties for which he was stationed there, in respect that you did not provide for him a shelter from the weather, —contrary to the Coal Mines Regulation Act, 1887, section 13 (2),* HIGH COURT.
Lord Justice-General.
Lord Kinnear
Lord Mackenzie.

* The Coal Mines Regulation Act, 1887 (50 and 51 Vict. cap. 58), enacts:—Sec. 13 (2). “A check-weigher shall have every facility afforded to him for enabling him to fulfil the duties for which he is stationed, including facilities for examining and testing the weighing machine, and checking the taring of tubs and trams where necessary; and if at any mine proper facilities are not afforded to a check-weigher as required by this section,

June 21, 1912. and the Coal Mines (Weighing of Minerals) Act, 1905, section 1 (4),*

—whereby you are liable to penalty not exceeding £20.”
 Dalmellington Iron Co.,
 Limited, v.
 Mackenna.
 The Sheriff-substitute (Shairp) found the accused Company guilty as libelled and imposed a fine of £1, and, at their request, stated a case for appeal.

The following summary of the facts stated in the case is taken from the opinion of the Lord Justice-General:—“The building concerned [the weigh-house occupied by the check-weigher] contained the furniture prescribed by the statute, and was of the necessary cubic capacity. There was no fault to be found with it as a structure. It is equally clear that this colliery is in an exposed situation, that its buildings are liable to be affected by draughts, and that in cold weather they become very cold. There is also a finding in fact to the effect that the check-weigher concerned was on several occasions absent from duty in consequence of having contracted a cold. Now, it is not easy to say that anyone can enjoy immunity from cold in Scotland in the months of November and January. It should be noted also, that it is found that this man did not wear a greatcoat. The matter comes to this, that no fault is alleged against the Company except that they did not heat this place artificially.’

The question submitted for the opinion of the Court was:—“Did the appellants fail to provide for the said Michael Colrain, as check-weigher at the coalpit mentioned in the complaint during the period therein libelled, a shelter from the weather in respect that the said weigh-house was not artificially heated; and was the Sheriff-substitute right in convicting the appellants of a contravention of the statutes quoted in the complaint by failing to provide proper facilities for enabling the said Michael Colrain to fulfil his duties as check-weigher at said coalpit during said period?”

The appeal was heard before the High Court on 21st June 1912.

Argued for the appellants;—The statute only contemplated the provision of a structure in which the check-weigher might conduct his work in shelter from the elements; it did not aim at securing for him any high degree of comfort. Before the passing of the Act of 1905 the check-weigher’s duties were conducted in the open air, and the facilities prescribed by the Act of 1887 were only facilities for performing these duties without molestation. The Act of 1905 added to the “facilities” so prescribed the provision of a “shelter from the weather” furnished with certain named accessories. Among these accessories there was no mention of any apparatus for artificial heating, which clearly showed that no such apparatus was contemplated. The Acts were penal statutes, and must therefore be construed strictly. As matter of fact the check-weigher would never have suffered from the cold weather had he adopted the ordinary precaution of wearing a greatcoat.

the owner agent and manager of the mine shall each be guilty of an offence against this Act, unless he proves that he had taken all reasonable means to enforce to the best of his power the requirements of this section.”

* The Coal Mines (Weighing of Minerals) Act, 1905 (5 Edw. VII. cap. 9), enacts:—Sec. 1 (4). “The facilities to be afforded to a check-weigher under section 13 of the principal Act shall include provision for a check-weigher of a shelter from the weather, containing the number of cubic feet requisite for two persons, a desk or table at which the check-weigher may write, and a sufficient number of weights to test the weighing machine.”

Argued for the respondent;—It was not contended that such a June 21, 1912. shelter should in all circumstances be artificially heated. But the statute required that a “shelter from the weather” should be provided, and it was a question whether, in the circumstances of each case, the shelter provided was, on a fair reading of the words “a shelter from the weather” capable of affording the check-weigher reasonable protection. Conditions of temperature were as much conditions of weather as those of moisture. It could not be contended that a shelter which admitted rain would comply with the statutory requirement, and it was hard to see any practical distinction between such a shelter and one which subjected the check-weigher to an excessive degree of cold. It had been shown that the shelter in question had the latter defect, and that in consequence the check-weigher had been unable to perform his duties with efficiency. The conviction should therefore stand.

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LORD JUSTICE-GENERAL.—This is a stated case in which the Dalmellington Iron Company, Limited, appeal against a conviction on a complaint in which they were charged with not having afforded to one of their check-weighers proper facilities to enable him to fulfil his duties, in contravention of the Coal Mines Regulation Act, 1887, section 13 (2), and of the Coal Mines (Weighing of Minerals) Act, 1905, section 1 (4). The question which is raised in the case is quite fairly put by the Sheriff-substitute when he says: “Did the appellants fail to provide for” the check-weigher “a shelter from the weather, in respect that the said weigh-house was not artificially heated?”

The Sheriff-substitute has stated the facts of the case at considerable length, but I think they may, for the purposes of this decision, be materially abbreviated. [Here followed the summary quoted *supra*.]

I am of opinion that the facts do not warrant the conviction. The statute under which check-weighers were originally appointed, the Coal Mines Regulation Act, 1887, provided, section 13 (2): “A check-weigher shall have every facility afforded to him for enabling him to fulfil the duties for which he is stationed, including facilities for examining and testing the weighing-machine, and checking the taring of tubs and trams where necessary.” Now if that provision had stood alone I should have no doubt of the meaning of the word “facility,”—that this did not apply to the provision of any structure in which a check-weigher’s duties might be performed, but only that he should be allowed to perform his duties unmolested. No question of the kind we are now considering could have arisen under the Act of 1887. The Coal Mines (Weighing of Minerals) Act, 1905, makes this provision: “The facilities to be afforded to a check-weigher under section 13 of the principal Act shall include provision for a check-weigher of a shelter from the weather, containing the number of cubic feet requisite for two persons, a desk or table at which the check-weigher may write, and a sufficient number of weights to test the weighing-machine.” This attaches a new and statutory meaning to the term “facilities.” Accordingly it is now necessary that the proprietor of the colliery should supply the things so described, but there is specification of what he is called upon to provide. He must provide a “shelter from the weather.” That the meaning of that is a structure only is clear from the

June 21, 1912. words which follow describing the accessories of the shelter. Not a word is said about the temperature which has to be maintained there.

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It must be observed that this is a penal statute, and must therefore be construed strictly, and that to support a conviction it must be proved that the shelter which has been provided is not a shelter within the meaning of the Act. That has not been done in the present case, and I think it could not be done; and I am accordingly of opinion that the conviction should be quashed.

LORD KINNEAR and LORD MACKENZIE concurred.

THE COURT answered both branches of the question of law in the negative: Sustained the appeal, and quashed the conviction.

SIMPSON & MARWICK, W.S.—SIR W. S. HALDANE, W.S., Crown Agent—Agents.

No. 14. GALBRAITH'S STORES, LIMITED, Appellants.—*Morison, K.C.—Kemp.*
 June 25, 1912. JOHN JAMES M'INTYRE (Police Court Procurator-fiscal, Glasgow),
 Respondent.—*Clyde, K.C.—Russell.*

Galbraith's Stores, Limited, v. M'Intyre.

Statutory Offences—Weights and Measures—Sale—Implied representation as to weight—Label "Not sold by weight"—Fraudulent intent—Glasgow Corporation Act, 1907 (7 Edw. VII. cap. cxlvi.), sec. 60.

The Glasgow Corporation Act, 1907, sec. 60, enacts that, if the weight of articles sold by weight does not correspond with the weight represented by the seller, the seller shall be liable to a fine, unless he proves that the deficiency in weight "has arisen without any fraudulent intent."

A boy entered a shop belonging to a limited company and presented a written order for $\frac{1}{4}$ lb. of butter. The salesman, without remark, handed him a mould or print of butter contained in a wrapper on which was printed "This article is not sold by weight." The butter weighed only 3 oz. $7\frac{1}{2}$ drams, and the sum paid by the boy was the price, according to the current wholesale rates, of that quantity of butter. The company had instructed their employees not to sell butter by weight, but this instruction was not always obeyed.

The company having been convicted of a contravention of the section, *held* (1) that the butter had been represented as being of the weight asked for, the notice on the wrapper not being sufficient to displace the representation implied in the transaction between the buyer and seller; but (2) that the company had proved that the deficiency in weight arose without any fraudulent intent, and conviction *quashed*.

HIGH COURT. GALBRAITH'S STORES, LIMITED, grocers and provision merchants, Glasgow, were charged in the Police Court of the city of Glasgow on a complaint under the Summary Jurisdiction (Scotland) Act, 1908, at the instance of J. J. M'Intyre, Procurator-fiscal. The charge in the complaint was "that you did on the 2nd day of December 1911, in your shop at 268 Cumberland Street, South, Glasgow, sell to Crawford Mess, eleven years of age, son of and residing with James Mess at 111 Watt Street, South, Glasgow, on behalf of Charles Findlater MacDonald, an inspector of weights and measures of the city of Glasgow, one print of fresh butter, represented by you to weigh 4 ounces imperial weight, which was found to be of less weight than the weight so represented, contrary to the Glasgow Corporation Act, 1907, sec-

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tion 60 thereof,* whereby you are liable to a penalty not exceeding June 25, 1912. five pounds."

The accused having pleaded not guilty, a proof was led. The S. Galbraith's
Stipendiary Magistrate (Neilson) thereafter found the accused guilty Stores,
as libelled, and imposed a fine of £5, and, at the request of the Limited, v.
accused, stated a case for appeal. M'Intyre.

The case set forth :—

"The following are the facts proved :—

"On the evening of 2nd December 1911, Charles F. MacDonald, an inspector of weights and measures, sent a boy named Crawford Mess to the shop of the appellants at 268 Cumberland Street, South, Glasgow, with a specific order in writing, marked A of process, in the following terms, viz :—

$\frac{1}{2}$ stone potatoes.
 $\frac{1}{2}$ lb. fresh butter.
 $\frac{1}{2}$ lb. best cheese.
1 $\frac{1}{2}$ vegetables.

The boy went to the shop as instructed and presented the written order to a shop lad named William Craig, in the employment of the appellants, who supplied him with potatoes, fresh butter, and cheese, but in handing back the written order, A of process, with the goods, told Mess that he could get the vegetables two doors down the street. The boy tendered 1s. in payment of the goods and received 5 $\frac{1}{2}$ d. change. The butter supplied was made up into a mould or print, and was wrapped in a paper wrapper, labelled outside,—

Guaranteed
PURE FRESH BUTTER
from
Galbraith's Stores, Limited.

This Article is NOT sold by weight.

The attention of the boy Mess was not in any way drawn to the

* The Glasgow Corporation Act, 1907 (7 Edw. VII. cap. cxlvi.), enacts :—Sec. 60 (1) "Any inspector of weights and measures or other officer appointed for the purpose by the Corporation may at all reasonable times enter any building or other place in which any articles are sold or are made up or kept or exposed for sale by weight or measure or in which articles are sold or are set apart or kept or exposed for sale in numbers or in which any articles are weighed or measured or any articles are numbered with a view to their being bought or sold or he may stop any vehicle or any person carrying or in charge of any basket from which such articles are sold or kept or exposed for sale on any public or private street and require such articles to be weighed measured or numbered in his presence and if the weight measure or number thereof when so ascertained does not correspond with the weight measure or number thereof which has been represented by the person who has sold or made up or kept or exposed the same for sale or who has weighed measured or numbered the same with a view to purchase or sale such inspector or officer may seize impound and convey such articles to the Police Office or to an office provided for the purpose by the Corporation and the person who has sold or made up or kept or exposed the same for sale or who has incorrectly weighed measured or numbered the same with a view to purchase or sale unless he proves that the deficiency in weight measure or number has arisen without any fraudulent intent shall be liable to a fine not exceeding £5 . . ."

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wrapper of the butter. No remark, other than that about the vegetables, was made to him. On his going towards the door of the shop he was met by Inspector MacDonald, and at once taken back to the counter of the shop. The boy pointed out the shop lad Craig (who is about sixteen or seventeen years of age) as having supplied him with the goods ordered, which Craig admitted. Craig also admitted to the inspector that the goods were in the same condition as when supplied by him. Inspector MacDonald then in accordance with the statute founded on, had the goods weighed in his presence, and in presence of the shop lad and the shop manager, James Clark. The weighing was done on the shop scales after the inspector had tested them and found them correct. On being weighed the potatoes and cheese were found correct. The butter was found to be short of a quarter pound, and to weigh only 3 ozs. 9 drams, inclusive of the wrapper, and 3 ozs. 7½ drams exclusive of the wrapper—a deficiency exceeding 10 per cent. The price of the butter supplied was 3½d. When the butter was being weighed the shop manager, James Clark, told MacDonald that it was not sold by weight, and referred him to the notice on the wrapper, this being the first verbal intimation to either MacDonald or his messenger, Mess, of the terms of the notice. The manager also stated that all the employees of the shop, including Craig, had instructions to sell the fresh butter by print and not by weight—a statement which Craig at the time denied, but at the trial admitted. Butter is a commodity customarily sold by weight. The practice in Glasgow is to sell fresh butter in prints similar in shape and appearance to the print in this case, but always by imperial weight. The wholesale price of prime fresh butter at the date of the libel, viz., 2nd December 1911, was 1s. 4d. per pound.

“ Appellants' explanation given at the trial was to the following effect. They have about fifty shops, and until about eighteen months ago they sold their fresh butter in prints of a quarter pound and a half pound imperial weight. Owing, however, to a complaint by a weights and measures inspector of short weight in some quarter-pound prints of fresh butter and overweight in others which had been exposed for sale in one of their suburban shops, the appellants resolved, while continuing to sell their salt butter by weight, not to sell their fresh butter by weight, but in small and large prints. They accordingly issued a written instruction to their shop managers and inspectors, not to sell fresh butter by weight, but in small and large prints, and also to point out to customers when purchasing that it was not sold by weight. Two customers testified that in the case of purchases by them of fresh butter this instruction had been carried out. Some verbal instructions were also given to salesmen to alter written orders for a quarter or a half pound of fresh butter by the substitution of 'small print' or 'large print,' instead of 'quarter pound' or 'half pound.' No intimation was made to the public of the change by written or printed notice, it being left to the shopmen to intimate to individuals, whether formerly customers or not, the new method of dealing. There was no proof of renewal of these instructions or insistence upon them. It was admitted by the shop lad Craig that he had on one or two former occasions sold fresh butter as quarter and half-pound prints, and had made no intimation to the customers of the fact that the butter was not sold by weight, and the shop manager Clark also admitted that there might have been occasions on which he had sold prints of fresh butter under similar cir-

circumstances without making any intimation. The appellants receive June 25, 1912. their fresh butter in bulk at their store in Paisley, where it is made up into small and large prints and sent out to their various shops. The managing director's explanation was that the price and size of the prints had been varied from time to time according to the market rates. He said that when butter was cheap the size of the print was increased. But he also said that when butter rose in price the prints were raised in price also. No intimation was made to the shopmen about any increase or decrease in weight of the prints. At the date libelled, viz., 2nd December 1911, the small prints weighed $3\frac{1}{2}$ ozs., and the large prints 7 ozs., and the prices were $3\frac{1}{2}$ d. and 7d. respectively. Only the appellants knew the weights of the small and large prints of fresh butter, as it was on their instructions to their store employees in Paisley that the variations in weight were made. Questions put by the Court failed to elicit whether the reduction in weight from a quarter pound began at once eighteen months ago, or whether the reduction had been a gradual subsequent process. The shopmen did not, or at least professed not to know what the actual weight of the prints was. About 3000 pounds of fresh butter are made into small and large prints weekly, and at the appellants' shop at 268 Cumberland Street from sixty to seventy dozen small prints of fresh butter are sold weekly.

"I held (1) that in the sale of the butter to the message boy who presented the order for a specific weight of butter, the statement on the wrapper, not confirmed by knowledge and acceptance of the purchaser, was not reasonable and was no part of the contract; (2) that in the absence of such knowledge and acceptance by the purchaser the delivery of the butter by the shop lad in silent response to a specific order constituted a representation of the quantity ordered; and (3) that in such a transaction, which was within the scope of the shop lad's employment, the appellants were liable for his act, notwithstanding any general instructions given to him. Accordingly I found the facts libelled in the complaint to have been fully proved, reserving for separate consideration the defence set up under the statute that the deficiency of over ten per cent in weight had arisen without fraudulent intent. On this head I was so far from being satisfied that I came to the conclusion from appellants' own explanations in defence, that their extraordinary system of dealing in fresh butter was inherently fraudulent, not only conducing to but producing as a practically inevitable consequence, the incident founded upon in the prosecution. I convicted the appellants as libelled, and fined them £5."

The questions of law were:—“(1) Whether on the facts proved I was right in holding that the appellants represented the weight of the butter sold and delivered by their shop lad to the message boy to be a quarter pound? (2) Whether appellants are liable under the Glasgow Corporation Act, 1907, section 60, in respect of the deficiency? (3) Whether on the facts proved I was right in holding that the appellants had failed to establish that the deficiency in question had arisen without any fraudulent intent? (4) Whether, in the circumstances, the conviction was justified?”

The appeal was heard before the High Court on 12th and 13th March 1912.

Argued for the appellants;—(1) The section libelled made it an offence to sell goods which were not of the weight *represented*. The

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prosecutor must prove, therefore, that a representation as to weight was made.¹ Here the appellants had made no representation, as appeared from the notice on the wrapper. Nor had their salesman made any representation; and, even if he had, the appellants were protected by that notice.² (2) Whether there was or was not a representation, there was no fraudulent intent in this case, and fraud was of the essence of the offence. There must be *mens rea* on the part of the accused.³ But, in the first place, a corporation could not be guilty of an offence if the statute creating the offence required *mens rea* on the part of the accused.⁴ In the second place, the element of fraud was excluded by the instructions given by the appellants to their servants, and by the fact that the price paid was the price of the amount of butter actually sold. (3) The conviction was bad as the appellants were not a "person" in the sense of the section said to be contravened. It was a question of circumstances whether that word included a corporation.⁵ Here, as the section struck at fraud, it appeared that "person" was not meant to comprehend a company; for while a company might be answerable civilly for the fraud of its servant, it could not be convicted of a fraudulent offence.

Argued for the respondent;—(1) The butter sold was represented as weighing $\frac{1}{4}$ lb. It was true that nothing was said as to the weight of the butter, but a representation might be made *rebus et factis*.⁶ Here the sale was a sale by weight. The boy handed in a paper in which the butter he desired to purchase was described as $\frac{1}{4}$ lb., and the salesman in handing over the butter handed back the paper unaltered, thereby adopting the description and making the paper to all intents and purposes an invoice of the goods supplied. It was immaterial to inquire as to the correspondence between the price paid and the amount supplied, because if a purchaser asked for a pound of butter and got half a pound it would be no answer to a charge against the seller to say that in fact the purchaser was charged only for half a pound. Nor did the notice on the wrapper safeguard the appellants, because (a) the general intimation contained in that notice could not qualify the terms of a particular contract if those terms were inconsistent with the intimation; it could be read into the contract only in the case where it did not conflict with the express terms of the contract; and (b) the wrapper was not seen by the purchaser at the time when the contract was made; it was put round the butter for the purpose of preserving it from being soiled; no one would expect to find a term of the contract printed on the wrapper, and the purchaser had no opportunity of examining it until the butter was in his hands after the conclusion of the contract. If the salesman had acted in accordance

¹ Roberts v. Woodward, [1890] 25 Q. B. D. 412; Langley v. Bombay Tea Co., [1900] 2 Q. B. 460; Bridger v. Neilson, (1894) 31 S. L. R. 744.

² Speirs & Pond v. Bennett, [1896] 2 Q. B. 65; Gage v. Elsey, (1883) 10 Q. B. D. 518; Souter v. Lean, (1903) 6 F. (J.) 20, 4 Adam, 280.

³ Derbyshire v. Houlston, [1897] 1 Q. B. 772; Bridger v. Neilson, 31 S. L. R. 744.

⁴ Pearks, Gunston, & Tee, Limited, v. Ward, [1902] 2 K. B. 1, *per* Alverstone, C.J., at p. 8, Channel, J., at p. 12.

⁵ Pharmaceutical Society v. London and Provincial Supply Association, (1880) 5 Q. B. D. 310, 5 App. Cas. 857; Co-operative Drapery Co., Limited, v. Bligh, (1902) 4 F. (J.) 97, 3 Adam, 548.

⁶ Davie v. Robertson, (1847) Ark. 336, at p. 350.

with the notice he would have refused to sell the butter by weight, June 25, 1912. and the notice laid it upon him to do so. If there was a representation, as submitted, then the appellants were responsible because it was made by their servant while acting within the scope of his employment.¹ (2) It was not necessary to prove fraudulent intent on the part of the appellants. In the section libelled the words "fraudulently" or "falsely" did not occur. The section contained an absolute prohibition of the sale of goods of less weight than was represented, and if goods under weight were sold the offence was committed unless the accused could prove—and it lay on him to do so²—that the deficiency arose from an innocent cause. That defence could not be maintained here. The notice on the wrapper showed that the deficiency did not occur through mistake or accident. As for the written instruction, it was not addressed to, and there was no proof that it reached, the salesmen; the appellants took no care to ensure that it was obeyed; and it proved that the appellants did not rely on the notice on the wrapper, for it called on their employees to point out to buyers that the butter was not sold by weight. The appellants' mode of selling was calculated to entrap the public, for they had formerly sold their butter by weight, and when they departed from this practice they made no alteration in the shape or appearance of their prints, but merely put a notice on the wrapper. What was meant by fraud in cases of this kind was defined in *Starey v. Chilworth Gunpowder Company*.³ It was possible to hold that the appellants had acted fraudulently although they were a company, because in the case of statutory offences fraud might be attributed to persons who could not be guilty of fraud in the sense of the common law. The case of *Derbyshire*⁴ was distinguishable as the charge there was for contravention of a section of a statute dealing with "false" warranties. (3) The conviction was not open to objection on the ground that the appellants were not a "person." The word "person" included a company, and a company might, therefore, be convicted under the section.⁵

At advising on 25th June 1912,—

LORD SALVESEN.—In this case the appellants were charged with having sold to a boy of eleven, who was in fact the messenger of one of the inspectors of weights and measures of the city of Glasgow, a print of fresh butter, represented by the appellants to weigh 4 ounces imperial weight, which was found to be of less weight than the weight so represented contrary to the Glasgow Corporation Act, 1907. The facts proved are that the boy presented a specific order in writing for, *inter alia*, $\frac{1}{4}$ lb. fresh butter, that he presented it to a shop lad in appellants' employment, who supplied him with a mould or print of butter in a paper wrapper which had

¹ *Linton v. Stirling*, (1893) 20 R. (J.) 71, 1 Adam, 61; *Patrick v. Kirkhope*, (1894) 21 R. (J.) 27, 1 Adam, 360; *Neilson v. Parkhill*, (1892) 20 R. (J.) 24, 3 White, 379; *Coppen v. Moore*, [1898] 2 Q. B. 306; *Collman v. Mills*, [1897] 1 Q. B. 396; *Brown v. Foot*, (1892) 56 J. P. 581, *per Wills, J.*, at p. 583.

² *Pearks, Gunston, & Tee, Limited, v. Ward*, [1902] 2 K. B. 1, *per Channel, J.*, at p. 12.

³ (1889) 24 Q. B. D. 90.

⁴ [1897] 1 Q. B. 772.

⁵ Interpretation Act, 1889 (52 and 53 Vict. cap. 63), sec. 2 (1); Summary Jurisdiction (Scotland) Act, 1908 (8 Edw. VII. cap. 65), sec. 28.

June 25, 1912. printed on it "This article is not sold by weight," and that the weight of the print exclusive of the wrapper was 3 oz. 7½ drams. No conversation with regard to the butter took place between the boy and the salesman.

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On these facts, if they had stood alone, and assuming the relevancy of the complaint which was not challenged, I think the magistrate would have been justified in holding that there had been a contravention of section 60 of the Glasgow Corporation Act, 1907. It was argued that there was no representation that a particular weight of butter was supplied, but I am unable to agree in that view. If a specific weight is demanded by a customer, and he receives a quantity of the material ordered as in implement of his order, I think there is a representation that the weight demanded has been supplied, and that it is not *per se* sufficient to displace this representation that on the wrapper there are printed words to the effect that the article is not sold by weight. These words are not inconsistent with the idea that the weight asked for has been supplied, any more than the words relied on in the case of *Souter*,¹ "Not guaranteed three per cent," were held to be inconsistent with the milk from the can so labelled being sweet milk and not, as in fact it was proved to be, a mixture of sweet and skim milk. It would be a different case if the label had stated the exact weight of the article supplied in such a way as to notify the customer who received it that he was not getting the weight he had specified, or if the customer had been verbally informed that the print of butter was not sold by weight, and that it was only approximately of the weight demanded.

It is, however, open under the same section of the statute for the accused to elide a conviction if he proves "that the deficiency in weight . . . has arisen without any fraudulent intent." On this matter the facts are as follows: About eighteen months before the incident out of which the complaint arose the appellants resolved not to sell their fresh butter by weight but in small and large prints of approximately ¼ lb. or ½ lb. in weight. They accordingly issued written instructions to their shop managers and inspectors to this effect; and it was part of these instructions that special wrappers containing the words previously quoted must be used, and that if customers asked ¼ lb. or ½ lb. the shopman was always to point out that the article was not sold by weight. Verbal instructions were also given to salesmen to alter written orders for ¼ lb. or ½ lb. of fresh butter by the substitution of small print or large print. Two customers testified that the verbal instructions had been carried out in their case when they made purchases of fresh butter, and no customers apparently were brought to give evidence to a contrary effect. It was admitted by the shop lad by whom the sale in question was effected that on one or two former occasions he had sold fresh butter as ¼ and ½ pound prints, and had made no intimation to the customers of the fact that the butter was not sold by weight; and the manager of the branch shop also admitted that he might have sold prints of fresh butter in similar circumstances without having made any similar intimation. It was also found as a fact that the wholesale price of prime fresh butter at the date of the sale was 1s. 4d. per lb., and that the butter sold to the inspector through his messenger was exactly at the rate of 1d.

¹ 6 F. (J.) 20, 4 Adam, 280.

per ounce or 1s. 4d. per lb. On these facts the magistrate came to the June 25, 1912. conclusion that the appellants' "extraordinary system of dealing in fresh butter was inherently fraudulent, not only conducing to, but producing as a practically inevitable consequence, the incident founded upon in the prosecution."

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I am unable to concur in that conclusion. It was admitted that there is nothing illegal in an article like butter being sold in prints or moulds without reference to weight. If, therefore, the appellants' instructions had been duly carried out, as we must assume it was intended that they should be, customers would have been informed of the appellants' system of dealing, and would not have been entitled to rely on a print of butter being of any particular weight. If, notwithstanding their instructions, the appellants had connived at their shop assistants selling a small print in response to an order for a quarter of a pound, they would not have been able to escape conviction. But no facts are found that would justify such an inference. On the contrary, as I read the facts, their instructions were carried out at the shop in question, although through carelessness or other causes the shop assistants in isolated cases neglected to observe them. Now, the proviso in the section is, I think, intended to protect the seller where he is able to show that an apparent contravention of the Act has been due to innocent mistake; in other words, that the deficiency in weight has arisen without any fraudulent intent on his part. It may be, as the magistrate says, that the system which the appellants have adopted is one which lends itself to fraud; and if they had taken no reasonable means to prevent such fraud, they would have incurred the penalty prescribed by the Act. Here, however, I am clearly of opinion that they took reasonable means to secure that the customers should be apprised that they were not selling fresh butter by weight; and, indeed, counsel for the respondent were unable to suggest any other practical precaution which they could have used to that end. Had their instructions been carried out a customer would never have been in doubt as to what he was getting; and even in the case libelled, where the customer was not apprised before the delivery was made that the print was not of the weight ordered, I am unable to see that he suffered any prejudice, as the price charged was exactly proportionate to the amount supplied at the wholesale rates of the day.

Another general question was argued at the bar, namely, whether the appellants, being a limited liability company, could be properly convicted of an offence which presumes a fraudulent intent. That is not one of the questions stated in the case, nor is it necessary that we should consider it even if we could competently do so. I do not propose, therefore, to express any opinion on a matter that is not unlikely to come before us in some other proceeding.

I propose that we should answer the first question in the affirmative, and the second, third, and fourth questions in the negative.

LORD DUNDAS.—I concur in that opinion, and have nothing to add.

LORD GUTHRIE.—I concur. The appellants maintained that no representation had been made by their servant of the nature contemplated by the statute. I think the stipendiary magistrate came to a right conclusion

June 25, 1912. when he found that in the absence of "knowledge and acceptance by the purchaser, the delivery of the butter by the shop lad, in silent response to a specific order, constituted a representation of the quantity ordered,"—that is, that the quantity ordered had been supplied.

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The difficult question arises under the defence which the statute allows the trader to prove, if he can, namely, "that the deficiency in weight . . . has arisen without any fraudulent intent." I concur in the result favourable to the appellants, which your Lordships have reached, but I do so not without difficulty. If the question were whether the appellants had taken all reasonable means to certify to the public, at the start of the new system and since, that they were going to sell, and were selling, their fresh butter not by weight, as formerly, but in large and small prints, which had necessarily the appearance to the eye, and the apparent weight to the hand, of the previous half and quarter pounds, while they were continuing to sell their salt butter as before by weight, I should have decided as the stipendiary magistrate has done. But this is not the question we have to determine. It is enough for the appellants, even if they might have done more and should have done more, to prove that they have done enough to show that the deficiency in weight arose without any fraudulent intent on their part. I do not wonder that the stipendiary magistrate came to an opposite result. But, on the whole, I think they have established the statutory defence in view of (1) the reason which led to the change of practice; (2) the appellants' written instructions to their shop managers and inspectors, and their verbal instructions to their salesmen; (3) the terms of the label on the wrappers, unsatisfactory as they are; and (4) the fact that the butter was sold at the wholesale price of prime fresh butter at the time.

THE COURT answered the first question in the affirmative and the other questions in the negative, and quashed the conviction.

LISTER SHAND & LINDSAY, S.S.C.—CAMPBELL & SMITH, S.S.C.—Agents.

No. 15.

THOMAS MASTERTON, Appellant.—*Macmillan, K.C.*—*Hon. W. Watson.*

June 25, 1912. JOHN SHAW SOUTAR (Procurator-Fiscal, Dunfermline), Respondent.—*Clyde, K.C.*—*J. B. Young.*

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Soutar.

Collier v,
Soutar.

MARGARET COLLIER, Appellant.—*Sandeman, K.C.*—*Wilton.*
JOHN SHAW SOUTAR (Procurator-Fiscal, Dunfermline), Respondent.—*Clyde, K.C.*—*J. B. Young.*

Statutory Offences—Weights and measures—Weighing and selling goods under weight—Necessity of libelling both weighing and selling—Power of specified officials to enter premises where goods exposed for sale—Right to delegate power—Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), sec. 430.

The Burgh Police (Scotland) Act, 1892, sec. 430, enacts that certain specified officials may enter any building in which any article is sold or exposed for sale by weight, measure, or number, or in which any article is weighed, measured, or numbered; and he may seize the same if the weight, measure, or number does not correspond with that represented "by the person who has sold, or made up, or kept, or exposed the same for sale, or who weighed, measured, or numbered the same

. . . and the magistrate may sentence the person who has sold, or made up, or kept, or exposed the same for sale, and who has incorrectly weighed, measured, or numbered the same " to a penalty.

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Held (1) that, as the section in terms imposed a penalty only on persons who both sold and also incorrectly weighed goods, a complaint which charged the accused merely with selling goods under weight was irrelevant.

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Semble, decision in *Barty v. Hill*, 1907 S. C. (J.) 36, 5 Adam, 235, differed from.

Held (2) that under the section the powers therein conferred were confined to the officials mentioned, and could not be delegated; and that, accordingly, a sale to a messenger sent by one of these officials for the purpose of purchasing the article would not support a charge of contravention of the section.

Statutory Offences—Weights and Measures—Sale of goods under weight—Goods weighed along with wrapper—Absence of fraudulent intent—Burgh Police (Scotland) Act, 1892, sec. 430.

The Burgh Police (Scotland) Act, 1892, sec. 430, imposes a penalty on persons who incorrectly weigh and sell goods under weight, unless they prove that the deficiency in weight "has arisen without any fraudulent intent."

A firm of provision merchants was in the practice of making up their tea in packets in readiness for delivery to purchasers. The tea contained in the packets, which were sold as $\frac{1}{2}$ lb. packets, fell below that weight by $5\frac{1}{2}$ drams, the weight of the paper wrapper of the packet; and on the outside of the wrapper was printed "This packet is guaranteed gross weight." It appeared that in the district where the firm carried on business "gross weight" was understood to mean the combined weight of an article and its receptacle; and that in the grocery trade it was a general practice for a grocer, when he was weighing tea in the presence of the purchaser, to put a paper bag along with the tea into the scales.

A purchaser having been supplied with one of these packets in response to a request for $\frac{1}{2}$ lb. of tea—

Held that the above section was not thereby contravened, as it appeared from the circumstances that the deficiency in the weight of the tea was not due to fraudulent intent.

So *held* also in circumstances which were similar, except that the words printed on the packets were: "Full weight of tea including wrapper."

On 2nd November 1911 Thomas Masterton was charged in the Sheriff Court at Dunfermline under a summary complaint at the instance of John S. Soutar, Procurator-fiscal. The complaint contained two charges, the first, which was alone the subject of appeal, being in these terms:—"Thomas Masterton, Simbur Place, Bowhill, as shop manager and the person locally in charge of their retail premises at Bowhill, Auchterderran Parish, Fife, of the affairs of the company known as Dick's Co-operative Institutions, Limited, and having its registered or head office at Bonnar Street, Dunfermline, you are charged at the instance of the complainer that (1) on 12th October 1911, at said premises at Bowhill, when locally in charge as aforesaid, you did, in response to a demand in your presence upon your assistant, James Dowie, by Alexander Loudon, Cupar, assistant to and acting as messenger for Robert Robertson, an Inspector of Weights and Measures for the county of Fife, appointed by the County Council of Fife, for a half pound of tea sell and deliver by

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June 25, 1912. the said James Dowie to the said Alexander Loudon a quantity of tea (made up and kept and exposed for sale by weight in a paper bag, on which were printed, *inter alia*, the words 'This packet is guaranteed gross weight'), for which he paid tenpence, which tea was weighed on said date in said premises in presence of the said Robert Robertson and you, and only weighed 7 ounces and 10½ drachms avoirdupois, and thus was deficient and did not correspond with the weight of tea (8 ounces avoirdupois) demanded by the said Alexander Loudon and represented by the said James Dowie as sold by him aforesaid to the said Alexander Loudon; (2) * . . . contrary to the Burgh Police (Scotland) Act, 1892, section 430, and the Local Government (Scotland) Act, 1908, section 10,† whereby you are liable to the penalties set forth in section 430 of the Burgh Police (Scotland) Act, 1892."

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On the same date Margaret Collier, shopmanager of the retail premises of the Buttercup Dairy Company at Bowhill, was also charged on a summary complaint in the same Court. The charge was in substantially the same terms as that quoted above, the only material variation being that in Collier's case the words printed on the paper bags were, "Full weight of tea including wrapper."

In both cases objections were taken to the relevancy of the charge. These objections, which are stated in the argument for the appellants *infra*, were repelled by the Sheriff-substitute (Umpherston); and, after evidence led, the accused were convicted.

* The second charge (which was found not proven by the Sheriff-substitute, and with which this appeal was not concerned), dealt with certain other packages, which were seized as not being of the weight represented.

† The Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), enacts:—Sec. 430. "*Chief Constable or inspector to have power to enter premises and require articles to be weighed.*—The chief constable, or any other constable specially appointed to perform the duty by the chief constable, or any inspector of weights and measures in the burgh, may, at all reasonable hours, enter any building or part of a building, or other place within the burgh in which any article is sold, or is made up, or kept or exposed for sale by weight or measure, or in which articles are sold or are set apart, or kept or exposed for sale in numbers, or in which any article is weighed or measured, or any articles are numbered with a view to their being bought or sold, or he may stop any cart or carriage, or any person carrying or in charge of any basket from which such articles are sold, or kept or exposed for sale, on the street, public or private, and require such article or articles to be weighed, measured, or numbered in his presence; and if the weight, measure, or number thereof ascertained does not correspond with the weight, measure, or number thereof which has been represented by the person who has sold or made up, or kept or exposed the same for sale, or who weighed, measured, or numbered the same with a view to purchase or sale, such chief constable or other constable or inspector may seize, impound, and convey such article or articles to the police office, or to an office provided for the purpose by the Commissioners, and the magistrate may sentence the person who has sold or made up or kept or exposed the same for sale, and who has incorrectly weighed, measured, or numbered the same with a view to purchase or sale, to a penalty . . . unless such person shall prove to his satisfaction that the deficiency in weight, measure, or number has arisen without any fraudulent intent."

The above section was applied to counties outwith Police Burghs by section 10 of the Local Government (Scotland) Act, 1908 (8 Edw. VII. cap. 62).

Both of the accused appealed on stated cases. In the case stated June 25, 1912. for Masterton the following facts were set forth as proved:—“(1) That the appellant was, on 12th October 1911, shopmanager and the person locally in charge, at their retail premises at Bowhill, Auchterderran, Fife, of the affairs of the company known as Dick's Co-operative Institutions, Limited, having their registered office at No. 3 Bonnar Street, Dunfermline. (2) That the said company carry on a retail business as grocers and provision merchants in Dunfermline and West Fife. (3) That the employees of the said company on the company's instructions at their said premises at Bowhill make up tea and other groceries in packets of various weights in readiness to meet the orders of their customers. (4) That, in weighing and making up these packets, the weight of the paper bag and of the article are intended together to make up a pound, a half-pound, or other quantity, and the weight of the bag is thus included in the weight of the article asked for by the purchaser. (5) That the bags in which the said company make up such packets of tea are of material as light in weight as is practicable for their purpose, and upon each bag there is printed, *inter alia*, the words, 'This packet is guaranteed gross weight.' Nothing except the article asked for and sold was contained in the said bags. (6) That there is a custom in the retail grocery trade when articles are sold and weighed in presence of the buyer to weigh the paper wrapper along with the article sold; that this custom does not apply to all articles; but that it does apply to tea when it is sold in quantities of less than one pound. (7) That within recent years a practice has grown up among wholesale dealers having retail shops and wholesale dealers selling through agents of selling tea in quarter-pound, half-pound, and one pound packets, such packets not being weighed in presence of the purchasers; that this practice is followed by many retail dealers; that some of such dealers include the paper wrapper in the weight of the packet, but that others give the full weight of tea exclusive of wrapper. (8) That Bowhill is situated in a mining district, and that the words 'gross weight' are well understood by miners to signify a weight inclusive of an article and of the receptacle in which it is contained. (9) That Alexander Loudon, Cupar, an assistant to Robert Robertson, Inspector of Weights and Measures for the county of Fife, on the instructions of, and as a messenger for, the said Robert Robertson, on 12th October 1911, personally ordered in the appellant's presence from James Dowie, an assistant employed at the retail premises of said company at their premises at Bowhill, Auchterderran, 'half a pound of tea and two pounds of sugar.' (10) That James Dowie then sold and delivered to Alexander Loudon a half-pound packet of tea in a bag labelled as stated, having printed thereon the words, 'This packet is guaranteed gross weight,' and a two pound packet of sugar, both of which had already been made up according to the practice and in the manner narrated in findings 3 and 4 hereof, and both wrapped up in brown paper as a parcel. (11) That Alexander Loudon's attention was not directed to, nor did he see, the words on the tea bag. He left said premises, taking his said purchases with him, and delivered them to the said Robert Robertson, with whom he afterwards returned to the premises when Robert Robertson required the tea in the said packet to be weighed. This was done in the presence of Robert Robertson and the appellant by Alexander Loudon. (12) That the weight of tea therein was 122½ drachms. (3) That, apart from the representa-

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tion contained in the sale, there was no proof of any dishonesty or fraudulent intent on the part of the appellant."

The case continued:—"Upon these facts, I found that the directions in section 430 of the Burgh Police (Scotland) Act, 1892, as applied to counties by section 10 of the Local Government (Scotland) Act, 1908, had been observed by the said Robert Robertson, as an inspector of weights and measures, and that the appellant had not discharged the onus laid on him by the statute of proving that the deficiency in weight had arisen without any fraudulent intent, and that he was guilty of the offence charged.

"With regard to the question of selling tea in packets, I found that there was no proof of a custom of trade under which the weight of the wrapper is included in the weight demanded by the purchaser of so universal and notorious a character that any person purchasing tea in packets must be understood to contract that the wrapper should be included in the weight."

The facts stated in Collier's case were substantially the same, except that the words printed on the bags were "Full weight of tea including wrapper."

In both cases the questions of law were:—" (1) Is the complaint relevant? (2) On the facts as above set forth, was I entitled to convict the appellant of the offence charged?"

The two appeals were heard together before the High Court on 15th and 19th March 1912.

Argued for the appellants;—(1) The charge was irrelevant in two respects. In the first place, it was only inspectors of weights and measures and constables who were entitled to act under section 430 of the Burgh Police Act of 1892, and there was nothing in the section to warrant the employment as here of a substitute or messenger by an inspector. Secondly, the procedure contemplated in the section was the seizure and impounding of goods. Here the proceedings set forth in the charge were of the nature of a trap-sale. The language of the section was obscure: but it was clear at least that the facts libelled could not constitute an offence under the section. (2) On the merits the conviction fell to be quashed. There was no misrepresentation as to the weight of the tea, for nothing was said by the salesman, and the printing on the wrapper sufficiently disclosed to the purchaser that the weight of the wrapper was included in the weight of the packet.¹ Moreover the practice of weighing the tea and the paper together was well known, and there was therefore no evidence at all of fraud.² The accused accordingly had proved that "the deficiency in weight" had "arisen without any fraudulent intent."

Argued for the respondent;—(1) The complaint was relevant. Under section 430 of the Burgh Police Act (which was considered in *Barty v. Hill*³) the offence consisted in selling or exposing for sale goods under weight. (2) On the merits the charge was proved. The

¹ *Spiers & Pond v. Bennett*, [1896] 2 Q. B. 65; *Sandys v. Small*, (1878) 3 Q. B. D. 449; *Pearks, Gunston, & Tee, Limited, v. Houghton*, [1902] 1 K. B. 889; *Langley v. Bombay Tea Co.*, [1900] 2 Q. B. 460; *Jones v. Jones*, (1894) 58 J. P. 653.

² *Bridger v. Neilson*, (1894) 31 S. L. R. 744; *Harris v. Allwood*, (1892) 57 J. P. 7.

³ 1907 S. C. (J.) 36, 5 Adam, 235.

appellants' case rested entirely on the printing on the wrapper of the June 25, 1912. packet. But that would not protect them, for the contract here was a verbal contract and the seller could not alter the offer or qualify his acceptance by means of a notice on the packet. Again, such a notice was material only if it was brought to the knowledge of the purchaser at the time when the contract was made: and in the present cases the purchasers were not at that time aware of the notices. Further, such notices would protect the seller only if they were in clear and explicit terms,¹ whereas the notices in question were of studied ambiguity. Accordingly the appellants had failed to prove that the deficiency did not arise from fraudulent intent.

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At advising on 25th June 1912,—

Masterton's Case.

LORD JUSTICE-CLERK.—This is a case arising under the Burgh Police (Scotland) Act of 1892, under section 430 which relates to frauds in selling articles by weight. The circumstances set forth are that Robert Robertson, an inspector of weights and measures, sent Alexander Loudon as his messenger to the shop of the appellant to ask for half a pound of tea, and two pounds of sugar, and that in response to that demand the person serving in the shop handed to Loudon a packet of tea weighing half a pound, but the weight of the wrapper being from five to six drachms, the quantity of tea was deficient by that amount. Conviction followed on this charge, which went to trial, the judge having repelled an objection to relevancy, stated on the ground that the clause of the statute did not authorise the inspector to purchase goods by another, but only authorised him to do so himself. This objection was insisted in at the debate, it being maintained that the Act does not show an intention to take notice of purchases made to entrap the seller—and this plainly was the case here, there being added an order for sugar to give it the appearance of a *bona fide* purchase—but is directed only to authorise the seizure of goods represented to be of a given weight, on the representation as to weight being found to be false when the goods are placed on the scale before the inspector.

It is necessary to examine the terms of the enactment closely. It empowers the person appointed under its authority to enter buildings where articles are sold, made up, or kept, or exposed for sale by weight, or in which any article is weighed with a view to purchase or sale, and to seize such article if deficient in weight. By a most unfortunate want of care in drafting, the section does not clearly point to the weighing taking place in presence of the inspector where the article is in a shop or other premises. The words seem to apply only to a different case—that of a person in charge of articles in the street for sale on the street. If the words are read strictly, they do not cover the case in question. It cannot be doubted that the words in question were intended to apply in both cases, but it is not for the Court to insert words which have been omitted, in order to make a statutory provision operative beyond its express terms.

¹ Dawes v. Wilkinson, [1907] 1 K. B. 278; Star Tea Co. v. Whitworth, (1904) 68 J. P. 443; King v. Spencer, (1904) 68 J. P. 530.

June 25, 1912. But this point is of little consequence, as I hold that the case can be disposed of on other and more direct grounds.

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It is next provided that if the weight does not correspond with the weight which has been represented by the person who has sold, or made up, or kept or exposed the same for sale, or who weighed the same with a view to purchase or sale, the person authorised to make the demand may convey such article to the police office, "and the magistrate may sentence the person who has sold, or made up, or kept or exposed for sale, and who has incorrectly weighed . . . the same with a view to purchase or sale, to a penalty not exceeding £5." Here, again, the drafting seems to have been unsatisfactory, for while in each of the two statements the words describing the two things struck at are the same, in the statement of them as regards the occurrence at the time of the offence, they are disjoined by the word "or," while in the statement of what the magistrate may do, they are conjoined by the word "and." Can this latter statement, which is truly the setting forth of the offence for which the magistrate may inflict a penalty, be read otherwise than as requiring him to be satisfied that both branches have been proved? I do not see how the Court can do otherwise than so hold. To hold that both parts of the statement quoted need not be proved would be to read "and" as if it meant "or"; and, although in some cases where the context seemed to justify it the word "and" has been read disjunctively, I cannot see upon what ground that can be done in dealing with the clause before us. If that be so, there do not seem to be any facts which would justify its being held that the accused had offended in both particulars, which, according to the strict reading of the clause, would be necessary before any conviction could follow. And indeed both are not charged in the first charge. It is most unfortunate that the clause is so framed as to lead to what, it may well be, is a miscarriage—according to the intention of the Legislature—but it is not for this Court to correct blunders in order to give effect to supposed intentions. The statutory enactments must be dealt with as their words require they should be, whatever be the consequence. The complaint here states in the first charge the first part only of what it is said will justify the infliction of a penalty. Everything after and including the word "and" is left out, and this must, I think, be held fatal to the charge.

Again, when the clause is examined, it is found that it has one procedure by the officer in contemplation, and one only, viz., that he may enter premises, and there proceed to act. There is nothing in the section to sanction proceedings under it by the officer sending someone else to go into premises, and there buy an article and remove it from the premises, out of the sight of the person from whom he received it. The Act seems to contemplate that all that is done up to the time of seizure shall be done in the premises in which the article which forms the subject of investigation is at the time, the intention plainly being that the official investigation shall take place where the article is, and then and there in the presence of the keeper of the premises in which it is offered for sale. This seems only fair, for if the article were taken away the person who had it in his premises would have no opportunity of seeing the weighing and checking it. He is entitled to see that those who charge him with incorrect weighing do the

check-weighing correctly. And this is what the statute secures to him. June 25, 1912. It does not deal with general sales, but with a sale on a representation to a proposing purchaser made in the premises, and followed at once with a weighing operation, while the article is intact, and in presence of the person offering it for sale. If this view be sound then the complaint does not set forth what is required by the statute, as the narrative is that one Alexander Loudon, acting as the official's messenger, bought the article, and it is stated in the facts found that he left the premises, taking his purchase with him. That was plainly not the sequence of events contemplated by the Act.

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Lastly, the Act contains a proviso that where there is deficiency of weight, the person selling may escape conviction if he can prove that there was no "fraudulent intent." The Sheriff held that the accused had failed to prove this. It is therefore necessary to look at the facts found proved to see whether they should not have been held to constitute such proof. These facts are:—(1) That the appellant's company sell their $\frac{1}{2}$ -lb. packets with these words printed on them,—“This packet is guaranteed gross weight.” (2) That it is the custom in the grocery trade when articles are sold by weight in the buyer's presence, to weigh the paper wrapper along with the article, and that this custom applies to tea sold in quantities of less than a pound. (3) That it has been a custom in recent years to sell such packets without their being weighed in presence of the purchaser, and that some dealers include the wrapper in the weight, and some give full weight exclusive of the wrapper. (4) That in the district in question “gross weight” is well understood to signify weight inclusive of the article and the receptacle in which it is contained. (5) That Loudon asked for half a pound of tea and two pounds of sugar, and received a packet of tea on which the words “This packet is guaranteed gross weight” were printed.

Now the Sheriff has held that these proved facts did not amount to proof that there was no “fraudulent intent.” That is a decision in law, and in my opinion it was erroneous. The packet being sold as “gross weight,” and so declared on the wrapper, and “gross weight” being known to mean weight including wrapper, the evidence negatived fraudulent intent, for the representation in handing over the packet was not a representation that the packet contained half a pound of tea, but represented only that the tea and cover, together as a packet, were of a gross weight of half a pound, which was true. I would have come to the conclusion on these facts that the onus was discharged, even had there been no precedent for that view. But in the case of *Bridger*¹ it has already been held in practically similar circumstances that it cannot be said that there was a presumption of guilt of fraud. I think the appellant is entitled to say: If, in the same circumstances as occurred here, it has been held that fraud is not proved, does it not logically follow that I discharge the onus laid on me by the Act by proving that the circumstances are the same?

It is unnecessary to notice the second charge, as the Sheriff gave a verdict of acquittal.

I would move your Lordships to answer both the questions in the negative.

¹ 31 S. L. R. 744.

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LORD SALVESEN.—The complaint upon which the appellant in this case was convicted is laid on section 430 of the Burgh Police (Scotland) Act, 1892. The substance of the first charge is that on a given date the appellant, in response to a demand made by Alexander Loudon (who acted as a messenger for Robert Robertson, an inspector of weights and measures) for a half pound of tea, sold and delivered to Loudon a packet of tea which weighed half a pound including the paper wrapper, but was some drachms short of the full weight of tea demanded. On this charge the Sheriff-substitute convicted the accused. The second charge is to the effect that on the same date and in the same premises the appellant represented to Mr Robertson that several other quantities of tea each weighed half a pound, and that on several of these being weighed in his presence they were found not to do so, but were deficient in weight to the extent of the weight of the paper wrapper. This second charge the Sheriff-substitute has found not proven. The facts show that the only difference between the two cases was that in the former Loudon asked for half a pound of tea and that a packet which did not contain a full half pound of tea was handed to him without remark by the shopman in charge, whereas in the other case the inspector simply demanded that certain packets which he found in the shop should be weighed, and there was no express or implied representation as to the amount of tea they contained.

At the first diet the accused objected to the relevancy of the complaint on the ground that section 430 of the Burgh Police (Scotland) Act, 1892, only authorised the inspector of weights and measures, and not an assistant, to purchase goods. This objection was repelled. At the debate before us the objection to relevancy was pressed in a somewhat enlarged form, and in particular it was maintained that section 430 does not contemplate trap purchases but the seizure of packages represented to be of a given weight, which is ascertained to be false on their being weighed by the official on whom the power is conferred.

I have found this objection attended with much difficulty. The heading of the section is "Chief Constable or Inspector to have power to enter premises and require articles to be weighed," and according to the ordinary meaning of the sequence of clauses this seems to be a fair description of it. The first clause is devoted to conferring power on the chief constable, or anyone specially appointed by him to perform the duty, or any inspector of weights and measures, to enter any building in which an article is sold, or is made up, or kept, or exposed for sale by weight, or in which any article is weighed with a view to its being bought or sold, or he may stop any cart or any person carrying any basket from which such articles are sold or exposed for sale on the street, and require such article to be weighed in his presence. I pause here to observe that the words "in his presence" have no proper correlative in the case of an entry of a building such as that with which we are concerned here, but directly apply to the other case dealt with of a person carrying or in charge of any basket from which articles are sold, or kept, or exposed for sale on the street, and this is an instance of the extremely bad draftsmanship which is characteristic of the Act as a whole. It may readily enough be assumed that the draftsman intended the words "in his presence" to apply not merely to the person carrying or in charge

of a basket, but to a person in charge of the premises described in the June 25, 1912. section, and entered under its authority, but no such person is mentioned, ^{Masterton v.} and on a strict reading of the section it would appear that it is only in the Soutar. case of a person who is stopped in the street carrying any articles sold by ^{Collier v.} weight, or in charge of a basket containing such articles, that it is impera- Soutar. tive that the weighing should be done in his presence. Such a distinction ^{Lord Salvesen.} is of course meaningless and can scarcely have been intended, and indeed is assumed not to exist by the person who framed the second charge ; but the Court has to deal with statutes as they find them and is not at liberty to interpolate words with the view of making a provision intelligible or consistent. The section then proceeds: "If the weight . . . does not correspond with the weight . . . which has been represented by the person who has sold, or made up, or kept or exposed the same for sale, or who weighed . . . the same with a view to purchase or sale, such chief constable," &c., may convey such article to the police office, "and the magistrate may sentence the person who has sold or made up, or kept, or exposed the same for sale, and who has incorrectly weighed " the same with a view to purchase or sale, to a penalty not exceeding £5. Here, again, a difficulty is created by the use of the word "and" in the last clause. Strictly construed, it would appear that the person who is liable to conviction must not merely have sold the article in question but also have incorrectly weighed it, whereas in the earlier part of the clause it is made clear that a distinction is made between premises in which a thing is sold or exposed for sale, and premises in which an article is weighed with a view to sale. One would therefore have expected that the clause I have already quoted should have been alternative, and should properly have been introduced by the word "or" and not by the word "and." The offence, however, is constituted by the latter clause, and reading it, as I think we are bound to do, strictly, I think it only applies to the person who has incorrectly weighed the article in question, as well as sold, or made it up, or kept, or exposed it for sale. It is true that in certain cases the Court have found themselves entitled to read the word "and" disjunctively and not cumulatively, but I see no ground upon which such a construction would be warranted in dealing with this very peculiar and very ill-drawn clause. If this be a sound view, there is no statement in the complaint (and no finding in fact) that the accused Thomas Masterton, who was in charge of certain retail premises at Bowhill belonging to a company known as the Dick's Co-operative Institution, Limited, had incorrectly weighed the packages in question, although there is a general finding that the employees of the Company at Bowhill were instructed, in weighing and making up packages of tea, to include the weight of the paper bag in the half pound or pound packets in which they sell this commodity.

I am unwilling to base my judgment on relevancy on so technical a point, but there is a further objection which goes to the root of the complaint, viz., that the representation must be made to the chief constable or constable specially appointed by him to perform the duty, or to the inspector of weights ; and that the complaint discloses that the representation relied on here was made to a messenger of the inspector of weights and not in his presence at all. In my opinion that objection is sound. Assuming, for the

June 25, 1912. sake of brevity, that the inspector were the only person authorised to enter the premises, then the section reads that he may enter certain premises and may require certain articles to be weighed; and then it goes on to say that if the weight does not correspond with the weight represented by the person in charge, he (the inspector) may convey the articles to a police office. The kind of case which would clearly fall under the section would be one where articles were displayed on the counter of a shop, in packets marked as of a given weight. The representation would then be contained on the packet itself; and an offence would *prima facie* be committed by the person in charge of the premises if the weight did not correspond with what was represented on the wrapper. Equally so if an inspector entered the shop and made a purchase of some article by weight and was given a parcel which did not contain the full weight of the article purchased. It is, of course, just as bad to make such a representation to an assistant of the inspector as to the inspector himself. But the same would apply to a member of the public who removed the article sold from the shop and afterwards communicated with the inspector of weights, who found it to be below the weight represented, and I find nothing to suggest that such a case was contemplated by the particular section with which we are now dealing. The truth is, that the section seems to be framed on the footing of preventing fraud on the public by arming certain officials with the power of entry, and not to provide for frauds which have actually taken place. I have therefore come to be of opinion that the objection to relevancy is sound, although I am fully alive to the fact that one of the best modes of detecting and punishing a fraudulent course of dealing, to wit, by means of a trap purchase made by some person who will not be recognised as acting under official instruction, will thus not be available. If the section had intended to deal with such cases it ought to have constituted it an offence for any person to give under-weight in a sale of an article of which a quantity of a given weight was demanded by the purchaser, and then to have armed certain officials with the preventive powers which the section confers. The only reason that occurs to me why the section was not so framed was that the dealer in such a case would not have the protection which the Act intended him to have of having the article immediately weighed in his presence, so that the deficiency in weight could be correctly ascertained. It would be a dangerous thing where a sale had been made to a member of the public who might subsequently have tampered with the contents of the parcel, if it should be open to him thereafter to call in an inspector of weights to ascertain its weight, with the view of making a charge against the seller; and while there can be no suggestion of this having been done in the present case, it affords a reason why the section should have taken the form in which it appears in the statute.

The section concludes with a proviso to which I have not hitherto referred, which is expressed in these terms: "Unless such person shall prove to his satisfaction, that the deficiency in weight, measure, or number has arisen without any fraudulent intent." Now the facts as found here are that each packet of tea had printed upon it the words—"This packet is guaranteed gross weight," and it is expressly found that the bags in which the Company make up such packages are of material as light in

weight as is practicable for their purpose; that there is a custom in the June 25, 1912. retail grocery trade, when articles are bought and weighed in presence of the buyer, to weigh the paper wrapper along with the article sold, and that this custom applies to tea when it is sold in quantities of less than one pound. Further, it is found that Bowhill is situated in a mining district, and that the words gross weight are well recognised to signify a weight inclusive of an article and of the receptacle in which it is contained. Moreover, there was no representation except that contained in the delivery of the packet to Loudon, in answer to his demand for half a pound of tea, that the packet contained half a pound of tea. On these facts the Sheriff held that the appellant had not discharged the onus laid on him by the statute of proving that the deficiency in weight had arisen without any fraudulent intent. I am unable to agree with him. I think where a practice has been long established of selling tea in packets, and there is a notice upon the packets that the weight of the wrapper is included in the weight, that the shopman is entitled to assume that the customer who asks for half a pound of tea is aware that he is not getting a full half pound of tea, but only a half pound of tea less the weight of the paper wrapper. I find that so far back as the year 1894, in the case of *Bridger*,¹ Lord Adam in the course of his opinion said: "Now it seems to be the custom of trade of this company and prevailing throughout the kingdom, in the sale of articles requiring paper to contain them when sold in small quantities, that the paper necessary for that purpose is placed on the scales and weighed along with them. Can it be said that a person following this practice of trade is to be presumed to be guilty of fraud? I think not." These words are all the more applicable to a case occurring eighteen years later, when it may be presumed that the public have become even better acquainted with the practice. I cannot say that I like the form of the notice on the packets in question. I think that it would have been far better if it had been expressed in some such form as "This packet weighs half a pound including the wrapper"; and I confess that I have a suspicion that the peculiar wording of the notice was adopted so as to make this not too clear to the unwary purchaser; but when I find that the learned Sheriff-substitute has found as a fact that the words "gross weight" are well understood by the class of customers who frequent this shop as signifying a weight inclusive of the article and of the receptacle in which it is contained, I have difficulty in understanding how he reached his conclusion. If the notice means this, as I think it does when fairly construed, it was exactly the same as if the shopman in handing the packet to the inspector's messenger had said, "This packet weighs half a pound including the wrapper," in which case it would not have been possible for a conviction to have been sustained. It is true that the onus is laid on the person who has given short weight to prove that the deficiency has arisen without any fraudulent intent, but I fail to see how he could satisfy that onus except by proving such facts as are found in the stated case. If the Sheriff saw his way to convict upon the first charge, I cannot see how he could avoid convicting also on the second; for he expressly

Masterton v.
Soutar.

Collier v.
Soutar.

Lord Salvesen.

¹ 31 S. L. R. 744.

June 25, 1912. found that packets of tea and other groceries of various weights were kept in readiness to meet the orders of customers, and that such packets would in ordinary course be delivered in response to orders for a given weight of the article, whether tea or other grocery, required. It may be that the law ought to be more stringent; and that it would be desirable in the interests of the public that it should be illegal to include the weight of the wrapper in response to an order for a given weight of the article which the wrapper contained; but there is no law at present which makes it illegal to sell packets of tea or other groceries although the contents of the packets are not of a given standard of weight. After all, it is questionable whether the public require any further protection than they at present have; for, provided the notice on the packet is sufficient, they are informed exactly of what they are getting, and need not receive the packet or continue dealing with a company which adopts the system of including the weight of the wrapper in the weight of the article delivered. On these grounds I have come to be of opinion that we should answer both questions submitted for the opinion of the Court in the negative.

Masterton v.
Soutar.

Collier v.
Soutar.

Lord Salvesen.

LORD GUTHRIE.—I concur in your Lordships' opinions on relevancy, and have nothing to add.

On the question of the appellant's proof that the deficiency in weight arose without any fraudulent intent, that is, without any intention on his part to deceive, I have felt greater difficulty than your Lordships. I have not found it easy to get over the impression, hostile to the appellant, created by the words "This packet is guaranteed gross weight," printed on the packets of tea in question. The appellant did not make any public intimation of the change resolved on by him in his method of selling tea, and there was no universal change among the traders in the district to make such an announcement unnecessary. But the announcement actually made on each packet of tea sold showed that he considered it necessary to make some statement in order to prevent mistakes on the part of the public. If so, the fact that the appellant, instead of saying in so many words that the weight of the packet, including the wrapper, was so much, or that the weight of the paper bag was included in the weight sold, used words so ambiguous is by itself suggestive of an intention, if not to deceive, at least to say as little as he possibly could. And here I may point out that although there is a statement of an understanding in the district of the meaning of the words "gross weight," it is only an understanding among miners, and says nothing either about their families or about other classes of the community.

But, taking the facts proved as a whole, I am not prepared to differ. Traders, however, must not understand that the Court approves of announcements such as that of the appellant in this case. Traders will find it to their interest to see that, when an announcement of a change of practice requires to be made, it should be such as to be universally understood even when hurriedly read by unlettered people.

Collier's Case.

LORD JUSTICE-CLERK.—What I have already said in the case of Masterton applies to this case, the circumstances being substantially the same. The

only real difference is that in this case the words on the wrapper were,— June 25, 1912.
 “Full weight of tea including wrapper.” That difference cannot affect the ^{_____} Masterton v.
 decision, as the words are plainly to the same effect, and, indeed, are more Soutar.
 direct, as indicating that the tea sold did not amount to a full half pound. ^{_____} Collier v.
 Soutar.

LORD SALVESEN.—The complaint in this case and the facts found by the Sheriff-substitute are substantially the same as those in the case just disposed of. The only difference in the facts is that the words printed on the packet were as follows:—“Full weight of tea including wrapper.” These words are open to the same objection as the notice in the case of Masterton—that they do not give clear and unambiguous notice that the customer does not get the full quantity of tea demanded. At the same time no evidence was led that the words were not understood by persons who frequented the shop; and I cannot think that anyone who considered their meaning could arrive at any other conclusion than that the wrapper had been weighed along with the tea in order to make up the weight demanded. It would have been quite open for the prosecutor to have led evidence of this kind, as it would have had a bearing upon the sufficiency of the notice and as to whether the implied representation constituted by the sale itself had been displaced by the notice. Having in view, however, the long-continued practice and the presumed knowledge of the persons frequenting the shop, I think the notice was sufficient to displace it, and to clear the appellant of any imputation of dishonesty. As I have so fully gone into the question of relevancy in the other case, it is unnecessary to do so again, there being no material distinction between the two cases. The questions submitted to us will fall to be answered in the negative, as in the case of Masterton.

LORD GUTHRIE.—I concur.

THE COURT answered both questions in the two cases in the negative, sustained the appeals, and quashed the convictions.

JOHN STEWART, S.S.C.—R. A. BREMNER, Solicitor—WILLIAM BLACK, S.S.C.—Agents.

GILBERT SCOTT (Sanitary Inspector, Airdrie), Complainer
 (Appellant).—*Morison, K.C.—D. P. Fleming.*

No. 16.

ANDREW JACK, Respondent.—*D.-F. Dickson—Dunbar.*

July 13, 1912.

Public Health—Food and Drugs—Genuineness of milk—Milk sold in condition yielded by cow—Deficiency of fat due to method of feeding—Sale of Food and Drugs Act, 1875 (38 and 39 Vict. cap. 63), sec. 6—Sale of Milk Regulations, 1901, (1) and (2). ^{_____} Scott v. Jack.

The Sale of Food and Drugs Act, 1875, section 6, makes it an offence to sell any article of food “which is not of the nature, substance, and quality demanded” by the purchaser. The Sale of Milk Regulations, 1901, (1) and (2), provide that where milk contains less than a certain percentage of milk fat and solids, “it shall be presumed for the purposes of the Sale of Food and Drugs Acts, 1875 to 1899, until the contrary is proved, that the milk is not genuine by reason of the abstraction therefrom” of milk fat or solids, “or the addition thereto of water.”

In a complaint the offence charged was that of selling “sweet milk which was not of the nature, substance, and quality of sweet milk, the article demanded by the purchaser, in respect that” it did not contain

June 25, 1912. found that packets of tea and other groceries of various weights were kept in readiness to meet the orders of customers, and that such packets would in ordinary course be delivered in response to orders for a given weight of the article, whether tea or other grocery, required. It may be that the law ought to be more stringent; and that it would be desirable in the interests of the public that it should be illegal to include the weight of the wrapper in response to an order for a given weight of the article which the wrapper contained; but there is no law at present which makes it illegal to sell packets of tea or other groceries although the contents of the packets are not of a given standard of weight. After all, it is questionable whether the public require any further protection than they at present have; for, provided the notice on the packet is sufficient, they are informed exactly of what they are getting, and need not receive the packet or continue dealing with a company which adopts the system of including the weight of the wrapper in the weight of the article delivered. On these grounds I have come to be of opinion that we should answer both questions submitted for the opinion of the Court in the negative.

LORD GUTHRIE.—I concur in your Lordships' opinions on relevancy, and have nothing to add.

On the question of the appellant's proof that the deficiency in weight arose without any fraudulent intent, that is, without any intention on his part to deceive, I have felt greater difficulty than your Lordships. I have not found it easy to get over the impression, hostile to the appellant, created by the words "This packet is guaranteed gross weight," printed on the packets of tea in question. The appellant did not make any public intimation of the change resolved on by him in his method of selling tea, and there was no universal change among the traders in the district to make such an announcement unnecessary. But the announcement actually made on each packet of tea sold showed that he considered it necessary to make some statement in order to prevent mistakes on the part of the public. If so, the fact that the appellant, instead of saying in so many words that the weight of the packet, including the wrapper, was so much, or that the weight of the paper bag was included in the weight sold, used words so ambiguous is by itself suggestive of an intention, if not to deceive, at least to say as little as he possibly could. And here I may point out that although there is a statement of an understanding in the district of the meaning of the words "gross weight," it is only an understanding among miners, and says nothing either about their families or about other classes of the community.

But, taking the facts proved as a whole, I am not prepared to differ. Traders, however, must not understand that the Court approves of announcements such as that of the appellant in this case. Traders will find it to their interest to see that, when an announcement of a change of practice requires to be made, it should be such as to be universally understood even when hurriedly read by unlettered people.

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only real difference is that in this case the words on the wrapper were,— June 25, 1912.
 “Full weight of tea including wrapper.” That difference cannot affect the ^{Masterton v.}
 decision, as the words are plainly to the same effect, and, indeed, are more ^{Soutar.}
 direct, as indicating that the tea sold did not amount to a full half pound. ^{Collier v.}
^{Soutar.}

LORD SALVESEN.—The complaint in this case and the facts found by the Sheriff-substitute are substantially the same as those in the case just disposed of. The only difference in the facts is that the words printed on the packet were as follows:—“Full weight of tea including wrapper.” These words are open to the same objection as the notice in the case of Masterton—that they do not give clear and unambiguous notice that the customer does not get the full quantity of tea demanded. At the same time no evidence was led that the words were not understood by persons who frequented the shop; and I cannot think that anyone who considered their meaning could arrive at any other conclusion than that the wrapper had been weighed along with the tea in order to make up the weight demanded. It would have been quite open for the prosecutor to have led evidence of this kind, as it would have had a bearing upon the sufficiency of the notice and as to whether the implied representation constituted by the sale itself had been displaced by the notice. Having in view, however, the long-continued practice and the presumed knowledge of the persons frequenting the shop, I think the notice was sufficient to displace it, and to clear the appellant of any imputation of dishonesty. As I have so fully gone into the question of relevancy in the other case, it is unnecessary to do so again, there being no material distinction between the two cases. The questions submitted to us will fall to be answered in the negative, as in the case of Masterton.

LORD GUTHRIE.—I concur.

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JOHN STEWART, S.S.C.—R. A. BREMNER, Solicitor—WILLIAM BLACK, S.S.C.—Agents.

GILBERT SCOTT (Sanitary Inspector, Airdrie), Complainer
 (Appellant).—*Morison, K.C.—D. P. Fleming.*

No. 16.

ANDREW JACK, Respondent.—*D.-F. Dickson—Dunbar.*

July 13, 1912.

Public Health—Food and Drugs—Genuineness of milk—Milk sold in condition yielded by cow—Deficiency of fat due to method of feeding—Sale of Food and Drugs Act, 1875 (38 and 39 Vict. cap. 63), sec. 6—Sale of Milk Regulations, 1901, (1) and (2). ^{Scott v. Jack.}

The Sale of Food and Drugs Act, 1875, section 6, makes it an offence to sell any article of food “which is not of the nature, substance, and quality demanded” by the purchaser. The Sale of Milk Regulations, 1901, (1) and (2), provide that where milk contains less than a certain percentage of milk fat and solids, “it shall be presumed for the purposes of the Sale of Food and Drugs Acts, 1875 to 1899, until the contrary is proved, that the milk is not genuine by reason of the abstraction therefrom” of milk fat or solids, “or the addition thereto of water.”

In a complaint the offence charged was that of selling “sweet milk which was not of the nature, substance, and quality of sweet milk, the article demanded by the purchaser, in respect that” it did not contain

July 13, 1912.

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the percentage of milk fat and solids required by the Regulations, "contrary to the Sale of Food and Drugs Act, 1875, section 6, and to the Sale of Milk Regulations, 1901."

It was proved that the milk did not contain the percentage of milk fat and solids required by the Regulations; that it had not been tampered with or adulterated, but had been sold in the same condition as yielded by the cows; and that the deficiency of milk fat and solids was due to the method of feeding, which had been purposely adopted to produce quantity of milk irrespective of quality.

Held that the milk was "genuine" and that the accused was not guilty of the offence charged.

Smithies v. Bridge, [1902] 2 K. B. 13, *commented on*.

HIGH COURT
(Full Bench.)
Lord Justice-General.
Lord Justice-Clerk.
Lord Dundas.
Ld. Johnston.
Lord Salvesen.
Lord Mackenzie.
Lord Guthrie.

ANDREW JACK, Airdrie-hill Farm, Airdrie, was charged in the Sheriff Court at Airdrie on a complaint at the instance of Gilbert Scott, sanitary inspector, Airdrie, appointed by the local authority for the burgh of Airdrie under the Sale of Food and Drugs Acts, 1875 to 1899, to enforce the said Acts for the public interest, which set forth:—"You are charged at the instance of the complainer that on 29th November 1911 in Parkhead Street, Airdrie, you did sell and deliver to the complainer to his prejudice three halfpence worth of sweet milk which was not of the nature, substance, and quality of sweet milk, the article demanded by the purchaser, in respect that it was deficient in milk fat to the extent of 14 per cent, and was also deficient in milk solids other than milk fat to the extent of 11 per cent, conform to certificate of analysis thereof, produced and served as relative hereto, granted by Robert Tatlock Thomson, public analyst for the local authority of the burgh of Airdrie, contrary to the Sale of Food and Drugs Act, 1875, section 6, and to the Sale of Milk Regulations, 1901, made by the Board of Agriculture in exercise of the powers conferred on them by section 4 of the Sale of Food and Drugs Act, 1899, and such offence is a first offence whereby you are liable to pay a penalty not exceeding £20." *

The Sale of Food and Drugs Act, 1875 (38 and 39 Vict. cap. 63), enacts:—

Sec. 6. "No person shall sell to the prejudice of the purchaser any article of food, or any drug, which is not of the nature, substance, and quality of the article demanded by such purchaser under a penalty not exceeding £20"

Sec. 9. "No person shall, with the intent that the same may be sold in its altered state without notice, abstract from an article of food any part of it so as to affect injuriously its quality, substance, or nature, and no person shall sell any article so altered without making disclosure of the alteration, under a penalty"

The Sale of Food and Drugs Act, 1899 (62 and 63 Vict. cap. 51), enacts:—Sec. 4 (1). "The Board of Agriculture may . . . make regulations for determining what deficiency in any of the normal constituents of genuine milk, . . . or what addition of extraneous matter or proportion of water in any sample of milk, . . . shall for the purposes of the Sale of Food and Drugs Acts raise a presumption, until the contrary is proved, that the milk . . . is not genuine or is injurious to health. . . ."

The Sale of Milk Regulations, 1901 (dated August 5, 1901), No. 657, enact:—"The Board of Agriculture, in exercise of the powers conferred on them by section 4 of the Sale of Food and Drugs Act, 1899, do hereby make the following regulations:—

"*Milk*—1. Where a sample of milk (not being milk sold as skimmed, or

The Sheriff-substitute (Glegg) assoilzied the accused, and, at the July 13, 1912, request of the complainer, stated a case for appeal.

Scott v. Jack.

The case set forth :—

“ The certificate of analysis was in the following terms :—‘ I am of opinion that this sample is not genuine, in respect that it is deficient in milk fat to the extent of 14 per cent, and is also deficient in milk solids other than milk fat to the extent of 11 per cent. The sample contains 2·57 per cent of milk fat and 7·51 per cent of milk solids other than milk fat, whereas genuine milk should contain 3 per cent of milk fat and 8·5 per cent of milk solids other than milk fat, according to the Sale of Milk Regulations, 1901. My analysis is as follows :—

	Per cent.
Milk fat,	2·57
Milk solids other than milk fat,	7·51
	<hr/>
Total solids,	10·08
	<hr/>
Mineral matter,	·63
Specific gravity,	1027·2
Preservatives,	none.

“ ‘ OBSERVATIONS.

“ ‘ No change had taken place in the constitution of the article that would interfere with the analysis when the latter was made.’

“ Respondent is a tenant farmer, who is bound under his lease to keep, and does keep, 20 cows. The byre in which these cows are kept is insufficiently ventilated and has been condemned on that ground by the County Sanitary Authority. Want of ventilation, and consequent occasional high temperature, are apt to be prejudicial to the cows, but the particular effect on the milk yielded by the cows was not proved. The cows were Ayrshires and crosses, and were selected by the respondent as likely to yield a large quantity of milk. Respondent fed the cows so as to produce the largest yield of milk, and paid no attention to the quality. The cows were in fair condition, and appeared to be healthy. The respondent has dealt largely in milk in the Airdrie district for several years and no complaints have been made as to the quality of the milk.

“ The sample analysed was taken from a can which contained part of a mixture of the morning milk of seven cows. It was taken about 9.30 A.M. when the respondent was finishing his morning round.

“ Respondent sold sweet milk only, and did not separate cream from milk. The milk was not tampered with or adulterated, but was sold in the same condition as yielded by the cows.

separated, or condensed milk) contains less than 3 per cent of milk fat, it shall be presumed for the purposes of the Sale of Food and Drugs Acts, 1875 to 1899, until the contrary is proved, that the milk is not genuine, by reason of the abstraction therefrom of milk fat or the addition thereto of water.

“ 2. Where a sample of milk (not being milk sold as skimmed, or separated, or condensed milk) contains less than 8·5 per cent of milk solids other than milk fat, it shall be presumed for the purposes of the Sale of Food and Drugs Acts, 1875 to 1899, until the contrary is proved, that the milk is not genuine, by reason of the abstraction therefrom of milk solids other than milk fat, or the addition thereto of water.”

July 13, 1912.

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"I held that the deficiency of milk fat and solids other than milk fat was due to the method of feeding, which method of feeding was purposely adopted to produce quantity of milk irrespective of quality. I further held that as it had been proved that there had been no abstraction of milk fat, of milk solids other than fat, and no addition of water, the presumption afforded by the certificate under the Sale of Milk Regulations, 1901, had been rebutted, and I assoilzied the respondent."

The questions submitted for the opinion of the Court were:—
 "(1) Whether milk containing only 2·57 per cent of milk fat and 7·51 per cent of solids other than milk fat, the deficiency being due to a method of feeding purposely adopted to produce quantity irrespective of quality, may be genuine milk within the meaning of the Sale of Milk Regulations, 1901? (2) Whether on the facts proved I was entitled to assoilzie the respondent?"

The case was heard before the High Court on 19th and 20th March 1912 and was subsequently reheard before a full bench on 13th June 1912.

Argued for the appellant;—The offence charged was selling an article which was not of the "nature, substance, and quality demanded,"¹ i.e., which was not genuine.² The Sale of Milk Regulations, 1901, set up a standard of quality, and provided that milk which did not reach that standard should be presumed not to be genuine.³ In the present case the milk was proved to be below this standard, and the presumption that it was therefore not genuine had not been displaced. Milk was "genuine" when it came from a healthy cow fed under normal conditions,⁴ and not subjected to "unusual treatment."⁵ In the present case it was expressly found that the deficiency of quality was due to a special mode of feeding. Deliberately to diminish the quantity of milk fat and solids in the milk by a process of feeding while the milk was still in the cow was just as much "abstraction" in the sense of the Sale of Milk Regulations as tampering with the milk after it had been taken from the animal. On the facts proved, the respondent should have been convicted.

Argued for the respondent;—The Sale of Food and Drugs Act 1875 was intended, as appeared from the title and the preamble, to provide for the sale of food in a "pure and genuine condition." To effect this, section 6 made it an offence to sell an article not of the "nature, substance, and quality demanded." This could not apply to the sale of milk in the state in which it came from the cow, which was truly its "pure and genuine" condition. The Act only struck at abstraction (section 9), and adulteration (section 3) as defined by Cockburn, C.J., in *Francis v. Maas*,⁶ and its "leading purpose" was to "suppress fraudulent imitations or counterfeits," not to ensure

¹ Sale of Food and Drugs Act, 1875 (38 and 39 Vict. cap. 63), sec. 6.

² Sale of Food and Drugs Act, 1899 (62 and 63 Vict. cap. 51), sec. 4 (1).

³ Sale of Milk Regulations, 1901 (dated Aug. 5, 1901, No. 657) (1) and (2); *Lamont v. Rodger*, 1911 S. C. (J.) 24, 6 Adam, 328.

⁴ *Wolfenden v. M'Culloch*, 1905, 20 Cox's Criminal Cases, 864.

⁵ *Smithies v. Bridge*, [1902] 2 K. B. 13, *per* Lord Alverstone, C.J., at p. 20; *Gordon v. Love*, 1911 S. C. (J.) 75, *per* Lord Salvesen, at p. 81, 6 Adam, 438.

⁶ (1878) 47 L. J., M. C. 83, at p. 84, 3 Q. B. D. 341.

uniformity of quality, which would be impossible.¹ There could there-
fore be no offence under the Act unless there had been adultera-
tion or abstraction,² and both adulteration and abstraction were ex-
pressly negatived in the present case. There was no finding that the
article sold was not of the nature, substance, and quality demanded,
and without such a finding there could not be a conviction.³ In so
far as *Smithies*⁴ decided that it could be an offence under section 6
of the Act to sell milk in the state in which it came from the cow, it
was a bad decision, and should be disregarded. The appellant's case
was made worse rather than better by his appeal to the Sale of Milk
Regulations, 1901. The standard of quality which they set up was
not absolute, and milk might be "genuine" even though it fell below
it.⁵ Further, it was clear on the terms of the Regulations that they
could only be infringed in two ways—adulteration and abstraction—
of both of which the respondent had been found innocent. The
purchaser had, in fact, got the article for which he asked, namely,
sweet milk. Nothing had been added to it and nothing had been
taken from it, and therefore its genuineness as milk could not be
impugned.

July 13, 1912.

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At advising on 13th July 1912,—

LORD JUSTICE-CLERK.—Stated in its baldest form, the question here is
whether if the prosecutor proves that milk, sold as sweet milk, is deficient
in fat or solids so as to be below the minimum fixed by the Milk Regula-
tions of 1901, a conviction must follow under the Food and Drugs Act of
1875, as for the sale of milk as sweet milk which is not genuine sweet
milk—not of the nature, substance, and quality of milk. It is maintained
on the part of the appellant that although the Sheriff found as matter of
fact that the milk sold was milk as it came from the udder of the cow, and
that there had in fact been no abstraction from it, or addition to it, he was
bound to convict, because it was not up to the standard set forth in the
Regulations, conform to certificate by the public analyst, and that therefore
it should be held not to be genuine.

The clauses of the Food and Drugs Act, 1875, which seem to bear upon
this case are the 6th and the 9th. The first of these strikes against selling
to the prejudice of a purchaser that which "is not of the nature, substance,
and quality" of the article demanded. The second (section 9) forbids the
abstraction of any part of an article of food, so as to affect injuriously its
quality, substance, or nature before selling it, and thereafter selling it
without informing the purchaser. The Act of 1899 confers on the Board
of Agriculture power to make regulations as to milk, for the purpose of
determining what deficiency in the normal ingredients of milk, or what
presence of other ingredients or what proportion of water shall raise a pre-
sumption that the milk is not genuine. Accordingly regulations have been

¹ *Davidson v. M'Leod*, (1877) 5 R. (J.) 1, *per* Lord Young, at p. 15, 3 Coup. 511; *Lane v. Collins*, (1884) 14 Q. B. D. 193.

² *Hoyle v. Hitchman*, (1879) 4 Q. B. D. 233, *per* Mellor, J., at p. 237; *Goulder v. Rook*, [1901] 2 K. B. 290.

³ *Macleod v. O'Neil*, (1882) 9 R. (J.) 32, 4 Coup. 629.

⁴ [1902] 2 K. B. 13.

⁵ *Wolfenden v. M'Culloch*, 20 Cox's Criminal Cases, 864.

July 13, 1912. issued setting forth the proportions of milk fat and other solids which should be found in genuine milk, and the absence of which proportion should raise a presumption under the Act until the contrary is proved, "that the milk is not genuine by reason of the abstraction therefrom of milk fat"—or other milk solids—"or the addition of water." This is, in other words, to say that the expression "genuine" is not applicable where there has been such abstraction or such addition.

Scott v. Jack.
Lord Justice-Clerk.

It appears very clearly, I think, from these quotations that what is contemplated as the thing done is that out of milk taken from the cow something has been removed which was in the milk—fat or milk solids—or that something has been added to the milk, namely, water. It is very difficult to see how the words can apply to milk from which, after the cow parted with it, nothing was taken away, and to which nothing was added before sale, the buyer receiving the article exactly in the form and containing all the substances, and only the substances, which came from the teats at milking. The Acts and the Regulations entitle the prosecutor to a conviction, if he proves the fact that there is deficiency as compared with the standard of the Regulations. But the accused has the right to redargue the abstraction or addition, if he can, by evidence. Now, by what possible evidence can he overcome the *prima facie* case against him? He can only do so by proving that the milk was the product of the cow, and that no person through whose hands it passed before it reached the buyer either abstracted from it or added to it. It is a question of fact: Has he proved that the milk was not tampered with? If the Judge who tries the case is satisfied as matter of fact that the milk was not tampered with, is he not bound to hold that the *prima facie* presumption is overcome, and that there can be no conviction? Must not the finding in fact that no abstraction and no addition took place lead of necessity in law to the assoilzieing of the accused from the accusation? I confess I can see nothing wrong in law in such a judgment following on the facts supposed, and these are exactly the facts which the Sheriff found here, and upon which he is final. I am confirmed in this view by the decision in the case of *Lamont v. Rodger*,¹ where it was held that, if competent evidence was led which, in the opinion of the Sheriff, proved that the milk had not had anything added to or abstracted from it, he was entitled to acquit the accused. The Sheriff in that case believed numerous witnesses who negatived the tampering, but erroneously supposed that as they were the accused himself and his family and servants he was not entitled to act upon their evidence, although he believed it, without further corroboration. In that he was plainly wrong.

But it is suggested that the Sheriff here was bound to convict, because it was proved—indeed, admitted by the respondent—that the cows he kept were selected as being of a breed likely to yield a large quantity of milk, and that they had been fed in such a manner as would produce a large yield. The argument was that the large yield led to a deficiency of milk fat, and that for this the respondent was responsible under the Acts and Regulations, as for selling milk which was not of "the substance, nature, and quality" of milk. I feel bound to say that but for the case of *Smithies*

¹ 1911 S. C. (J.) 24, 6 Adam, 328.

v. Bridge,¹ I should have had no difficulty in repelling the argument. It July 13, 1912.
 was in consequence of that case that I thought it desirable that the present *Scott v. Jack.*
 appeal should be argued before a fuller bench.

The case of *Smithies v. Bridge*¹ appears to me to have been wrongly Lord Justice-
 decided, and I concur entirely in the dissent expressed by Mr Justice Clerk.
 Darling. As regards the actual decision, the majority of the Court seem
 to have proceeded upon the view that the decision of the magistrate was
 only a decision in fact, with which the Appeal Court should not interfere.
 That might be quite satisfactory if the decision was one of fact only, and
 it must be presumed that matters of fact were for the magistrates alone.
 But there surely was in that case a finding in law which the Courts were
 entitled to review. The facts found proved were one thing, but the legal
 effect of those facts was another. When the magistrates gave their
 judgment to the effect, as stated by Mr Justice Channell, that "this
 liquid, though it purported to be"—which I assume must mean was
 in fact—"milk direct from the cow, was not of the nature, substance,
 and quality of milk," that was not a finding in fact but was giving a
 construction in law as applicable to the facts. I dissent altogether from
 the view expressed by Mr Justice Channell when he says: "The magis-
 trates find that as a question of fact, and it was within their province to do
 so." The finding as regards nature, substance, and quality, was a finding
 essentially of application of the law to the facts, and when Mr Justice
 Channell says "we ought not to interfere with their decision," I cannot
 agree with his view. I think the Court were bound to consider whether
 the finding applying the words of the statute to the facts found was a
 sound legal decision on those facts, and if it was not, to quash the convic-
 tion. Mr Justice Channell says that the cow was producing "another
 liquid which did not contain the constituent parts of milk." I cannot under-
 stand this reasoning. If the milker goes to the cow and draws off liquid
 in the ordinary way, how is he to know that "another liquid" is being
 given off from the udder? But it is unnecessary to go into that matter,
 for *Smithies'* case¹ was not under the Regulations to which the prosecutor
 appeals in this case. He is not entitled to drop his case under the Regula-
 tions, and to try to upset the Sheriff's judgment by appealing to section 6
 of the Act alone.

The Lord Chief-Justice in his opinion referred to the Regulations, which
 had then been promulgated but were not in force in the case before him.
 He accepts the view that proof of non-conformity to the Regulations is only
prima facie evidence, and that the defendant can redargue it by proof of
 genuineness. But he then proceeds to express *obiter* his view that although
 the article produced by the cow is the result of an abnormal condition of
 things arising "either from disease or, as here, from unusual treatment of
 the cow, I think that that does amount to evidence on which the magis-
 trates can find that the article is not of the nature, substance, and quality
 of the article demanded." If that means that when a party is charged with
 abstracting fat or adding water under the Regulations, a conviction might
 follow, although the magistrate held it proved that neither thing was done,

¹ [1902] 2 K. B. 13.

July 13, 1912. then I respectfully dissent from the *obiter dictum* of his Lordship. My
Scott v. Jack. view is very clearly to the contrary. The Regulations enable the prosecutor
Lord Justice- to throw the onus on the accused of proving "no abstraction" and "no
Clerk. addition." To allow him, after the accused has discharged the onus, to
demand that notwithstanding his having done so, the Regulations shall be
thrown overboard and a conviction pronounced on an interpretation of
section 6 alone would seem to me to be little short of oppression.

I will only add that if the prosecutor intends to make a case of something
having been effected in the body of the cow, he ought to be required to
state this with specification in his complaint. Whether he could relevantly
do so may be a question. If it is desired to meet cases of abnormal treat-
ment of the animals, it would probably be necessary—the whole procedure
in these matters being statutory—that the Legislature should be appealed
to to pass suitable enactments.

On the grounds I have stated, I would propose to your Lordships that
the questions be answered in the affirmative.

LORD DUNDAS.—I am of the same opinion. The prosecutor here, a
sanitary inspector, appeals by way of stated case against the judgment of
the Sheriff-substitute, who has assolized the respondent. The complaint is
of an alleged sale of "three-halfpence worth of sweet milk which was not
of the nature, substance, and quality of sweet milk," the article demanded
by the purchaser, in respect that it was deficient to the extents specified in
milk fat and milk solids other than milk fat, conform to a certificate of
analysis produced, "contrary to the Sale of Food and Drugs Act, 1875,
section 6, and to the Sale of Milk Regulations, 1901 made by the Board of
Agriculture in exercise of the powers conferred on them by section 4 of the
Sale of Food and Drugs Act, 1899." The prosecutor thus libels, and
undertakes to prove, a contravention both of the Act and of the Regulations.
The argument at our bar turned mainly upon the proper construction to be
put upon the Regulations. But I have come to the conclusion that the
facts found by the Sheriff-substitute do not infer an offence either under
the Regulations or the Act of 1875.

The facts disclose, *inter alia*, that the respondent's cows "were selected"
by him "as likely to yield a large quantity of milk. Respondent fed the
cows so as to produce the largest yield of milk, and paid no attention to the
quality. . . . The milk was not tampered with or adulterated, but was
sold in the same condition as yielded by the cows." The analyst's certificate
produced and relied on by the prosecutor bears that the sample sold was
"not genuine," in respect that it is deficient in milk fat and in milk solids
other than milk fat respectively to the extents stated, "whereas genuine
milk should contain 3 per cent of milk fat and 8·5 per cent of milk solids
other than milk fat, according to the Sale of Milk Regulations, 1901." The
Sheriff held "that the deficiency of milk fat and solids other than milk fat
was due to the method of feeding, which method of feeding was purposely
adopted to produce quantity of milk irrespective of quality." He further
held "that as it had been proved that there had been no abstraction of milk
fat, of milk solids other than fat, and no addition of water, the presumption
afforded by the certificate under the Sale of Milk Regulations, 1901, had

been rebutted," and assoilzied the respondent. In my opinion the Sheriff-July 18, 1912.
substitute was right.

Scott v. Jack.

Lord Dundas.

It is, I think, worth while to trace the use of the word "genuine" in the legislative provisions affecting this matter. The Sale of Food and Drugs Act, 1875,¹ proceeds upon the preamble that it was desirable "that the law regarding the sale of food and drugs in a pure and genuine condition should be amended." The word "genuine," however, does not occur in any of the sections (3 to 9 inclusive) which are comprised under the fasciculus "Description of Offences." Section 3 prohibits mixing any article of food with any ingredient or material so as to render it injurious to health, with intent that the same may be sold in that state, and selling the same so mixed. Section 4 similarly prohibits the mixing of drugs with injurious ingredients and selling the same. Section 6 enacts that no person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded, subject to certain provisos. Section 9 prohibits the abstraction of any part of an article of food so as to affect injuriously its quality, substance, or nature before sale, and selling it without notice. The ruling idea seems to me to be that food and drugs are not to be tampered with before sale, either by adding to or abstracting from their proper nature, substance, and quality; which is the same thing, I suppose, as is meant by saying that they must be sold "in a pure and genuine condition." The Act of 1899² reverts to the word "genuine," and seems to carry on the idea above indicated, when it confers (section 4) power on the Board of Agriculture to make regulations for determining what deficiency in any of the normal constituents of genuine milk, or what addition of extraneous matter or proportion of water in any sample of milk shall, for the purposes of the Acts, raise a presumption, until the contrary is proved, that the milk is not genuine, or is injurious to health. In pursuance of this power the Board issued in 1901 the Regulations already referred to, which provide (confining one's attention to the sections said to affect the case before us) that where a sample of milk (not being milk sold as skimmed or separated or condensed milk) contains less than a specified percentage of milk fat, or of milk solids other than milk fat, it shall be presumed for the purposes of the Acts, until the contrary is proved, "that the milk is not genuine, by reason of the abstraction therefrom of milk fat," or of milk solids other than fat, as the case may be, "or the addition of water." I think the words quoted are in substance a definition, or at least an explanation, for the purposes of the Regulations and of the Acts, of what is meant by "genuine."

Now, it is clear from the facts found by the Sheriff that in this case there was no abstraction of milk fat or other solids, and no addition of water, and no tampering with or adulteration of the milk after it left the cow's udder. This appears to me to exclude the application of the Regulations altogether. Their language seems to me designedly to confine the presumption that milk is not genuine to cases where milk fat or other solids have been abstracted from it, or water added to it; and I do not think it can be held to apply, if I may so put it, to an alleged adulteration of the

¹ 38 and 39 Vict. cap. 63.

² 62 and 63 Vict. cap. 51.

July 13, 1912. milk while yet in the body of the cow, resulting from, and effected by, a peculiar method of feeding. If this construction is correct, the respondent has, upon the proved facts, successfully rebutted the presumption.

Scott v. Jack.
Lord Dundas. It is right to notice the English case of *Smithies v. Bridge*,¹ to which the appellant's counsel urgently directed our attention. That decision is not, of course, binding upon us ; but I should see no necessity for differing from it, as a decision, if it can be regarded as merely proceeding upon a finding in fact pronounced by the magistrates which it was within their province to make, and which they had some evidence before them to justify. On that hypothesis, one would readily agree that the majority of the English Court were right in declining to disturb the judgment of the magistrates. I observe, however, from the opinion of Channell, J., that the magistrates found that "this liquid, though it purported to be milk direct from the cow, was not of the nature, substance, and quality of milk." If that was the finding, I am unable to agree with the learned Judge when he says :—"The magistrates find that as a question of fact, and it was within their province to do so. In my opinion they were entitled to come to that conclusion, and we ought not to interfere with their decision." I humbly think that the magistrates' finding involved matter of legal construction, which it was for the Court to determine, as well as matter of fact properly so called ; and it seems to me that the Court ought to have quashed the conviction. I confess that I cannot accept the view indicated by Channell, J., that "the cow was not in fact producing milk, but was producing another liquid which did not contain the constituent parts of milk" ; and I think there is irresistible force in the observation by Darling, J. (who dissented), "Unless we can say that the liquid he got was not milk, we cannot uphold this conviction. . . . But if it was not milk, what was it?" I humbly think that the appellant in *Smithies'* case¹ ought not to have been convicted of an offence under section 6 of the Act ; and it seems to me that, even if the present prosecutor could escape from the onus he has undertaken of proving a contravention of the Regulations of 1901, his case under section 6 would fail, in the circumstances here proved. The appellant founded upon a passage in the opinion of Lord Alverstone, C.J. (who agreed with Channell, J.), in *Smithies v. Bridge*,¹ where his Lordship refers to the Regulations of 1901, which were before the Court, though they did not apply to the case then under consideration, the prosecution in which had (I apprehend) been instituted before the Regulations came into force. The Lord Chief-Justice said :—"As to the recent order of the Board of Agriculture, I do not think it purports to set up a standard of what is or is not genuine milk, but only means to say that the want of a certain percentage of fat is to be *prima facie* evidence that the milk is not genuine, and it will still be open to the defendant to prove that the milk is genuine." So far, I respectfully agree. But his Lordship proceeds :—"If, however, the article produced, although it is produced by the cow, is the result of an abnormal condition of things arising either from disease, or, as here, from unusual treatment of the cow, I think that that does amount to evidence on which the magistrates can find that the article is not of the

¹ [1902] 2 K. B. 13.

nature, substance, and quality of the article demanded." We are not here July 13, 1912. in the position of reviewing a finding such as his Lordship contemplated, *Scott v. Jack.* but I must frankly say that I am unable to construe the Regulations as extending to a case like the present, where the indifferent quality of the milk is attributable to "unusual treatment of the cow"; and I respectfully disagree with the *obiter dictum* of the Lord Chief-Justice if it means (as I gather it does) that, in face of the Regulations of 1901, magistrates could properly find a contravention of section 6 of the Act under the circumstances postulated. I do not think the appellant can take any material assistance from the case of *Smithies*,¹ and I should add that the subsequent case of *Wolfenden*² does not, in my judgment at all events,—looking to the very guarded opinions of the learned Judges—add anything to its weight or authority. In my opinion the terms of the Regulations, as framed, exclude their application to the present case. If the Board of Agriculture intended to include such a case, they might easily have framed their regulations accordingly; but, as matters stand, they have not, in my judgment, done so. Whether or not it is desirable that under the present, or analogous, circumstances an offence should be declared is, I apprehend, a matter for the Legislature or the Board of Agriculture, and not for this Court to consider. In my opinion the Sheriff-substitute's decision was right, and we ought to answer the questions accordingly.

LORD JOHNSTON.—[In his Lordship's absence, his opinion was read by Lord Mackenzie]—The Sale of Food and Drugs Act, 1875, section 6, made it an offence to sell to the prejudice of the purchaser any article of food which is not of the nature, substance, and quality of the article demanded by such purchaser. On this, three things must be noted—First, that by the preamble, the Act proceeds on the desirability of repealing the Acts then "in force relating to the adulteration of food," and of amending "the law regarding the sale of food, &c., in a pure and genuine condition." It is thus clear that "genuine" is used in contradistinction to "adulterated," and that "genuine" means "unadulterated." Second, that the "not of the nature, substance, and quality" of section 6 is really an expansion of the "not genuine," or "adulterated," of the preamble. Third, that there is no provision of any standard for any particular article of food. Accordingly, it is not surprising that there was considerable difficulty in applying the Act, at anyrate in the case of such an article as milk.

This resulted in the enactment of the Sale of Food and Drugs Act, 1899, section 4, which conferred on the Board of Agriculture a power of making Regulations for determining what deficiencies in any of the normal constituents of genuine milk, or what addition of extraneous matter, or proportion of water, in a sample shall, for the purposes of the Sale of Food, &c., Act, 1875, raise a presumption, until the contrary is proved, that the milk is not "genuine." Here "genuine," assumes a meaning rather more extended than "unadulterated" in the ordinary sense. Negative, as well as positive, adulteration, if it be allowable to use the expression, is suggested—adulteration by abstraction as well as by addition. The Board of Agriculture may

¹ [1902] 2 K. B. 13.

² (1905) 20 Cox's Criminal Cases, 864.

July 18, 1912. then fix a standard, on failure to attain which the article milk shall be presumed not genuine until the contrary is proved. But it is quite consistent with this provision that milk may be deficient in the normal constituents of genuine milk and yet be genuine, else how could there be any room for proving the contrary of the statutory presumption. The whole purview of the statutes leads, I think, to the conclusion that what the Legislature strikes against is tampering with—that is either negatively or positively adulterating—the article milk. What, then, is meant by milk? I think that milk in the sense of the statute is milk as drawn from the cow, not milk in the process of formation in the chyle, in the blood, or in the glands of the cow, and that what the statutes strike at is the tampering with such milk so as, by abstraction or addition, to adulterate or render it not “genuine” milk. It is therefore, I think, going beyond the statute to seek to maintain that the poverty of condition of the cow occasioned by poor feeding, and the consequent poverty of the milk yielded by the cow, constitute a statutory offence. This could only be if the statutory standard were absolute, and not merely a means of raising a presumption capable of being rebutted.

Here the respondent has disproved either the abstraction of normal constituents or the addition of foreign substances, or the addition of water, and he has therefore discharged the onus which the statutes lay upon him.

At first sight the decision in the case of *Smithies*¹ appears to give support to the contrary view, but I hardly think that it really does so. It was decided before the Regulations of the Board of Agriculture, issued under the Act of 1899, came into force, and the true ground of judgment is, as it seems to me, thus stated by Lord Alverstone, C.J.: “The magistrates have found that the article supplied was not of the nature, substance, and quality of the article demanded, because it came from the cow in such a condition that it could not be described as milk at all. It is impossible, as I think, to say, having regard to the facts, that there was no evidence on which they could so find.” In other words, the magistrates’ judgment could be supported on this consideration—what was demanded was new milk, by which I assume is meant what in Scotland is termed sweet milk; what was supplied was, according to evidence, milk which, owing to neglect, had lain so long in the udder of the cow that it could no longer be termed new or sweet milk, any more than could the milk of a diseased cow. Accordingly, the Court of Appeal could not say that the judgment of the magistrates was against evidence or without evidence. I do not therefore regard the case of *Smithies*¹ as really hostile to the conclusion to which I have come in the present case.

LORD SALVESSEN.—The complaint in this case is not a model of good draftsmanship, for it appears to be self-contradictory to say that the respondent sold sweet milk which was not of the nature, substance, and quality of sweet milk; and it is also open to the objection that in order to succeed the prosecutor seems to have taken upon himself the onus of proving that the sale in question was not merely contrary to section 6 of the recited Act, but also to the Sale of Milk Regulations, 1901. I am

¹ [1902] 2 K. B. 13.

willing, however, to take the case on the assumption that the complaint July 13, 1912. had been properly framed and that a conviction might have been sustained ^{Scott v. Jack.} if the sale were found to have been contrary either to the Act or to the Regulations; although I am far from saying that if the technical objections ^{Lord Salvesen.} only had been pressed, they might not have been fatal. The Sheriff-substitute has, however, assoilzied the respondent, and the questions submitted to us are whether he was entitled to do so; and in particular, whether milk containing less than 3 per cent of milk fat and $8\frac{1}{2}$ per cent of other solids is genuine milk within the meaning of the Sale of Milk Regulations, 1901, where the deficiency is due to a method of feeding the cows which is purposely adopted to produce quantity irrespective of quality.

As regards the latter question I do not think there is any real difficulty. If a sample of milk contains less than 3 per cent of milk fat or less than $8\frac{1}{2}$ per cent of milk solids other than milk fat, the Regulations establish a presumption that the milk is not genuine. For the purpose of the Regulations, however, it appears to me that the last words of the clause define what is meant by genuine; and that what the framer of the Regulations alone had in view was that solids might be abstracted from the milk, or that the milk might be diluted by the addition of water. The respondent here was able to satisfy the Sheriff-substitute that there had been no abstraction of solids or addition of water, and that he sold the milk exactly as it came from the cows. It is expressly found that the cows were in fair condition and appeared to be healthy, but that they had been selected as being of a breed which was likely to yield a large quantity of milk, and that they had been fed so as to produce the largest yield of milk without any attention being paid to the quality. I cannot hold that if, under these conditions, the cows actually yielded a milk of poorer quality than the standard fixed by the Regulations, there is anything in these Regulations to suggest that an offence has been committed; and I find nothing inconsistent with that view in the decisions to which we were referred in *Lamont v. Rodger*¹ and *Gordon v. Love*,² to both of which I was a party. In the former of these cases it was held that the *onus* of establishing that the milk was genuine might be discharged by evidence given by the accused, his mother, and servants, that the milk had not been tampered with if the Sheriff-substitute saw no reason to disbelieve the evidence; in the latter all that was decided was that section 3 of the Sale of Milk Regulations, 1901, was not *ultra vires* of the Board of Agriculture.

It was, however, strenuously maintained for the appellant that milk which was sold just in the condition in which it came from the cows might nevertheless not be of the substance, nature, or quality of milk, and so that an offence might be committed under section 6 of the Food and Drugs Act, 1875. In support of this contention much stress was laid on the decision in the case of *Smithies v. Bridge*,³ where a conviction was sustained because, although the milk sold was the product of the cow, its deficiency in milk fat could reasonably be attributed to the circumstance that the cow had not been milked for sixteen hours, and had presumably

¹ 1911 S. C. (J.) 24, 6 Adam, 328.

² 1911 S. C. (J.) 75, 6 Adam, 438.

³ [1902] 2 K. B. 13.

July 13, 1912. absorbed into its own system a portion of the milk fat which the milk would otherwise have contained if it had been drawn off some hours earlier.

Scott v. Jack. — Some language that I used in the case of *Gordon v. Love*¹ in referring to Lord Salvesen. this decision was referred to as indicating approval of the decision there come to, and I admit it is open to that construction. It must, however, be borne in mind that the sentence founded on was a mere *obiter dictum*, and that the authority of the case of *Smithies*² had not been challenged ; while I understand the present case has been remitted to a fuller bench in order that we may determine whether the decision in *Smithies*' case² should be followed by us. As the result of the argument I have come to be of opinion that the view of the dissenting Judge (Darling, J.) is to be preferred. I agree with him that when there is a sale of sweet milk just as it comes from a healthy cow in response to a demand for sweet milk, it is impossible to say that what the purchaser has got was not of the substance, nature, and quality of the article demanded. I asked the counsel for the appellant to state how he would describe what was delivered to the appellant if it was not to be described as sweet milk, and his only answer was that it was not of the standard quality prescribed by the Regulations. But if the sale was not contrary to the Regulations, then I do not see how the Regulations can be appealed to in aid of the statutory enactment. If the purchaser had demanded sweet milk containing 3 per cent of milk fat or upwards and had got milk of a poorer quality, an offence might have been committed ; but the only demand here made was for sweet milk, and sweet milk unadulterated and not in any way tampered with was what was supplied. It is to be noted that the case of *Smithies*² was decided before the Regulations had come into operation, and I am inclined to hold that, so far as the article milk is concerned, the Regulations define what milk is to be regarded as genuine, to wit, milk which is undiluted by water and from which milk fat has not been abstracted. Further, the subsequent case to which reference was made at the debate³ indicates that the decision in *Smithies*' case² would not now be implicitly followed even in England. I am therefore of opinion that the Sheriff-substitute came to a right conclusion, and that there are no grounds for disturbing his decision.

LORD MACKENZIE.—In dealing with this case it appears to me to be necessary, in the first place, to consider whether the respondent could possibly, under this complaint, have been convicted on the facts found proved of the offence with which he is charged. The complaint libels the Sale of Milk Regulations, 1901, so as to make it necessary to prove that these have been contravened, otherwise the charge fails. In my opinion, if the person charged proves that the milk was in the same state as it left the cow, he does not come within the scope of the Regulations, which deal with abstraction of milk fat or milk solids, or the addition to milk of water. The Regulations do not set up a standard of what proportion of milk fat and milk solids, other than milk fat, milk must contain in order to be milk, but merely create a presumption, which the person charged must rebut if the

¹ 1911 S. C. (J.) 75, 6 Adam 483.

² [1902] 2 K. B. 13.

³ *Wolfenden v. M'Culloch*, 20 Cox's Criminal Cases, 864.

milk on analysis proves to contain less than the percentages specified in the July 13, 1912. Regulations. In the present case it is expressly found that the milk was not tampered with or adulterated, but was sold in the same condition as yielded by the cows; that there had been no abstraction of milk fat, or of milk solids other than fat, and that there had been no addition of water. In the circumstances I am unable to see how the respondent could have been convicted on this complaint. It follows from this that the second question put by the Sheriff-substitute should be answered in the affirmative.

Scott v. Jack.

Lord Mac-
kenzie.

The case is, however, intended to raise the general question, whether milk may be not genuine though there has been no abstraction of milk fat or milk solids and no addition of water—that is to say, whether a man who sells sweet milk in an unaltered state can be convicted of selling what is not genuine milk—the deficiency being due to an improper method of feeding purposely adopted to produce quantity irrespective of quality. In my opinion he cannot. The Act of 1875 in its original state was entitled “An Act [to repeal the Adulteration of Food Acts, and] to make better provision for the Sale of Food and Drugs in a pure state.” The words in brackets have been repealed by the Statute Law Revision Act. The preamble sets forth, “Whereas it is desirable that the Acts now in force relating to the adulteration of food should be repealed, and that the law regarding the sale of food and drugs in a pure and genuine condition should be amended.” Section 6 provides that no person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser. This section, in my opinion, deals with the identity of the article demanded, and this view is confirmed by reference to the subsections (1), (2), (3), and (4), which provide that an offence shall not be deemed to be committed in the cases therein specified, all of which deal with what may be called foreign substances. According to the best definition of adulteration it is just the introduction of foreign substances into an article—*Francis v. Maas and Others*.¹ In the same way section 9 prohibits the abstraction of any part of an article of food before sale so as to affect injuriously its quality, substance, or nature, and the sale of the same as altered without notice. There could not, in my opinion, be an offence against either section 6 or section 9, if sweet milk was asked for and sweet milk was given in an unaltered state. I cannot find in the Act, and I have already stated that I cannot find in the Sale of Milk Regulations, any warrant for charging an offence because the milk is poor in quality.

It may be that there are circumstances which require that cases of abnormal treatment or improper feeding ought to be regarded as offences. They are not, however, offences at common law unless they involve fraud, and I am unable to take the view that what is not a *malum in se* has been made a *malum prohibitum* by the Acts of 1875 or 1899 or the Regulations. As regards the case of *Smithies*,² I agree with what has been said by my brother Lord Dundas.

The first question in the present case should, in my opinion, be answered in the affirmative.

¹ 3 Q. B. D. 341, *per* Cockburn, C.J.

² [1902] 2 K. B. 13.

July 13, 1912.

Scott v. Jack.

LORD GUTHRIE.—I think the Sheriff-substitute has come to a right conclusion in assoilzieing the respondent. But in view of the terms of the complaint and the facts found proved, it seems to me that the question before us is truly this—Whether, in consequence of the respondent having proved that the milk was the natural product of a healthy cow, and that he had not tampered with the milk after it had left the cow, was the Sheriff bound to acquit him of the charge as libelled? I say this because I do not wish to prejudge the question which may arise in a future case of treating a cow, healthy or unhealthy, with drugs so that the milk is not in that sense the natural product of a normal animal.

LORD JUSTICE-GENERAL.—There being no difference of opinion among your Lordships I have no vote, but I may say that the result at which your Lordships have arrived coincides with the opinion which I have formed.

THE COURT answered both questions in the affirmative and dismissed the appeal.

W. & J. L. OFFICER, W.S.—MAXWELL, GILL, & PRINGLE, W.S.—Agents.

No. 17.

JOHN DOCHERTY AND THOMAS GRAHAM, Complainers.—*J. A. Christie.*

NEIL M'LENNAN (Burgh Prosecutor, Kirkintilloch), Respondent.—

Wark.

July 17, 1912.

Docherty and
Graham v.
M'Lennan.

Procedure—Proof—Admissibility of witness—Witness present in Police Court when other witnesses examined—Evidence (Scotland) Act, 1840 (3 and 4 Vict. cap. 59), sec. 3.

Section 3 of the Evidence Act, 1840 (which relaxes the common law rule excluding a witness who has heard the evidence given by other witnesses), applies only to proceedings in the Courts specified in the section, among which the Burgh Police Court is not included; and accordingly, in proceedings in that Court, it is a good objection to a witness that he has been present in Court during the examination of other witnesses in the case.

Procedure—Proof—Admissibility of witness—Examination of additional witness after case closed.

Held that it was not competent for the prosecutor in a criminal trial in a Burgh Police Court, even with the leave of the presiding magistrate, to adduce a witness after the case for the prosecution had been closed.

HIGH COURT.
Lord Dundas.
Lord Salvesen.
Lord Guthrie.

JOHN DOCHERTY and Thomas Graham, labourers, were charged in the Burgh Police Court at Kirkintilloch on a summary complaint at the instance of Neil M'Lennan, burgh prosecutor. The charge against the accused was that they had wilfully and maliciously broken the glass in the window of an unoccupied house.

The accused, after a trial at which they were not assisted by counsel or law-agent, were convicted and fined. They then brought a bill of suspension, in which they averred that at the trial "the respondent adduced the evidence of Walter Hay, Neil Brown, and Sergeant Stephens of the Police Force in Kirkintilloch, and closed the case for the prosecution. Thereafter several witnesses who had been cited for the defence were examined on oath, and cross-examined by the respondent. The case for the defence was closed, and the presiding magistrate was about to deal with the case on the evidence which he

had heard, when the respondent called Andrew Matson, bank-agent July 17, 1912. and house-factor, Kirkintilloch, as a witness for the prosecution. During the whole proceedings the said Andrew Matson had been present in Court, and had heard the examination and cross-examination of the witnesses both for the prosecution and the defence.* The presiding magistrate called the attention of the prosecutor to this fact, but the respondent insisted that such procedure was common in the Police Court at Kirkintilloch, and the said Andrew Matson was accordingly examined as a witness for the prosecution. The respondent also recalled the witness Hay, who had already been examined, and had been in Court while the other witnesses were giving their evidence, and further examined him."

Docherty and
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Answers were lodged for the respondent, in which it was admitted that, after the witnesses for the defence had been examined, the respondent asked and obtained leave to examine the witness Matson, and that he was examined as a witness for the prosecution. It was also averred that the witnesses Hay and Brown had deponed that they had seen the accused breaking the glass of the window, while the witnesses for the defence deponed that they had observed the window to be broken before the date libelled, and that Matson's evidence was confined to the condition of the window on the day before that date. It was further averred that Matson was not present when the case was called, but arrived in Court (unnoticed by the respondent) while a witness for the prosecution was being examined; that the magistrate allowed Matson to be examined, although he knew that Matson had heard part of the evidence; that the witness Hay was recalled by the magistrate *ex proprio motu* and examined by him; and that thereafter the magistrate informed the complainers that they might lead any additional evidence they thought fit, but they intimated that they did not desire to do so.

The complainers stated, *inter alia*, the following plea:—The complainers are entitled to suspension in respect (1) the said procedure was irregular and illegal, in respect that after the case for the prosecution had been closed, and witnesses for the defence examined, the respondent called another witness for the prosecution who had been in Court during the whole proceedings.

The case was heard before the High Court on 17th July 1912.

Argued for the complainers;—The convictions fell to be suspended as they proceeded upon evidence which was improperly admitted.¹ There were two errors in the Court below. (1) At common law a person who had heard the testimony of other witnesses could not be

* The Evidence (Scotland) Act, 1840 (3 and 4 Vict. cap. 59), enacts:—
Sec. 3. "In any trial before any Judge of the Court of Session or Court of Justiciary, or before any Sheriff or Stewart [*the revised statutes omit the words 'or Stewart'*] in Scotland, it shall not be imperative on the Court to reject any witness against whom it is objected that he or she has, without the permission of the Court and without the consent of the party objecting, been present in Court during all or any part of the proceedings, but it shall be competent for the Court, in its discretion, to admit the witness where it shall appear to the Court that the presence of the witness was not the consequence of culpable negligence or criminal intent, and that the witness has not been unduly instructed or influenced by what took place during his or her presence, or that injustice will not be done by his or her examination."

¹ M'Lean v. Skinner, 1907 S. C. (J.) 96, 5 Adam, 376; Makin v. Attorney-General for New South Wales, [1894] A. C. 57.

July 17, 1912.

Docherty and
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examined as a witness.¹ A certain relaxation of this rule was allowed by section 3 of the Evidence Act, 1840²; but the section applied only to trials before "the Court of Session or Court of Justiciary, or before any Sheriff or Stewart in Scotland." "Stewart" was the same as "Sheriff"³; and there was nothing, therefore, to affect the operation of the common law rule in Burgh Courts. (2) It was incompetent to call Matson as a witness after evidence for the defence had been led, as proof in replication was never permissible in a criminal case.⁴

Argued for the respondent;—(1) The rules of evidence were always applied with greater strictness in the case of serious crimes tried before the higher Courts than in proceedings for less grave offences before the lower Courts. The relaxation of the common law rule which obtained in the superior Courts must be allowed also in Burgh Courts. At any rate the witness fell to be excluded only where his testimony was likely to be affected by the evidence he had heard. Here Matson was examined only in regard to the state of the window; and his evidence on that matter could not be affected by the evidence of the previous witnesses. (2) It was open to the magistrate to allow Matson to be examined after evidence for the defence had been led⁵; and, even if the magistrate had erred, no injustice had been caused to the complainers, and, therefore, there was no ground for quashing the convictions.⁶

LORD DUNDAS.—[After stating the facts]—Two objections have been taken to this conviction, viz., (1) that the witness Matson had been in Court during a substantial part of the proceedings at the trial before he gave his evidence; and (2) that it was incompetent to call him as a witness for the prosecution after the case for the prosecution, and also the case for the defence, had been closed.

The first objection appears to me to be well founded. No doubt exists as to the ancient and immemorial rule and practice of our law regarding the seclusion of witnesses. It is laid down in Hume (vol. ii., p. 379) that "before proceeding to proof all the witnesses on either part are shut up in an apartment by themselves, whence they are successively called into Court to be examined; so that it is a good objection to anyone, that he has been left at large, and has heard the testimony of another, or part of it even, by which he may shape his own." The rule is stated with equal emphasis by Alison (vol. ii., p. 542); and practice, so far as I know, has been uniform in the matter. The Evidence Act, 1840, no doubt introduced a certain emendation of the rule. [His Lordship quoted section 3 of the Act.] To that extent a qualification was introduced by the enactment, but I think that it only applies to the Courts mentioned in the Act—Courts which are presided over by experienced lawyers—and thus does not alter or modify the law and practice in regard to a Court such as we are dealing with here. It is immaterial to speculate as to the possible or probable effect

¹ Hume on Crimes, 3rd ed., vol. ii. 379; Alison's Criminal Law, vol. ii. 542; Dickson on Evidence, sec. 1599.

² 3 and 4 Vict. cap. 59.

³ Bankton, vol. ii. 552.

⁴ Wynn and Another v. Lindsay, (1883) 11 R. (J.) 18, 5 Coup. 370.

⁵ Summary Jurisdiction (Scotland) Act, 1908 (8 Edw. VII. cap. 65), sec. 32 (8).

⁶ Summary Jurisdiction (Scotland) Act, 1908, sec. 75.

of Matson's evidence upon the decision arrived at by the magistrate. I am of July 17, 1912. opinion that the first objection stated for the suspenders must be sustained. Doocherty and

It appears to me that the second objection is also a good one. The Graham v. manner in which Matson was put into the witness-box was quite indefen- M'Lennan. sible. I am clearly of opinion that a prosecutor cannot call a witness after Lord Dundas. he has closed his case. We were referred to *Wynn v. Lindsay*,¹ where a strong opinion to that effect was expressed by Lord Young, who treated it as a matter of decided authority from remote times. Proof in replication cannot be led in criminal proceedings, and, so far as I know, such proof has never been permitted. It was for the prosecutor, if he thought that Matson's evidence was of importance, to have asked for an adjournment as soon as he discovered that the witness was not present. He was not entitled to call him as a witness once he had closed his case. The Clerk of Court has referred me to the case of *Collison v. Mitchell*,² in which it was decided that an inferior Judge is entitled of his own motion to recall a witness and ask him any question he may consider necessary, even after the case for both parties has been closed; and I rather think the same course has occasionally been adopted by Judges in the High Court when the Judge, or the jury with the Judge's sanction, desire further information upon some particular matter. But it is unnecessary to deal with such exceptional cases. It is well established that proof in replication is not permissible in a criminal Court. The present case, indeed, does not truly raise any question about proof in replication; what was here done was the quite unwarranted interjection of a witness after proof was closed.

On these grounds I am of opinion that the objections stated are well founded, and that the conviction must be quashed.

LORD SALVESEN and LORD GUTHRIE concurred.

THE COURT quashed the conviction.

E. ROLLAND M'NAB, S.S.C.—PATRICK & JAMES, S.S.C.—Agents.

HUGH COMRIE TODD, Appellant.—*Gentles*.

THOMAS A. HARVIE ANDERSON (Territorial Force Prosecutor, Glasgow), Respondent.—*Sol.-Gen. Anderson—Pitman.*

No. 18.

July 18, 1912.

Procedure—Proof—Public and official documents—Regulations for the Territorial Force—Extent to which Regulations prove themselves—Necessity of lodging copy in process—The Army Act, 1881 (44 and 45 Vict. cap. 58) (as amended by the Annual Army Acts to 1911), sec. 163—The Territorial and Reserve Forces Act, 1907 (7 Edw. VII. cap. 9), sec. 26 (2). Todd v. Anderson.

The Army Act, 1881 (as amended down to the passing of the Army (Annual) Act, 1911), sec. 163, enacts:—“(1) The following enactment shall be made with respect to evidence in proceedings under this Act, whether before a civil Court or a court martial; that is to say . . . (c) Copies, purporting to be printed by a Government printer, of King's Regulations . . . of royal warrants, of army circulars or orders, and of rules made by His Majesty, or a Secretary of State or the Army Council, in pursuance of this Act, shall

¹ 11 R. (J.) 18, 5 Coup. 370.

² (1897) 24 R. (J.) 52, 2 Adam, 277.

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Anderson.

be evidence of such regulations, royal warrants, army circulars or orders, and rules”

Held that the Regulations for the Territorial Force and for County Associations fall within this section, and may accordingly be proved by production of a copy purporting to be printed by a Government printer without other evidence ; but that the Court does not take judicial notice of the Regulations, and, therefore, that a prosecutor desiring to found on them must lodge a copy in process before closing his case.

HIGH COURT.
Lord Dundas.
Lord Salvesen.
Lord Guthrie.

HUGH COMRIE TODD, a private in the Queen's Own Royal Glasgow Yeomanry, was charged in the Sheriff Court at Glasgow on a summary complaint at the instance of Thomas A. H. Anderson, writer, the officer authorised to prosecute on behalf of the Territorial Force Association of the County of the City of Glasgow. The charge in the complaint was that “you did, between the 1st day of November 1910 and the 31st day of October 1911, without leave lawfully granted or on account of sickness or other reasonable excuse allowed in the prescribed manner, fail to attend the number of drills in Glasgow, and fulfil the other conditions relating to preliminary or annual training prescribed for your arm or branch of the service, contrary to section 21 of the Territorial and Reserve Forces Act, 1907.” *

After a trial the Sheriff-substitute (A. S. D. Thomson) found the accused guilty of having, without leave or reasonable excuse, failed to attend the prescribed number of drills, and imposed a fine.

The accused appealed on a stated case which submitted a number of questions of law, of which, however, only one was answered by the Court, viz. :—“(4) In respect that the Regulations for the Territorial Force and for County Associations were not produced by a witness on oath, were they competently in evidence, and if not could I competently convict the appellant of the alleged contravention ?”

In regard to this question it was stated in the case that it was proved “that in terms of the Regulations for the Territorial Force the number of drills prescribed in connection with the training of the Yeomanry which the appellant required to attend is ten per annum after the first year.”

The case also stated that “the Regulations for the Territorial Force and for County Associations, which are No. 6 of process, were not produced in the course of the trial by a witness on oath, but were tendered and referred to by respondent in the course of the subsequent hearing on the evidence.”

The case was heard on 17th and 18th July 1912. At the hearing it

* The Territorial and Reserve Forces Act, 1907 (7 Edw. VII. cap. 9), enacts :—

Sec. 21. “Any man of the Territorial Force who, without leave lawfully granted, or such sickness or other reasonable excuse as may be allowed in the prescribed manner, fails to appear at the time and place appointed for preliminary training, or for annual training, or fails to attend the number of drills and fulfil the other conditions relating to preliminary or annual training prescribed for his arm or branch of the service, shall be liable to forfeit to His Majesty a sum of money not exceeding five pounds, recoverable on complaint to a Court of summary jurisdiction by the prescribed officer”

Section 26 (2). “Sec. 163 of the Army Act (relating to evidence) shall apply to all proceedings under this part of this Act.”

Sec. 163 of the Army Act is quoted in the rubric.

was admitted on behalf of the respondent that the Regulations for the July 18, 1912. Territorial Force and for County Associations were not lodged in process until after the cases for the prosecution and for the defence were closed, and parties were being heard on the evidence by the Sheriff. Todd v.
Anderson.

Argued for the appellant;—The Territorial Regulations were not King's Regulations, nor were they within the category of other documents enumerated in section 163 (1) (c) of the Army Act; and therefore they did not prove themselves, but required to be proved by witnesses. But even assuming that they were within the section, it was necessary that a copy of them should be lodged in process, because the Court did not take judicial notice of such Regulations. As this had not been done, the Regulations were not before the Court; and, as the number of drills which the appellant was required to attend was fixed only by the Regulations, the respondent had failed to prove a material part of his case, and the conviction should, therefore, be quashed.

Argued for the respondent;—In terms of the Territorial and Reserve Forces Act, 1907, section 26 (2), and the Army Act, section 163 (1) (c), the Regulations did not require to be proved by witnesses; and the Summary Jurisdiction (Scotland) Act, 1908, section 28, contained a similar provision as to the proof of such documents. Under these sections the Regulations were endowed with the privileges of statutes, and the Court, therefore, would take judicial notice of the Regulations. But assuming that the Regulations required to be produced in process, this requirement had been in substance complied with before the respondent's case was closed, as his witnesses had spoken to the regulations, and had really incorporated the material portions in their evidence.

LORD SALVESSEN.—In this case a great many interesting and to some extent difficult questions have been mooted in the course of the debate. If it were necessary to decide all these questions, we are agreed that we ought to take time to consider our judgment. I have, however, reached the conclusion that this conviction must be set aside upon one of the grounds upon which it is challenged, and I think we are entitled to decide the case upon that ground, having in view the obvious interest of the appellant to have this matter disposed of at once, without having to wait for a considered judgment on the whole of the questions, in which he is really not interested so long as he gets the conviction quashed.

Now, the ground upon which I think that this conviction must be set aside is that which is expressed, although I think not well expressed, in the fourth question submitted for our opinion. It is possible to read that question as simply raising for our decision the question whether the Regulations for the Territorial Force prove themselves, or whether they must be proved by a witness on oath. If that were the only question in the case I should have no difficulty in answering that they do prove themselves—that is to say, you do not require extraneous evidence in order to make them available as evidence in the case. That, I think, follows from section 163 of the existing edition of the Army Act, subsection (1) (c). The Regulations now under consideration are, in my opinion, included in the documents therein referred to, and therefore the subsection applies, which provides that copies of such Orders, printed by the Government

July 18, 1912. printer, shall be evidence of the Regulations. In this respect the Army Act does not appear to lay down any different rule from that which is contained in section 38 of the Summary Jurisdiction (Scotland) Act, 1908.

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Anderson.

Lord Salvesen. But, then, although the Regulations prove themselves, it is a very different thing to say that they need not be produced in the course of the evidence, but may be referred to, as you refer to a statute, at any time after the evidence has been closed, for the purpose of convincing the Court that a statutory offence has been committed. It is not said in the Army Act that these Regulations or Orders shall have the force of statute, but only that a copy of the Regulations purporting to be printed by a Government printer shall be evidence of the Regulations themselves; and that this is a point of substance and not of form appears from the circumstance that these Army Regulations are apparently amended and modified from time to time, and that the Court could not be certiorated by the mere production of such Regulations—although printed by a Government printer, and although having once emanated from a Government department—that they were those that were still in force. I do not doubt that in the present case the Regulations produced were those in force; but the necessity of producing them in evidence before the Crown case was closed arises from the circumstance that unless that is done the accused will not have an opportunity of showing that they have been modified or altered since the date of their issue. In the case of an amending statute it is always open to him to appeal to it, just as the prosecutor can appeal to the statute which he has libelled; but there is no official publication, such as there is in the case of statutes, by which you can obtain access to the Regulations. These are admittedly altered from time to time; and the extent of the changes since the Act of 1907 was passed may be gathered from the black ink markings upon the book for 1910, which appear on almost every page.

Now it is admitted here that without the Regulations the prosecutor cannot succeed. It was contended by the Solicitor-General that, as the Regulations had been referred to in the evidence, they must be held to have been embodied in the evidence, and that they were practically produced. Well, I think it was Lord Halsbury who once said that if you say that a thing has been “practically” done, you mean that it has not been done at all. We had the admission of the Solicitor-General to the effect that the agent who conducted the prosecution was under the impression that these Regulations had the force of statute, and did not require to be produced in process at all, and that the Regulations were only put in after the evidence on both sides had been closed and at the suggestion of the Sheriff-substitute, who, I suppose, by that time entertained doubts as to whether the prosecutor had not formed a wrong opinion upon that matter. If, as was in effect conceded, these Regulations were part of the evidence necessary for a conviction, and they were not produced in process before the case on both sides had been closed, then I think they ought not to have been introduced into the process at all, and that the case for the complainer necessarily failed. I regret very much that we are obliged to quash the conviction upon this purely technical ground; but it would never do to depart from our settled course of procedure and to admit productions which are necessary evidence in the case after the case on both

sides had been closed. Injustice might be done in other cases, if not in July 18, 1912. this case; and it is necessary that the rules of procedure, which are intended to secure justice in the conduct of cases, should be strictly enforced.

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Anderson.

On that short ground I think we ought to answer the fourth question, not by a simple negative, but by narrating in substance what was made matter of admission at the bar, and hold that the Sheriff-substitute ought not to have convicted the appellant of the contravention charged.

Lord Salvesen.

LORD GUTHRIE.—I agree. I think the case can and ought to be disposed of on the point which, looking to what took place in the course of the debate, may be considered as raised by the fourth question. I do not think the question is fairly raised by that query, or by the statement of the case; and I doubt whether it was really in the minds of those who were responsible for the framing of the case, because the question directly raised is whether the Regulations require to be proved by a witness on oath.

But the frank admission of the Crown that the Regulations were not made one of the productions until not only the prosecution had closed their case but until the whole case was over makes it necessary to consider the fourth question in the way your Lordship has done. I rather think that what took place was probably due to a failure to detect the difference between a document which proves itself and a document which, like a statute, not only proves itself but does not require to be put in evidence. I agree that, while it is clear that the document does prove itself, it is not in the highest category of all—namely, that of a document which is expressly made to have the force of statute.

LORD DUNDAS.—I also agree with Lord Salvesen as to the only point which we propose to determine. Question 4 is badly framed; but I think we should in effect find that though the Regulations mentioned in that question do not require to be proved by a witness on oath, but prove themselves, they do require to be produced and put in evidence; and that, as this was not done in the present case, the conviction cannot stand. I further agree that the better course is for us now to express our opinion that the conviction must fall upon this point alone, rather than make the appellant wait, as we should otherwise have to do, for at least three months, while we deliberated upon the other points, our conclusion on which, whatever it might be, could not alter the decision of the case.

THE COURT found that though the Regulations mentioned in question 4 did not require to be proved by witnesses on oath but proved themselves, they did require to be produced and put in evidence, and therefore that the Sheriff-substitute could not competently convict the appellant of the contravention charged; sustained the appeal, and quashed the conviction.

WEIR & MACGREGOR, S.S.C.—GEORGE INGLIS, S.S.C.—Agents.

No. 19.
 —
 July 18, 1912.

ROBERT LINDSAY (Food and Drugs Inspector, Midlothian),
 Appellant.—*Macmillan, K.C.—Pitman.*
 ANDREW DEMPSTER, Respondent.—*Mercer.*

Lindsay v.
 Dempster.

Public Health—Food and Drugs—Sale of milk deficient in fat—Unauthorised sale by servant—Liability of master—Master and Servant.

In the prosecution of a dairyman for selling, by the hand of his servant, milk which was not genuine, it was proved that the servant who sold the milk had no authority to do so, his duty being merely to deliver milk to his master's customers.

Held that, as the servant had exceeded his authority in selling the milk, there had been no sale by the accused; and that he must, therefore, be acquitted.

HIGH COURT.
 Lord Dundas.
 Lord Salvesen.
 Lord Guthrie.

ANDREW DEMPSTER, dairyman, Edinburgh, was charged in the Sheriff Court at Edinburgh on a complaint at the instance of Robert Lindsay, the chief inspector appointed by the County Council of Midlothian under the Sale of Food and Drugs Acts, 1875 to 1899. The charge against the accused was "that on or about the 7th day of February 1912, at or near Pinkhill Nursery, Corstorphine, within the said county of Midlothian, you did, by the hands of Charles Walker, a servant in your employment, in response to a demand by William Beattie, an assistant inspector appointed by the County Council of the said county of Midlothian under the Sale of Food and Drugs Acts, 1875 to 1899, acting by direction and on behalf of the complainer, for one pennyworth of sweet milk, sell to the complainer one pennyworth of milk which was not genuine, but was milk containing less than three per cent of milk fat, as is shown by the certificate of analysis made by John Hunter, public analyst for the said county of Midlothian, a copy of which is annexed and signed as relative hereto, contrary to the Sale of Food and Drugs Act, 1875, section 6, as amended by the Sale of Food and Drugs Act Amendment Act, 1879, section 2, and the Sale of Milk Regulations, 1901, made by the Board of Agriculture in exercise of the powers conferred on them by section 4 of the Sale of Food and Drugs Act, 1899."

The Sheriff-substitute (Orr), after a proof, found the accused not guilty, whereupon the complainer appealed on a stated case.

The case set forth that the following facts were proved:—

"(2) The respondent carries on business as a dairyman and purveyor of milk at Carrick Vale Dairy, Balgreen Road, Edinburgh, which is within the boundaries of the city of Edinburgh. He keeps 40 cows, and the milk is mixed before being made up for his customers.

"(3) Certain of respondent's customers reside within the suburban district of the county of Midlothian; and these customers are supplied by the respondent in terms of orders, previously given, with certain quantities of milk every morning. The milk for each customer is put up for him in a separate pitcher or can, at the conclusion of the milking, before 6 o'clock each morning, and is afterwards delivered by the respondent's vanman, Charles Walker.

"(4) On the morning of 7th February 1912 the said Charles Walker, after having delivered certain quantities of milk within the city of Edinburgh, was sent by the respondent's wife (the respondent himself being then ill and unable to attend to business) to deliver various quantities of milk, which had been made up in separate pitchers as aforesaid, to customers of the respondent who were resident within the suburban district of the county of Midlothian. The respon-

dent's instructions to his said vanman were to deliver to each customer the pitcher or can of milk which had been ordered by and put up for him as aforesaid. The said vanman was not employed by the respondent to sell milk, but only to deliver it. On the occasion in question he had no milk for sale nor measures for selling milk, and he had no authority from the respondent to sell any of the milk in the van.

July 18, 1912.
Lindsay v.
Dempster.

"(5) At 7.50 A.M. on said 7th February 1912 the respondent's servant, Charles Walker, had just delivered the milk which he had received from the respondent's wife for delivery to several customers who resided within the Pinkhill Nursery Grounds, Corstorphine; and on returning to the public road at the gate of the Pinkhill Nursery, where his horse and van were left standing while he was delivering milk to the respondent's customers within the nursery grounds, the said Charles Walker was accosted by William Beattie, one of the appellant's assistant inspectors.

"(6) The said William Beattie was accompanied by another assistant inspector, Allan W. Ritchie, both acting by the direction and on the instructions of the appellant.

"(7) The said William Beattie asked the said Charles Walker, the respondent's servant, for a pennyworth of sweet milk, and the said Charles Walker, who knew that the said William Beattie and Allan W. Ritchie were inspectors, supplied the said William Beattie with a pennyworth of milk. To enable him to do this he took a pennyworth of sweet milk out of the pitcher which contained the quantity of milk which he had been instructed to deliver to another customer at a house named Beechwood, to whom delivery had not yet been made. The said William Beattie then paid Walker a penny for said milk, and told him that he was an inspector under the Sale of Food and Drugs Acts, and had purchased the milk for analysis by the public analyst. The said William Beattie thereupon divided the sample of milk which he had purchased into three portions, and labelled and sealed the same. One portion was handed to the said Charles Walker, another was sent to the public analyst, and the third portion was produced at the trial, and forms No. 1 of process.

"(8) The said Charles Walker on his return to the dairy at Balgreen Road told the respondent's wife that he had sold a pennyworth of milk to the inspectors out of the pitcher containing the quantity ordered by the customer above referred to, and had in consequence made a short delivery to that customer. He also handed to her the portion of milk which had been handed to him by the inspectors. Neither the respondent, nor any one on his behalf, sent any intimation to the appellant that his servant, the said Charles Walker, had no authority to sell the milk in question to the inspectors."

The case further stated that the milk was found on analysis to be deficient in fat, and continued:—"On the above facts I held that the respondent's vanman, Charles Walker, was charged only with the duty of delivering the milk from the respondent's dairy to certain customers as made up for them in accordance with the orders previously given by them; that he was not employed and had no authority to sell milk to anyone on behalf of the respondent, and that in selling the sample of milk in question to the inspectors the said Charles Walker acted in breach of his instructions and outwith the scope of his authority; and that accordingly no sale by the respondent to the inspectors had been proved. I therefore found the respondent not guilty of the charge libelled."

July 18, 1912. The question of law was:—"Was I right in holding upon the facts proved that there was not a sale of milk by the respondent to said inspectors imposing liability on him under the provisions of the Sale of Food and Drugs Acts, 1875 to 1899?"

Lindsay v.
Dempster.

The case was heard on 18th July 1912. At the hearing counsel for the appellant referred to *Morrison v. Statter*.¹

Counsel for the respondent was not called upon.

LORD DUNDAS.—[After narrating the facts]—I entirely agree with the Sheriff-substitute's decision. It was said by Mr Pitman that the respondent ought at once to have written to the inspectors repudiating the sale, and that by keeping silence he had in some way homologated the transaction. I cannot follow that argument. The respondent could not know what, if anything, was to come of the matter, and I think he acted quite reasonably, and within his rights, in maintaining silence until the time arrived for him to defend his conduct in Court. Then, it was said or suggested, that the result of the Sheriff-substitute's decision would be to prevent inspectors from detecting contraventions of the Acts, or to impede them in their efforts to do so. I think there is no substance in that suggestion. It would have been a simple course for the inspectors to wait until the milk had been delivered to a customer, and obtain a sample of the milk at the place of delivery. On the whole matter, I have heard nothing to make me think that the Sheriff-substitute's conclusion was wrong, and I am for answering the question of law in the affirmative.

LORD SALVESSEN.—I agree. The charge here is that a dairyman did by the hands of a servant in his employment sell to an inspector of food and drugs a pennyworth of milk. Now, it is found as a fact, that Walker, the servant, had no authority to sell milk. His sole duty was to deliver milk to the respondent's customers, and he was in course of doing so when the inspectors accosted him and induced him to give them a pennyworth of milk in exchange for a penny. I cannot see, therefore, how in these circumstances there was a sale to the inspectors by the respondent. There may be cases where an employer may be held to have homologated the act of his servant so as to make what was done truly a sale by him. There is, however, no evidence of anything of that kind here.

It has been suggested that the result of our decision will be seriously to embarrass inspectors in the discharge of their delicate and difficult duties in connection with such matters. I do not see why that should be so, as all the inspector had to do was to inquire of the vanman if he was authorised to sell milk, and if not, was to follow the van to the place of delivery and obtain his sample there. Instead of doing so, he chose, without inquiry, to assume that the milk in the van was for sale. Unfortunately, his assumption has turned out to be wrong, and the result is that he has failed to prove the sale which was the subject of the complaint.

LORD GUTHRIE.—I agree.

THE COURT answered the question of law in the affirmative, and dismissed the appeal.

JAMES A. B. HORN, S.S.C.—ALLAN TURNER, S.S.C.—Agents.

¹ (1885) 12 R. 1152.

CASES

DECIDED IN

THE COURT OF SESSION, &c.,

1911-1912.

(*Poor*) GEORGE CLARK, Pursuer (Reclaimer).—*J. S. Mackay.* No. 1.
THE NORTH BRITISH RAILWAY COMPANY, Defenders (Respondents).—
Cooper, K.C.—E. O. Inglis. Oct. 17, 1911.

Reparation — Negligence — Railway — Private dock — Shunting operations inside dock—Duty to close dock gates or give warning before shunting commenced. Clark v. North British Railway Co.

In a dock owned by a railway company three lines of rails connecting the quays with the main railway system crossed the road leading into the dock on the level at a point inside and opposite the dock gate. A seaman entered the dock by the gate, which was open, and attempted to pass between two wagons which were standing on the crossing. While he was doing so the wagons were shunted, and he was caught between the buffers and injured.

In an action of damages at his instance against the railway company, he averred that the defenders were at fault in neither shutting the gate nor giving warning before beginning to shunt the wagons.

Held (rev. judgment of Lord Johnston) that there was no duty on the railway company either to shut the gate or to give warning before beginning to shunt the wagons, and action *dismissed* as irrelevant.

GEORGE CLARK, ship's cook, Falkirk, brought an action against the 2D DIVISION. North British Railway Company for £700 as damages in respect of Ld. Ormidale. personal injury.

The pursuer averred that the defenders were proprietors of the docks at Bo'ness, access to which was obtained by passing through the west gate at the foot of East Pier Street. (Cond. 2) "Three lines of rails belonging to the defenders, and running from their railway system through said docks, intersect the said access. Said access is one of the ordinary routes from the town of Bo'ness to the said docks, and is open to all persons who require to go to said docks. Between the gate on the south side of said lines of rails and said docks there was on 9th June 1910, and still is, a level-crossing, as shown on the plan produced herewith. The defenders work the traffic over said lines of rails at the level-crossing by means of engines and wagons. The gate at the south side of said level-crossing, in place of being shut constantly, as it ought to have been when defenders or their servants were carrying on the operation of shunting wagons, was usually kept open." (Cond. 3) "On the 9th day of June 1910, between 11 and 12 noon, the pursuer," who was ship's cook on board the s.s. "Kingswood" lying at a berth in the docks, "obtained per-

Oct. 17, 1911.
 Clark v.
 North British
 Railway Co.

mission from the mate of the s.s. 'Kingswood' to go into the town of Bo'ness for the purpose of posting a letter. The usual route from the 'Kingswood' to the town was taken by the pursuer, *videlicet*, over said access and level-crossing. On said date the pursuer on arriving at said level-crossing found his passage blocked by a number of wagons belonging to the defenders. Said wagons were stationary. The gatekeeper, who is in the employment of the defenders, told the pursuer to climb over the wagons if he desired to get to the town. The pursuer accordingly climbed over said wagons and proceeded to Bo'ness. On returning from Bo'ness to his ship, the 'Kingswood,' he again found his way blocked by a number of wagons standing on the middle set of rails at said level-crossing. The said wagons were stationary, and the pursuer had no reason to believe that shunting operations were in progress; and in point of fact the pursuer believed that shunting operations were not in progress. The pursuer in order to return to his said ship attempted to pass over said level-crossing. On the pursuer attempting to pass over said level-crossing and between two of said wagons, the defenders' servants who were in charge of said wagons, without notice to the pursuer, began to shunt said wagons. The said wagons were set in motion, and the pursuer was caught between the southmost buffers of two of said wagons and had his left arm crushed. The pursuer, although he looked both east and west along said lines of rails, did not see any engine near said wagons, and is not aware in what way they were set in motion. . . . At the time of said accident no warning of any kind was given by the defenders or their servants that shunting operations were about to commence." (Cond. 4) "The injuries sustained by the pursuer were caused by the negligence of the defenders or those for whom they are responsible. The defenders and their servants were well aware that persons employed in connection with the shipping at Bo'ness Docks required to make use of said level-crossing as a means of access to and from said docks. The defenders' servants well knew that shunting operations on said level-crossing constituted a risk of injury to persons going out of or coming into said docks. It was the duty of the defenders' servants not to commence shunting operations so long as the gates on the south side of the rails were left open. The facts of the gates being left open and of no warning being given that shunting operations were about to commence led the pursuer to believe that shunting operations were not in progress. It was also the duty of the defenders' servants to see that the railway lines were clear before commencing shunting operations, and to give warning that shunting was about to take place. There was no shunter or coupler at or near the two wagons which crushed the pursuer, as there ought to have been."

The pursuer pleaded;—The pursuer having been injured through the fault or negligence of the defenders or their servants, for whom they are responsible, the pursuer is entitled to decree in terms of the conclusions of the summons.

The defenders pleaded, *inter alia*;—(1) The pursuer's averments being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed. (4) The accident having been caused, or at least materially contributed to, by the negligence of the pursuer, decree of absolvitor should be pronounced.

On 14th July 1911 the Lord Ordinary (Lord Johnston for Lord Ormidale) allowed the pursuer to amend his record, approved an issue,

and found the pursuer liable to the defenders in expenses (modified Oct. 17, 1911. to £3, 3s.), in respect of the amendments made, payment of said sum to be a condition precedent to the action proceeding.

Clark v.
North British
Railway Co.

The pursuer having reclaimed against the award of expenses, the defenders took advantage of the reclaiming note to challenge the relevancy of the pursuer's averments.

The case was heard before the Second Division (consisting of the Lord Justice-Clerk, Lord Dundas, and Lord Skerrington) on 17th October 1911.

Argued for the defenders;—The pursuer had not relevantly averred any fault on the part of the defenders. The dock was a private place, and those who came there were bound to know that shunting operations were always in progress, and to take reasonable precautions for their own safety. The defenders were not bound to close the gates,¹ or to give special warning before commencing to move the wagons. In any event, the pursuer's averments showed that he had been guilty of contributory negligence in attempting to pass between the wagons without making sure that they would remain stationary.²

Argued for the pursuer;—If this had been a level-crossing over a public road, it would have been illegal, under section 5 of the Railways Clauses Act, 1863,³ for the defenders to pass any trains over it in shunting, or to allow the wagons to stand across it. Although this section did not directly apply, this being a level-crossing inside a private dock, the principle to be applied was the same, namely that, where people were in the habit of passing a railway line at a particular place, the Company had a special responsibility to see that reasonable care was exercised in moving their trains over that portion of the line.⁴ It would have been a very reasonable precaution to have kept people from coming on the line by closing the gate, or, if they were on the line, to have given them notice that the trucks were about to be moved. There was no room for the plea of contributory negligence. The defenders acted negligently in leaving the gate open. By so doing they invited the pursuer to come on to the line, and having put him in a position of danger by their own default, they could not found on any subsequent mistake on his part.⁵

LORD JUSTICE-CLERK.—We have heard a very good argument in this case, and Mr Mackay has stated his case as clearly and well as it could be stated, and has shown industry in finding cases which could be quoted in support of his case. I am afraid they do not help his case very much. It must be kept in view that this is not the case of a highway at all. It is a case in which a private dock belonging to a railway company has in it rails which are not intended for the running of trains, but are intended solely for the purpose of moving wagons up to ships or moving wagons away from ships in order that they may reach the line of railway. It is essentially a dock

¹ Hendrie v. Caledonian Railway Co., 1909 S. C. 776.

² Tully v. North British Railway Co., (1907) 46 S. L. R. 715; Mitchell v. Caledonian Railway Co., 1909 S. C. 746, 1910 S. C. 546.

³ 26 and 27 Vict. cap. 92.

⁴ Barrett v. Midland Railway Co., (1858) 1 F. & F. 361.

⁵ Dublin, Wicklow, and Wexford Railway Co. v. Slattery, (1878) 3 App. Cas. 1155, *per* Lord O'Hagan, at p. 1184, Lord Selborne, at p. 1193; North-Eastern Railway Co. v. Wanless, (1874) L. R., 7 E. and L. App. 12.

Oct. 17, 1911. arrangement, perfectly well understood and common. It is like a line taken
Clark v. into big public works, such as a paper-mill or anything of that kind, where
North British for convenience the railway wagon is brought straight to the spot where it
Railway Co. has to be loaded or unloaded. Therefore, it is not the same case as a rail-
Lord Justice- way crossing on a highway or anything of that kind.
Clerk.

Now, the first thing that is said is that although there were wagons standing on this line, the gates, which lead into the dock and which are opposite to the place where the wagons were, were not closed. I cannot accept that for a moment as a ground of fault. The gates are not intended at all for the protection of people crossing those lines; otherwise the lines would need to have gates on both sides of them, because there is no protection whatever in having gates only on one side. They were the entrance gates of the dock provided by those to whom the dock belongs, in order that they may close them at hours during which they intend to allow nobody to go in or come out. They stand open as a matter of course during the busy part of the day. Therefore there was no fault whatever so far as the gates were concerned, and I see no fault whatever so far as having these trucks upon that particular line of rails was concerned.

Now, what is the state of matters as regards these wagons standing upon the rails in the dock? They are intended to be moved as they are required for purposes of loading and unloading. Some of them may stand for some time on a siding, some of them may stand on the quay, and they may be moved singly or several together. But that is part of the ordinary business that goes on inside the dock, and people who go to the dock are supposed to know that, and do know it. Is it to be said that when a few wagons which are standing on a line require to be moved, there must be some special warning given by the railway company that the wagons are going to be moved to persons who are at the dock, presumably in connection with the dock and presumably knowing what they are about? I cannot accept the view that any such warning is required. That sort of dry nursing inside a dock would not be practicable. It would subject the company to very heavy and improper expense.

But then nothing can be more plain than this, that when trucks are standing quite properly upon a dock, it is not intended or right that people should crawl over the rails below the buffers, or, as in this case, in line with the buffers, so that when the trucks were moved this man's shoulder was caught. I cannot consider the accident to be due to anything but the pursuer's own fault; I see no fault on the part of the Railway Company at all. Therefore, I am for recalling the interlocutor of the Lord Ordinary, and dismissing the action.

In the view I take of the case, it is unnecessary to enter upon the question of contributory negligence; but, in my opinion, the case as disclosed by the pursuer's own record, if it were necessary to say so, would properly be held to disclose a case of contributory negligence.

LORD DUNDAS.—I am entirely of the same opinion. This is an action for damages in respect of the fault or negligence of the defenders, and I have searched the record in vain for any relevant averment of anything approaching fault on the part of the Railway Company. This makes it, as your

Lordship has pointed out, quite unnecessary to say anything about contributory negligence; but, if it were necessary to do so, I should agree with your Lordship that the pursuer's own record does disclose a case of his own negligence sufficient to bar his claim. I agree that the action should be dismissed.

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LORD SKERRINGTON concurred.

THE COURT recalled the interlocutor reclaimed against, sustained the first plea in law for the defenders, and dismissed the action, with expenses.

D. LEWIS KIRK, S.S.C.—JAMES WATSON, S.S.C.—Agents.

THE PALACE BILLIARD ROOMS, LIMITED, Petitioners.—*Cooper, K.C.*— No. 2.
Wilton.

THE CITY PROPERTY INVESTMENT TRUST CORPORATION, LIMITED, Oct. 19, 1911.
Respondents.—*Horne, K.C.*—*Dykes.*

Company—Reduction of capital—Objecting creditor—Security for creditor's debt—Debt due to landlord for future rent—Whether debt contingent—Companies (Consolidation) Act, 1908 (8 Edw. VII. cap. 69), sec. 49.

Palace
Billiard
Rooms,
Limited, v.
City Property
Investment
Trust Cor-
poration,
Limited.

The Companies (Consolidation) Act, 1908, enacts that where a company is seeking to reduce its capital the Court shall settle a list of the creditors entitled to object; and enacts further, sec. 49 (3):—"Where a creditor entered on the list whose debt or claim is not discharged or determined does not consent to the reduction, the Court may, if it thinks fit, dispense with the consent of that creditor on the company securing payment of his debt or claim by appropriating, as the Court may direct, the following amount (that is to say)—(i.) If the company admits the full amount of his debt or claim, or, though not admitting it, is willing to provide for it, then the full amount of the debt or claim; (ii.) If the company does not admit or is not willing to provide for the full amount of the debt or claim, or if the amount is contingent or not ascertained, then an amount fixed by the Court after the like inquiry and adjudication as if the company were being wound up by the Court."

A company, occupying premises under a lease of which four years had still to run, presented a petition for confirmation of a resolution to reduce its capital. The landlords of the premises objected to the reduction of capital unless provision was made to secure the payment of their rent during the remainder of the lease. The company offered to appropriate in security a sum less than the full amount of the rents to become due, and maintained that, the landlords' debt being contingent, the Court should approve of the offer as sufficient.

Held that, as the company admitted the full amount of the debt, and as that amount was neither contingent nor unascertained, the case fell under subsec. (3) (i.) of sec. 49, and the company was bound to provide security for the full amount of the debt; and on the company stating that they were not prepared to do so the Court *dismissed* the petition.

On 30th March 1911 a petition was presented by the Palace Billiard Rooms, Limited, 95 Hope Street, Glasgow, under section 47 of the Companies (Consolidation) Act, 1908, for confirmation of a resolution for reducing the share capital of the Company. The resolution was

1st Division.

Oct. 19, 1911. in the following terms:—"That the capital of the Company be reduced from £4000, divided into 4000 ordinary shares of £1 each, to £2000 divided into 4000 shares of 10s. each, and that such reduction be effected by reducing the nominal amount of the ordinary shares from £1 each to 10s. each, and extinguishing the liability in respect of uncalled capital on the ordinary shares to the extent of 10s. per share."

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On 11th April 1911 the Lord Ordinary officiating on the Bills (Skerrington) remitted to Sir George M. Paul, C.S., to inquire into the regularity of the proceedings, and the reasons for the proposed reduction of capital, and to report, and fixed 22nd April 1911 as the date at which every creditor entitled to any debt or claim against the Company within the meaning of section 49 of the Companies (Consolidation) Act, 1908, should be entitled to object to the proposed reduction of the Company's capital.

On 21st April 1911 answers were lodged for the City Property Investment Trust Corporation, Limited, the proprietors of premises occupied by the petitioners, under a lease expiring at Whitsunday 1915. The respondents averred;—"The respondents are creditors of the petitioners, being proprietors of the premises occupied by them at No. 95 Hope Street foresaid. The respondents let said premises to the petitioners conform to lease, dated 19th June and 11th July 1900, for a period of fifteen years, from and after the term of Whitsunday 1900. The lease expires at Whitsunday 1915. The rent of the premises is £630 per annum. The proposed reduction of capital involves the diminution of liability, in respect of unpaid share capital, to the extent of, at least, £1714, 10s., and would prejudicially affect the respondents' security for the rent of said premises. In these circumstances the respondents object to the prayer of the petition being granted until the petitioners either consign, in name of the Accountant of Court, a sum sufficient to cover the rent of said premises up to Whitsunday 1915, or otherwise grant satisfactory security therefor."

Sir George Paul having reported,* the case was heard before the First Division on 18th October 1911.

* After dealing with the facts, and the contentions of the petitioners and respondents, Sir George Paul's report proceeded as follows:—"The respondents maintain that the Court, before confirming the proposed reduction, must, under section 49, subsection 3, of the 1908 Act, make provision for security of the future rents of the property and the due fulfilment of the other contingent obligations of the lease during the four years of it which have yet to run.

"The petitioners, on the other hand, point out that while the cancelling of the whole uncalled capital undoubtedly diminishes the now existing security of the landlords, it should be kept in view, in the present case, that when the lease was entered into in 1900 the issued shares were fully paid, and that what the Company now propose to do is simply to revert to the original state of matters, i.e., to have the whole issued capital fully paid up. The shares would no doubt be of the nominal amount of 10s. each as against the original amount of £1 each, but it is not said in the answers that the security which the landlords originally had for their rents and fulfilment of the obligations of the lease, and on the faith of which they entered into the contract, will thus be in any way impaired. If, instead of taking the course they have done, first in 1908 and again in 1911, i.e., paying back to the shareholders 10s. per share out of the fund accumulated

Counsel for the petitioners stated that the Company was willing to pay at once the half-year's rent due at Martinmas, and to appropriate in security of the rents to become due a sum of £630, being a full year's rent, and their reserve fund, amounting to £455, referred to by the Reporter; he further stated that over £3000 had been spent on the billiard tables, &c., in the premises, and argued;—The petitioners' Company being solvent, the security offered was sufficient with the landlords' hypothec. The respondents' claim was not merely future but was contingent, because if the lease terminated before Whitsunday 1915 and a new tenant offered for the premises, the landlord's only claim in a liquidation of the Company would be for the difference, if any, between the petitioners' rent and that of the new tenant. Thus the security offered was a suitable amount to be fixed "if the Company were being wound up by the Court," and was as much as the petitioners should be required to appropriate, they being in the position provided for in the first part of subsection (3) (ii.) of section 49 of the Act.¹

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Argued for the respondents;—The petitioners were seeking a privilege, and were bound to comply with the requirements of subsection (3) (i.) of section 49 of the Act,¹ because they had to admit the full

from undivided profits, and thus making the fully paid £1 share into a share with 10s. paid up and 10s. uncalled, and thereafter cancelling that uncalled portion, the Company had distributed the undivided profits directly among its members, the landlords would have had no ground of objection. The leasehold subject, with its contents, was in no degree reduced in value by the Company's mode of dealing with the fund which was subsequently created for the Company's own purposes and not on the requisition, possibly even without the knowledge, of the landlords.

"While there seems to be some apparent force in these contentions, the express provision in the 49th section must be kept in view, viz., that where a creditor whose debt or claim has not been discharged does not consent, the Court may, if it thinks fit, dispense with such consent on the company securing payment of the debt or claim by appropriating, as the Court may direct, . . . if the amount is contingent or not ascertained—'an amount fixed by the Court after the like inquiry and adjudication as if the company were being wound up by the Court.' With reference to that and the cases noted—(*In re Telegraph Construction Co.*, 10 Eq. 384; *Gooch v. London Banking Association*, 32 Ch. D. 41; *Elphinstone v. Monkland Iron Co.*, 11 App. Cas. 332; *Oppenheimer v. British and Foreign Exchange and Investment Bank*, 6 Ch. D. 744)—Buckley observes,—'It would appear that when a company proposes to reduce its capital, a lessor is entitled to have a sum impounded to meet future rents.'

"As regards the security to be provided, that might either take the form of a satisfactory personal obligation by one or more of the directors or shareholders for payment of the full rents and fulfilment of the tenants' obligations till the termination of the lease, or the setting aside of such a sum by way of security as might be considered equitable in the circumstances. The whole of the reserve fund, which now amounts to £455, with any additions that may be made thereto, might be set apart and appropriated as a special security, together with such an additional sum as with the reserve fund might amount to two years' rents. The additional sum might either take the form of a setting aside of cash or cancellation of a smaller amount of uncalled capital. It has to be kept in view that the rents have been regularly paid, and that only four more full rents are payable. . . ."

¹ 8 Edw. VII. cap. 69 (sec. 49 is quoted in the rubric).

The following authorities were referred to:—*Telegraph Construction Co.*,

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amount of the respondents' debt, which, though future, was not contingent. Even if the petitioners' position was that provided for by subsection (3) (ii.) of section 49, the security appropriated must be ample, as suggested by the Reporter, and the security offered by the petitioners was quite insufficient.

At advising on 19th October 1911,—

LORD PRESIDENT.—This is a petition at the instance of the Palace Billiard Rooms, Limited, to confirm a resolution to reduce the capital, and we have a report from Sir George Paul. Only one point arises for your Lordships' consideration. The Company propose to reduce their capital by one-half, and, in doing so, to put an end to a 10s. liability which there is at present upon their shares.

Answers have been lodged by a company who are landlords of property which the petitioning Company have got on lease. The petitioning Company was formed for the purpose of keeping billiard-rooms, and it is quite evident from the figures in the petition that, for some reason or another, billiards as a business is upon the wane. While a few years ago they paid very large dividends, they have lately paid nothing at all. At the same time they are, at this moment, perfectly solvent. The compearing landlords object to this diminution of capital unless their rent is secured for the terms which are still to come, which are, I think, seven or eight half-yearly terms.

Counsel for the petitioning Company laid some stress upon the fact that it was really owing only to the action of the Company themselves that they were in the present position, because in the days of their prosperity they returned half of the capital—the shares having been originally fully paid-up shares—they returned half the capital to the shareholders, and put the Company into the position in which it is now of having an uncalled liability of 10s. per share. That is an appeal *ad misericordiam*, and I am afraid it is one that we cannot take any notice of. We are bound to take things as they are, and the landlords are entitled to the advantage of things as they are.

The whole question comes to be a very short one, and depends upon section 49 of the Companies (Consolidation) Act, 1908. That section provides for an application of this sort being intimated to creditors; and it provides, by subsection (3), "Where a creditor entered on the list whose debt or claim is not discharged or determined does not consent to the reduction, the Court may, if it thinks fit, dispense with the consent of that creditor,"—now, that is what we are asked to do; the Court is asked to grant the privilege of dispensing with the consent of a person who does not wish to consent—"on the company securing payment of his debt or claim by appropriating, as the Court may direct, the following amount." Now, it seems to me that that is quite absolute. The Court can only do it "on the company securing payment of his debt or claim by appropriating . . .

(1870) L. R. 10 Eq. 384; Statutory Rules and Orders, 1909, p. 52, Rule 8; Oppenheimer v. British and Foreign Exchange and Investment Bank, (1877) 6 Ch. D. 744; Panther Lead Co., [1896] 1 Ch. 978; Midland Coal, Coke, and Iron Co., [1895] 1 Ch. 267; Palmer's Company Law, 9th Edition, 572-4.

the following amount," and then come two alternatives: "(i.) If the company admits the full amount of his debt or claim, or, though not admitting it, is willing to provide for it, then the full amount of the debt or claim; (ii.) if the company does not admit or is not willing to provide for the full amount of the debt or claim, or if the amount is contingent or not ascertained, then an amount fixed by the Court after the like inquiry and adjudication as if the company were being wound up by the Court."

Now, the first question that has to be determined is, Which of these two alternatives does this matter fall under? I confess I cannot come to any conclusion but one. I think that this is a case where the Company does admit the full amount of the debt or claim. They do not say that the rent will not be due at the terms when they come, and consequently I think the matter falls within subsection (3) (i.). I do not think it can be held to fall within subsection (3) (ii.). It does not fall under the first part, because the Company does not "not admit," and it cannot fall under the second part, because, in my view, it is not a contingent debt. It is a perfectly certain debt, a future debt but not a contingent debt.

Accordingly, I do not think there is any alternative left to us—that is to say, we can dispense with the respondents' consent only if we appropriate a sum which will secure the full amount of the debt. Of course, inasmuch as the debt is future, the sum will not necessarily be precisely the sum which will eventually be payable, because, by ordinary rules, there must be a rebate for what is equivalent to a present payment. But I come to the conclusion that, unless the Company are in a position to offer some security which will be equivalent to a security for the full amount of the debt when it becomes payable, we should not dispense with the consent.

LORD KINNEAR concurred.

LORD JOHNSTON.—I experienced some difficulty in this matter, partly because the case was the first, so far as I am aware, that has occurred in this Court where, in a question of reduction of capital, a creditor's interest has been involved, but more particularly from the phraseology of a number of cases in the English Courts directly or indirectly bearing on this matter. I refer to the distinction between admission to claim and admission to proof, and to the use of the qualifying term "contingent" in, as it seemed to me, a different sense from that which it would receive here. But I find that the same difficulty occurred to Vice-Chancellor Hall in the case of *Oppenheimer v. British and Foreign Exchange and Investment Bank*,¹ and the learned Vice-Chancellor explains the situation in such a way as to remove the difficulty.

As regards the application of the statute, I entirely agree with what your Lordship has said.

The respondents' title on the statute to object is undeniably complete. On your Lordship's interpretation, which I accept, they are entitled as a condition of their consent to require that an appropriation be made to the full amount of their debt or claim.

But this appropriation does not involve immediate payment, but only the

¹ 6 Ch. D. 744.

Oct. 19, 1911. Palace Billiard Rooms, Limited, v. City Property Investment Trust Corporation, Limited. securing payment by appropriating, as the Court may direct, the necessary sum. What the Court did in the *Telegraph Construction Company's* case,¹ under the Acts of 1862 and 1867 (and I do not find that there was any difference in their language from that of the Act of 1908), was to order the full amount of the claim to be paid into Court, with liberty to either party to apply—by which I understand liberty to the creditor to apply for payment *pro tanto* if the Company did not meet its obligation at any term, and for the Company to apply to have the fund released *pro tanto* if it did meet its obligations term by term. In the analogous case—*Oppenheimer*²—of a shareholders' liquidation, the lessor's interest for future rent was protected in a similar manner by setting aside the whole amount of his future claims to cover the risk of the sub-lessee's failure. *Gooch's* case³ is in the same direction. The Company here must, I think, submit to appropriation on similar terms if they want to reduce their capital as proposed.

Counsel for the petitioners having stated that the Company, though solvent, was not prepared to consign the full amount of the future rents of the premises, or to give further security than that offered at the hearing—

THE COURT dismissed the petition.

WM. DOUGLAS, S.S.C.—J. & J. ROSS, W.S.—Agents.

No. 3. THOMAS SKENE ESSON AND ANOTHER (Dr Andrew Vans Dunlop's Trustees), First Parties.—*Pitman*.
 Oct. 19, 1911, JANE DUNLOP FERGUSSON POLLOK AND OTHERS, Second Parties.—*Constable, K.C.—Chree*.
 Vans Dunlop's Trustees v. Pollok. THE UNIVERSITY COURT OF THE UNIVERSITY OF EDINBURGH, Third Parties.—*Clyde, K.C.—J. H. Millar*.

Trust—Administration—Severance of interests of beneficiaries—Appropriation of investments to particular legacies—Appreciation in value of investments appropriated.

A testator directed his trustee to hold a specified sum for a certain party in liferent, and his issue in fee, and to pay over the residue of his estate "as it accrues and becomes available" to his residuary legatees. The trustee set apart and invested the specified sum for behoof of the liferenter and his issue, and from time to time made payments out of residue to the residuary legatees. On the death of the liferenter it was found that the stocks, in which the sum appropriated to the legacy had been invested, had considerably increased in value.

In a competition between the fiars and the residuary legatees for the amount of this increase, *held* that the trustee had an implied power under the terms of the trust-deed to set aside and invest the specified sum for the satisfaction of the legacy, and, accordingly, that the fiars were entitled to the benefit of the appreciation in the value of the securities in which it was invested.

Observations upon the distinction between trusts in which a special power of appropriation must be conferred upon trustees, and those in which such a power may be implied.

¹ L. R., 10 Eq. 384.

² 6 Ch. D. 744.

³ *Gooch v. London Banking Association*, 32 Ch. D. 41.

DR ANDREW VANS DUNLOP died on 27th February 1880, leaving a trust-disposition and settlement by which he conveyed his whole estate, heritable and moveable, to William Fergusson and others as trustees. Oct. 19, 1911.
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By the eleventh purpose of his settlement the testator provided as follows:—"That in case Mrs Jane Johnston Crawford Pollok or Fergusson, wife of my brother-in-law, the said William Fergusson, shall not have succeeded to the Pollok estates before my death, or before the 1st day of January 1883, I leave and bequeath to the said William Fergusson, but only in the said event, the sum of £5000 sterling in liferent, to be held by my trustees in Europe for his liferent use alienably, and for his lawful issue in such proportions as he, and failing him, as his said wife, may direct and appoint, in fee: Providing always that if his said wife shall have succeeded to these estates as aforesaid, this legacy shall lapse, and shall form part of the residue of my estate." By a codicil the testator left to these legatees a further sum of £2000, to be held on the same terms as the £5000. 1st DIVISION.

The testator's settlement further provided:—"Lastly, With regard to the residue and remainder of my means and estate hereby conveyed, after all the legacies, bequests, and provisions, before mentioned or referred to, as well as any other sum which I have left, or may hereafter leave and bequeath in any codicil, memorandum, or other writing, executed or to be executed by me as aforesaid, have been fully paid and satisfied, or provided for, I hereby nominate and appoint the University of Edinburgh, . . . to be my residuary legatees, . . . declaring, as it is hereby provided and declared, that the funds to be liferented in terms hereof, by" [certain named legatees, among whom his brother-in-law was not included] "shall, after their respective deaths, and so far as not required for the fulfilment of the other purposes of these presents, be held as forming part of the residue of my said estate, and be dealt with accordingly under this purpose of these presents; and I direct my said trustees in Europe to pay and make over the whole of the said residue and remainder of my estate as it accrues and becomes available, to my said residuary legatees; declaring that a receipt or discharge under the hand of the principal or treasurer of the said University for the time being shall be a sufficient discharge and exoneration to my said trustees in Europe for the said residue and remainder of my estate; and in order that my trustees in Europe, and my executors in India, may be able to execute the purposes of the present trust, I hereby confer on them the following powers and privileges, viz.:—[Here followed an enumeration of their powers]: And as a further direction to my trustees in Europe, I hereby advise that they shall retain such of my stocks and shares as they may consider to be good and safe investments, . . . and having estimated the value of these stocks and shares at the market rate of the day, they shall divide them accordingly among the various legatees, or otherwise appropriate them for the purposes of this trust."

William Fergusson, afterwards William Fergusson Pollok, was the only one of the testator's trustees who accepted office. His wife did not succeed to the Pollok estate before 1st January 1883, and accordingly, the legacies of £5000 and £2000 having then vested in him in liferent and his children in fee, he paid the legacy-duty of £350 thereon, and invested the balance of £6650 to meet these legacies. Part of this fund was invested (on a change of investment

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in 1892) in £1218, 3s. 9d. of British Linen Company Stock, the investment being taken in the joint names of Mr and Mrs Fergusson Pollok, "and the survivor of them in trust for their children." On it being pointed out that the investment should have been taken in Mr Pollok's name as trustee, Mr and Mrs Pollok subsequently signed a minute in token of their wish that the said sum of bank stock should be held in their joint names for behoof of their children, and they thereby acknowledged and declared "that although the investment has been taken in these terms, the same truly forms part of the trust-estate of the late Dr Vans Dunlop, and is subject to the trusts of his settlement relating to the said two bequests of £5000 and £2000 of which it forms part." In the trust accounts the sum of £6650 appeared under the heading "*Estate held for Special Purposes*," sub-head "*Sum held by the Executor for behoof of Mr William Fergusson in liferent and his children in fee.*"

The University received, from time to time, as funds accrued and became available, large payments to account of residue from the trustee on the trust-estate, amounting (with the exception of some small sums retained to meet contingencies) to the whole residue. For these payments the University granted formal discharges acknowledging their receipt and ratifying and approving of the whole actings, intromissions, and management of William Fergusson Pollok as trustee, but expressly saving and reserving the University's right in those portions of the trust-estate set aside to meet liferent legacies or other bequests or legacies bequeathed by the testator, which might thereafter revert and accrue to the trust-estate and become part of the residue payable to the University.

Mr Fergusson Pollok survived his wife and died on 5th November 1908, when the fee of the legacies of £5000 and £2000 fell to be paid over to his issue. At that date the value of the investment in British Linen Company Stock had appreciated to the extent of some £2000, and questions arose between these legatees (Mr Pollok's issue) and the residuary legatees (the University of Edinburgh) as to the parties entitled to this increase in value.

A special case was accordingly presented to the Court by the testator's acting trustees (*first parties*), the issue of William Fergusson Pollok (*second parties*), and the University Court of the University of Edinburgh (*third parties*).

The case, after setting forth the facts narrated above, stated the contentions of the parties as follows:—

"The second parties contend that as Mrs Jane Johnston Crawford Pollok or Fergusson did not succeed to the Pollok estates before 1st January 1883, said legacies of £5000 and £2000 at that date vested in Mr William Fergusson in liferent and in his issue in fee, and that the University then ceased to have any interest in said sums. That said sums were at that date properly set aside and appropriated by the said William Fergusson as trustee for himself in liferent and his issue in fee as distinct from the residuary estate in which the University was interested. That . . . the proceeds of the British Linen Bank Stock which formed one of said investments belong exclusively to the second parties, and now fall to be paid over to them.

"The third parties contend that the said William Fergusson Pollok, as trustee foresaid, had no power to and did not legally set aside and appropriate the investments above mentioned to meet the

said legacies of £5000 and £2000, and did not competently sever the same from the rest of the trust-estate. They further contend that the second parties are now entitled to payment only of the balance of the said legacies remaining unpaid, and that the appreciation which has taken place in the British Linen Bank Stock, in which the said balance has since 1892 stood invested, enures to residue and is payable on realisation to the third parties."

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The questions of law were, *inter alia*:—"1. Was the late William Fergusson Pollok, as trustee foresaid, empowered by the testator's testamentary writings to set aside and appropriate particular investments to satisfy the said legacies of £5000 and £2000, so as to sever the same from the rest of the trust-estate? 3. Are the second parties entitled to the benefit of the appreciation which has taken place in the investment in British Linen Bank Stock representing the balance of the said legacies? or, Are the third parties entitled, on realisation of the said British Linen Bank Stock, to the difference between the price realised and the balance of the capital of the said legacies remaining due to the second parties?"

A further question was stated, with which this report is not concerned, as to whether the investments had in fact been sufficiently appropriated to these legacies.

The case was heard before the First Division on 19th October 1911.

Argued for the second parties;—The testator's settlement should be interpreted as conferring power upon his trustees to set apart the sum destined in fee to the second parties, because the trustees were directed to make over the residue as it became available, and it became ascertainable, and so available, in so far as affected by this legacy of £7000, in 1883, when the legacy vested in the legatees. Further, the power given to the trustees to "appropriate" stocks among the various legatees was consistent with their having authority to set apart and invest specific sums to meet individual legacies. The discharges granted by the third parties were absolute in their terms *quoad* this question, for the reservations therein contained did not apply to such legacies as this, the fee of which had vested in the legatees. The securities representing this legacy were accordingly held absolutely for the second parties, and they were entitled to the benefit of any appreciation which might take place in the value of these securities.¹

Argued for the third parties;—No authority, express or implied, was conferred upon the testator's trustees to sever the sum in question from the trust-estate in such a manner as to deprive the third parties of the benefit of any appreciation in the value of the securities in which it was invested, creating a balance in excess of the amount of the legacy. The saving clause in the discharges granted by the third parties kept open their present claim to the difference between the market value of the securities in which the trustee had invested this legacy destined to the second parties and the balance of capital due to them.²

LORD PRESIDENT.—[After stating the facts]—The special bequest of £7000 being now free to be given to the fiars, the liferenter being dead, the

¹ Robinson v. Fraser's Trustees, (1881) 8 R. (H. L.) 127.

² Teacher's Trustees v. Teachers, (1890) 17 R. 303; Scott's Trustees v. Scott, (1895) 23 R. 52.

Oct. 19, 1911. University have put in a claim for the value of the appreciation which has taken place upon the investment held.

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—
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I confess I can see no ground whatsoever upon which that claim can be supported. It seems to me that the trustees have all along held this particular sum of money and this investment for the liferenter and for the fiars designated, and that the appreciation, if any, belongs to them. I can quite understand that where a trust is, in all its terms, a continuing trust but for the benefit of different individuals, it might be necessary to have a special power of appropriation conferred upon trustees in order to allow them to separate up the investments of the trust and tie the fortunes of each beneficiary or set of beneficiaries to particular investments. But it seems to me that, when a trust is of a composite character and is partly for holding and partly for distribution, there is of necessity an implied power upon trustees to set apart the whole, at the time when they have to part with some of the trust for distribution. And I think that not only is *Robinson's* case¹ an illustration, but that Lord Trayner in the case of *Scott*,² in the passage which Mr Millar cited as helping his case for the University, fully recognises that fact. He quotes the case of *Robinson*,¹ and then he says: "In that case appropriation of special funds to meet certain legacies was sustained, although such appropriation had not been directed to be made by the trust-deed. That such a course was intended by the truster in that case might very reasonably be inferred, because such appropriation was necessary to enable the residue to be divided without undue delay, which was the truster's object, and, indeed, direction." And I think you have a good illustration of the opposite class of case in the case of *Teacher*,³ which was also referred to. Indeed, I think the doctrine put forward by Mr Millar, if carried out, would really be a most inconvenient doctrine in the management of trust-estates, because I think that its stringent application would lead to this—that wherever a truster had directed, *inter alia*, a certain sum of money to be held by his trustees for the benefit of a liferenter or liferenters and then fiars, it would never be possible for them to pay the other special bequests and the residue, and wind up the trust (with the exception of the sum to be held), because it would always be in the mouths of the liferenters and fiars to say, "Oh, no, you must not part with the estate, because our investment may in future depreciate."

Accordingly, I think that the case is a very simple one, and that questions one . . . and the first part of three must be answered in the affirmative.

LORD KINNEAR, LORD JOHNSTON, and LORD MACKENZIE concurred.

THE COURT answered the first question and branch one of the third question in the affirmative.

TODS, MURRAY, & JAMIESON, W.S.—E. A. & F. HUNTER & Co., W.S.—
W. & J. COOK, W.S.—Agents.

¹ 8 R. (H. L.) 127.

² 23 R. 52, at p. 58.

³ 17 R. 303.

JOHN BORLAND, Appellant.—*Moncrieff—Fenton.*

No. 4.

WATSON, GOW, & COMPANY, Respondents.—*Horne, K.C.—Duffes.*

Oct. 21, 1911.

*Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), sec. 1 (1)—**Accident arising out of and in the course of the employment—Injury to knee**—Incapacity alleged to be due to similar injury in previous employment—**Onus of proof.*Borland v.
Watson,
Gow, & Co.

In December 1908 a workman in the course of his employment felt a severe pain in his right knee on rising from a kneeling position, and on examination it was found that the cartilage was torn. Three years before, while in another employment, he had sustained a "wrench" to the same knee, which had incapacitated him for some weeks, after which he was able to resume his ordinary work. It was not clear on the evidence whether the later injury was connected with the former, or, if so, to what extent it was so connected.

In answer to a claim by the workman for compensation against the firm in whose employment he was in December 1908, the employers maintained that the incapacity was not due to an accident occurring in the course of his employment with them, but to the original injury.

Held that, as the injury in December 1908 was apparently sustained in the employment of his then employers, the onus was on them to show that it was really due to the former accident; that they had failed to discharge this onus; and that they were accordingly liable to pay compensation.

IN an arbitration under the Workmen's Compensation Act, 1906, between John Borland, range-fitter, Glasgow, and Watson, Gow, & Company, Limited, Etna Foundry, Glasgow, the Sheriff-substitute at Glasgow (Fyfe) refused compensation, and at the request of the workman stated a case for appeal.

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Sheriff of
Lanarkshire.

The case set forth the following facts as proved:—“(1) That appellant is a range-fitter to trade. (2) That about three years ago, whilst in the employment of Messrs Mechan & Son at Whiteinch, he sustained a wrench to his knee, and in respect thereof claimant received compensation under the Workmen's Compensation Act for a period of some weeks. (3) That subsequently, on several occasions, the result has been that, when at work upon his knees, the knee gave him trouble whilst in the act of raising his body from the ground, causing him pain at the moment, but not preventing him continuing to work. (4) That on 4th December last appellant was in the employment of the respondents. (5) That he was then, in the course of his work, kneeling upon the knee which had previously sustained the injury. (6) That in rising from the kneeling position he again felt the same kind of pain. (7) That on being taken to the infirmary it was found that the internal cartilage of the right knee joint was torn. (8) That an operation was performed on or about 22nd January. (9) That he was discharged from the infirmary on 27th February 1909. (10) That he was not then fit for work. (11) That he is not yet fit for work. (12) That the rupture of the knee cartilage on the 4th December 1908 was the result of the strain experienced when appellant was in other employment than that of the respondents.”

The Sheriff found that the appellant had failed to prove that he was injured by accident arising out of and in the course of his employment with the respondents.

The question of law was:—“Whether the injury which the appel-

Oct. 21, 1911. **Borland v. Watson, Gow, & Co.** Injant sustained on 4th December 1908 was an accident arising out of and in the course of his employment as a workman while with the respondents, entitling him to compensation under the Workmen's Compensation Act, 1906."

The case was heard before the Second Division on 6th July 1911, when the Court remitted the case to the arbitrator for further findings in fact.

The questions stated by the Court and the Sheriff's answers were as follows:—

"(Ques. 1) Was the cartilage in the appellant's knee ruptured when he was injured in the service of Messrs Mechan & Son at Whiteinch, and received compensation for a time for inability to work? (Ans. 1) The evidence does not disclose whether the cartilage was ruptured then.

"(Ques. 2) If there was rupture, was it completed or was it increased, on 4th December 1908, by exertion made on that date? (Ans. 2) Assuming there was a rupture, it was increased by the occurrence of 4th December 1908.

"(Ques. 3) Were the symptoms which showed themselves on 4th December in any way different from these which had shown themselves on previous occasions when the appellant required to kneel when working? (Ans. 3) No.

"(Ques. 4) Did the appellant receive any new injury while in the respondents' employment, or was the condition in which his knee was found to be on 4th December 1908 produced by the accident three years before, as a natural result of that injury? (Ans. 4) It is not possible from the evidence to say.

"(Ques. 5) In what circumstances, and by whom and when, was he taken to the infirmary? (Ans. 5) On 4th December 1908, when he rose from the kneeling position and felt pain in knee, it was about twelve o'clock, but he stayed on till five, when he was assisted home. At home he was treated by his family doctor till 22nd January, when he was sent to the infirmary by his own doctor."

The case was again heard before the Second Division on 21st October 1911.

Argued for the appellant;—The appellant's knee was undoubtedly affected by something which happened on 4th December, and which left it in a different and worse condition than it was in before. This amounted to an "accident" in the sense of the Act.¹ It might be that what happened on 4th December would not have incapacitated the workman but for the injury sustained in Messrs Mechan & Son's employment three years previously, as a result of which his knee was left in a weak condition. But this did not affect his claim for compensation against the respondents in respect of the accident which happened when he was in their employment.² It was for the respondents to prove, if they could, that the present incapacity was due to the original accident, and this they had failed to do.

¹ *Hamlyn v. The Crown Accidental Insurance Co., Limited*, [1893] 1 Q. B. 750; *Stewart v. Wilsons and Clyde Coal Co., Limited*, (1902) 5 F. 120; *Fenton v. J. Thorley & Co., Limited*, [1903] A. C. 443.

² *Golder v. Caledonian Railway Co.*, (1902) 5 F. 123; *Ismay, Imrie, & Co. v. Williamson*, [1908] A. C. 437; *Clover, Clayton, & Co., Limited, v. Hughes*, [1910] A. C. 242; *Martin v. Barnett*, (1910) 3 Butterworth's W. C. C. 146.

Argued for the respondents;—The arbitrator had found that the rupture of the knee cartilage on 4th December was the result of the strain experienced when appellant was in other employment than that of the respondents. This negatived conclusively the idea that the injury was due to any accident on 4th December. The appellant had failed to prove his case. The whole burden of proving the conditions necessary to an award of compensation was upon him.¹ There was no evidence to show that his incapacity was due to an accident arising out of and in the course of his employment with the respondents. This, at least, was the view of the arbitrator, and there were no grounds for altering his judgment.² In fact, the incapacity was not due to any accident on 4th December, but to a previously existing cause.³ The appellant was not without his remedy, for he could still—even after a lapse of years—claim compensation from the persons in whose employment he was when the accident occurred to which his present incapacity was due.⁴

LORD DUNDAS.—This is a stated case under the Workmen's Compensation Act. There seems to have been an extraordinary amount of unexplained delay in the Court below, because I see that the Sheriff says that the case was heard before him and proof led in July and September 1909, and the appeal was not boxed to this Court till June 1911. When the case came here we found that—whether as the result of the delay or not I do not know—the facts were so imperfectly stated that we thought it necessary to adjust certain questions and remit them to the Sheriff-substitute to answer. This the learned Sheriff-substitute has done, and I am bound to say that, even with the further assistance we have got, the facts are not so clear as we could wish them to be, or as they ought to be. But I think we have sufficient matter before us to enable us to decide the case; and that it will not be necessary in doing so to advert to the numerous authorities that have been quite properly quoted to us at the discussion.

It appears that on the 4th of December 1908 the appellant, while engaged in his employment with the respondents, felt a severe pain as he was rising from a kneeling position, and on his being taken to the infirmary it was discovered that he had sustained rupture of the internal cartilage of his right knee joint. *Prima facie* that looks very like a case for compensation; but then it is said that some three years before, while in another employment, he had sustained a wrench of that knee in respect of which he received compensation for some time from these former employers, and it was argued that this injury in December 1908 was really just a recurrence of the former injury sustained three years before. I do not think it is clear on the facts whether the later injury was or was not connected with the former, or to what extent it was connected, but as the new injury in December 1908 was apparently sustained while in the employment of the present respondents, and arising out of that employment, I think the onus

¹ Pomfret v. Lancashire and Yorkshire Railway, [1903] 2 K. B. 718, per Collins, M. R., at p. 721.

² Coe v. Fife Coal Co., Limited, 1909 S. C. 393.

³ Hawkins v. Powells Tillery Steam Coal Co., Limited, [1911] 1 K. B. 988; Boardman v. Scott & Whitworth, [1902] 1 K. B. 43.

⁴ Dempster v. Baird & Co., Limited, 1908 S. C. 722.

Oct. 21, 1911. was on the respondents to make it clear, if they could, that no new injury was really sustained, but that anything suffered on 4th December 1908 was due to the former accident. It seems to me enough for the decision of this case that this workman had, so far as we know, worked continuously as an ordinary workman for some three years prior to the 4th December 1908, and it is plain enough, I think, that the old injury must have subsided and disappeared to this extent that he was able to perform his ordinary work as a workman, whereas something occurred on the 4th December of so serious a nature as to incapacitate him from work. The facts seem to me to show that that injury arose in the course of his employment with the respondents, and out of it, and therefore I think this is a case where compensation ought to be given. Towards the close of his argument, indeed, Mr Duffes took courage and urged that there was here no "accident" at all, but I must say I think that argument, as I understood it, is negatived by decisions of the House of Lords with which your Lordships are familiar. On these short grounds, I think we ought to answer the question put to us in the affirmative.

LORD SALVESSEN.—I think this a very clear case. The Sheriff-substitute seems to have held that his inability to infer from the evidence whether the injury which the appellant suffered was the result of a strain which he experienced at the time, or was the result of some prior strain experienced three years before, made it impossible for him to reach a conclusion in favour of the appellant. I do not think that is so at all. There are only two alternatives. Either the man's cartilage was ruptured on the date on which he was obliged to cease work in the employment of the respondents, or it had been previously ruptured, and what happened then increased the rupture and unfitted him there and then for the very same kind of work which he had been doing for three years. On either view it is quite clear that this was an accident to which the Workmen's Compensation Act applies. I have therefore no difficulty in reaching the same result as your Lordship.

LORD JUSTICE-CLERK.—This man was engaged in work for some time with the respondents. On a certain day while employed on work which involved his being on his knees, he found on rising that he had some injury which prevented his continuing to work, and which led to his being taken to hospital, where it was discovered that his knee cartilage was torn and that he was in consequence unfit for work.

These facts, if proved, would, in my opinion, entitle the injured man to compensation. He would not need to prove anything more than that the accident arose out of his employment. The facts seem to me to make it impossible to find otherwise. He is just a workman who on a certain day ceased to be able to work on account of something which had happened to him while at his work. That is the ordinary case of accident under the Act. He would need to prove nothing more than I have said. If he prove that, it is still open to the respondents to bring forward evidence that it was not an accident in their employment but something else which incapacitated him, and their case is that that something else happened three years before. I think there is no alternative except either that he met with an

accident on the occasion libelled, having never had an accident to his knee before, or that having had a previous accident, he had so recovered that he was able to do his own regular work for a considerable time, and then that something happened to the same part of his body. In both of these cases the ultimate and immediate cause of his being no longer able to work was what happened on the day in question, when, on rising from his knees, it was found that his cartilage was torn, and it could not have been torn during the three years before, otherwise he would not have been able to work during that time as we are told that he did. I think it is one of the clearest cases we have seen, and we do not need to go to the anthrax case¹ in order to decide it. It was an injury by violence occurring to the workman during his work, producing incapacity from which he was not suffering before, and on these grounds I am of opinion that compensation falls to be given, and the proper course will be to answer the question in the affirmative, and remit the case to the Sheriff-substitute to assess the amount of compensation.

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Lord Justice-
Clerk.

THE COURT answered the question of law in the affirmative.

JAMES G. BRYSON, Solicitor—MACPHERSON & MACKAY, S.S.C.—Agents.

MRS MARY DUNBAR, Pursuer.—*Macquisten*.
ROBERT W. DUNBAR, Defender.—*W. T. Watson*.

No. 5.

Oct. 25, 1911.

Sheriff—Action of separation and aliment—Cause remitted to Court of Session—Power of Court to send it back to Sheriff—Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. cap. 51), sec. 5. Dunbar v. Dunbar.

The Sheriff Courts (Scotland) Act, 1907, sec. 5, extends the jurisdiction of Sheriffs to actions of separation and aliment and for custody of children, with this proviso:—"Provided also, that on cause shown or *ex proprio motu* the Sheriff may at any stage remit to the Court of Session any action of separation and aliment or relating to the custody of children."

A Sheriff having, *ex proprio motu*, remitted an action of separation and aliment to the Court of Session, the Court remitted it back to the Sheriff, holding (1) that the section does not prevent the Court from dealing with a remitted cause as it thinks fit, and in particular sending it back to the Sheriff; and (2) that as the record did not disclose any special difficulty in the case, the Sheriff was not justified in declining to exercise his jurisdiction.

ON 15th August 1911 Mrs Mary Brown or Dunbar brought an action of separation and aliment in the Sheriff Court at Linlithgow against her husband, Robert W. Dunbar.

1st DIVISION.
Sheriff of the
Lothians and
Peebles.

The pursuer based her claim for separation on the alleged cruelty of her husband, and averred:—(Cond. 3) "About six months after the marriage defender gave way to drink, and he has continued to lead an intemperate life ever since." (Cond. 4) "Both in his fits of drunkenness and when sober defender frequently beat his wife and threatened her life. In particular, on or about the evening of 25th December 1907, in his dwelling-house in Market Street, Bo'ness, defender struck

¹ Brintons, Limited, v. Turvey, [1905] A. C. 230.

Oct. 25, 1911.

Dunbar v.
Dunbar.

the pursuer a severe blow on the face, and compressed her throat, to her serious injury. In July 1909 defender locked out pursuer, who had to get a night's lodging with Mr and Mrs Harris, Grange-pans. He (defender) again assaulted pursuer by striking her on the face on a day in the month of February 1910, also in his said dwelling-house in Market Street, Bo'ness." (Cond. 5) "Latterly, defender's acts of cruelty towards the pursuer became so frequent and serious that the latter, having regard for her personal safety, was compelled to leave the defender's house, which she did on or about 7th July 1911. The direct and immediate cause of pursuer's leaving defender's house was as follows:—On the date mentioned, 7th July 1911, defender returned home at 5.30 P.M. John Falconer, to whom further reference is made in pursuer's answer 2 to defender's statement of facts, was in the house with pursuer at the time. He was there by appointment with the defender, whose friend he was, and whom he had come to meet, to arrange, it is believed, how they were to spend the following Saturday afternoon. Defender, on entering the house, demanded some dinner. Pursuer explained that this had been ready for him at 1 o'clock, at which hour he had promised to return, but that she would prepare something fresh as quickly as possible. Defender thereupon struck the pursuer a blow on the face, and said he would prepare the dinner himself. Pursuer, referring to defender's systematic ill-treatment of her, and this last instance of it, then said that unless there was a change in his (defender's) way of living she would go home to her folks; to which defender replied, 'Go now, and I'll give you something more to take home with you,' accompanying his remark with a further attempt to strike pursuer, which he was prevented from carrying out by the timely intervention of Falconer. On Falconer interfering, defender flew into a rage and ordered him to leave the house at once, which he did. After Falconer's departure defender lifted the pursuer off her feet and threw her heavily against a bed, gripped her savagely by the neck, and attempted to strangle her. She escaped after a struggle, when he pursued her and struck her a severe blow on the face. Then it was that the pursuer, with ample justification, left the defender's house, where to remain was at the risk of her life."

The defender denied these averments.

On 3rd October 1911 the Sheriff-substitute (Macleod) *ex proprio motu* remitted the cause, under section 5 of the Sheriff Courts (Scotland) Act, 1907,* to the First Division of the Court of Session.†

On the calling of the case in Single Bills on 25th October, counsel for the defender moved the Court to remit it back to the Sheriff-substitute, on the ground that there was nothing in the record which justified the action being remitted to the Court of Session, and that

* Quoted in rubric.

† "NOTE.—It was, I think, the intention of the Legislature that in the ordinary case an aggrieved spouse should have the right to have her claim to this remedy decided in the Sheriff Court. But there will arise now and then an exception.

"My attention was attracted by the pleadings and productions in this case. They seemed to me at first sight to disclose a situation of considerable delicacy. I have thought over the matter with care, and my impression deepens that, in the interests of the administration of justice, it would later on be matter for grave regret if this cause failed to have at all subsequent stages the benefit of the wider matrimonial experience of a Judge of the Court of Session."

the remit had been made without parties being heard with reference thereto. Oct. 25, 1911.

Counsel for the pursuer did not oppose the motion.

Dunbar v.
Dunbar.

LORD PRESIDENT.—This is an action of separation and aliment raised in the Sheriff Court in terms of the extended jurisdiction given to Sheriffs by the Sheriff Courts Act, 1907, and the Sheriff-substitute has remitted the cause to the Court of Session, his warrant for doing so being the proviso appended to section 5 of the Act, which is in these terms :—" Provided also, that on cause shown or *ex proprio motu* the Sheriff may at any stage remit to the Court of Session any action of separation and aliment or relating to the custody of children."

Now, it is clearly within the power of the Sheriff to take this step, but I do not think that the Act excludes the power of this Court to deal with the matter as it thinks fit, and in particular to send the case back to the Sheriff.

I have examined the record in this case, and I do not think that it is one that raises questions of delicacy such as sometimes arise in these cases. The law of what entitles a spouse to separation and aliment has been clearly stated in a passage of the opinion of Lord President Inglis in the case of *Graham v. Graham*,¹ quoting the opinion of Lord Brougham in the case of *Paterson v. Russell*,² where he says,—“ Personal violence, as assault upon the person of the woman ; threats of violence, which induce the fear of immediate danger to her person ; maltreatment of her person, so as to injure her health ; these are, both by the law of Scotland and the law of England, a sufficient ground of divorce *a mensa et thoro* ”; and Lord Brougham goes on to state other conduct which is sufficient. Now, where there has been conduct short of the brutal conduct instanced by Lord Brougham difficult and delicate questions are raised sometimes, but here there is a distinct averment of personal violence, and if the pursuer proves this averment there can be no question of difficulty in the case. It seems to me that it involves a simple question of fact, and I think the pursuer is entitled to avail herself of the cheaper procedure in the Sheriff Court, and that we should re-remit the case.

LORD KINNEAR.—I am entirely of the same opinion. I think that the ground upon which this particular case has been remitted to the Court of Session, if it were sound, would justify the same procedure in every case of the kind. Lord President Inglis points out in *Graham v. Graham*¹ that in these cases the Court must always have a very delicate duty to discharge, for reasons which he explains. But that general difficulty does not justify the notion that a jurisdiction which Parliament has expressly conferred upon the Sheriff Court is suitable only for the Court of Session, and that is the ground on which the case has been remitted. It would have been a different matter if the Sheriff had found any special difficulty peculiar to the particular case, and it may be that a question of that kind might still arise. But the Sheriff's absolute refusal on general grounds to exercise his statutory jurisdiction cannot, in my opinion, be supported.

¹ (1878) 5 R. 1093, at p. 1095.

² 7 Bell's App. 337, at p. 363.

Oct. 25, 1911. LORD JOHNSTON and LORD MACKENZIE concurred.

Dunbar v.
Dunbar.

THE COURT remitted the cause back to the Sheriff-substitute to proceed.

PURVES & SIMPSON, S.S.C.—JAMES F. MACDONALD, S.S.C.—Agents.

No. 6. MRS MARGARET TAYLOR OR BROWN, Pursuer (Appellant).—
M'Lennan, K.C.—Maclaren.

Oct. 27, 1911. DAVID FERGUSON, Defender (Respondent).—*Chree—Kirkland.*

Brown v.
Ferguson.

Parent and Child—Bastard—Aliment—Custody—Death of mother—Claim for aliment by maternal grandmother—Denial of paternity coupled with offer to accept custody of the child.

B. gave birth to an illegitimate child and claimed aliment from F., whom she alleged to be the father. F. denied paternity, but offered to pay aliment, and did so for four years until B.'s death, when he offered to take charge of the child himself. The offer was refused by B.'s mother, with whom the child was living and continued to live, and who subsequently brought an action against F. for a finding that he was the father and for payment as aliment of the sums disbursed by her for its support since B.'s death. In his defences F. denied paternity, and renewed his offer to take charge of the child. The pursuer maintained that F., while denying paternity, had no right to the custody of the child, or, in any event, that he had no such right until it was seven years of age.

Held that F.'s offer to take charge of the child, even though coupled with a denial of paternity, was a conclusive answer (irrespective of the age of the child) to the claim for aliment made by its grandmother, who stood in no legal relationship to it and was under no obligation to support it and had no right to its custody.

Keay v. Watson, Feb. 19, 1825, F. C., 3 S. 561, *distinguished*.

2D DIVISION.
Sheriff of
Lanarkshire.

IN December 1909 Mrs Margaret Taylor or Brown, Aberdeen, brought an action in the Sheriff Court at Glasgow against David Ferguson, miner, Airdrie. The pursuer craved the Court "to find that defender is the father of an illegitimate male child of which pursuer's daughter, the said Elizabeth Brown (now deceased), was delivered on 29th June 1900 at 9 Canal Street, Aberdeen; to decern against defender for payment to pursuer of the yearly sum of £8 in name of aliment for said child from said 29th June 1900 till he attains the age of fourteen years. . . ."

The pursuer averred that the defender had connection with Elizabeth Brown, her daughter, as a result of which the latter gave birth to an illegitimate male child on 29th June 1900. (Cond. 7) "Prior to the birth of said child, and in the beginning of 1900, defender admitted having 'had to do' with the said Elizabeth Brown, but denied the paternity of said child. He further called at the residence of the said Elizabeth Brown in Aberdeen, when said child was about ten months old, for the purpose of taking said child away, but delivery of said child was refused." Elizabeth Brown went to South Africa, where she died on 8th June 1904. (Cond. 8) "Prior to and since the death of pursuer's daughter, the said Elizabeth Brown, pursuer maintained, and is still maintaining, the said child in family with her, and has disbursed the sums concluded for."

The defender lodged a statement of facts, which was not in sub-

stance denied, and in which he averred:—(Stat. 2) “Defender has throughout denied the paternity of the child to which the said Elizabeth Brown gave birth on 29th June 1900, but subsequently, to avoid the heavy cost of litigation, and without admission of paternity, he offered to take charge of the child, and he went to Aberdeen for the purpose. His offer was refused, and ultimately, upon the same conditions, he agreed to pay half aliment.” (Stat. 4) “After the death of the said Elizabeth Brown, which occurred on 8th June 1904, defender renewed in August 1904 his offer to take charge of the child, but pursuer refused the offer.” (Stat. 5) “Defender is still quite willing to take charge of the child, and his mother, who is able to provide an equally suitable home to that of pursuer, has all along been willing to attend to the upbringing of the child.”

Oct. 27, 1911.

Brown v.
Ferguson.

The defender tendered payment of arrears of aliment up to August 1904, and renewed his offer to take charge of the child.

The pursuer pleaded, *inter alia*;—(1) Defender being the father of said illegitimate male child, is bound to aliment same.

The defender pleaded, *inter alia*;—(1) Defender not being the father of said child, is not bound to aliment the same. (3) Defender having made a *bona fide* offer to take charge of said child as from and after 8th June 1904, and said offer having been refused, pursuer is not entitled to decree for aliment after the date of said offer.

On 16th March 1910 the Sheriff-substitute (Davidson) sustained the third plea in law for the defender, and found the pursuer entitled only to the sum tendered.

The pursuer appealed to the Sheriff (Millar), who, on 6th July 1910, adhered.

The pursuer appealed to the Court of Session, and the case was heard before the Second Division (consisting of the Lord Justice-Clerk, Lord Dundas, and Lord Skerrington) on 17th and 18th October 1911.

Argued for the appellant;—So long as the defender denied the paternity of the child, he could not claim its custody,¹ and so could not avoid this action, as an admitted father might do, by offering to take the child into his own house. The mother had expressed her wish that the child should remain with its maternal grandmother, and there being no suggestion that its welfare would thereby suffer, effect should be given to the mother's wishes.² The grandmother was therefore, in these circumstances, entitled to insist in this claim. In any event, the defender was not entitled to the custody of the child till it was at least seven years old,³ and he was therefore liable in aliment up to that time. The pursuer did not now press for an award of aliment beyond the date when the action was raised, but on account of the aliment afforded by her up to that date she was entitled to insist in this action.⁴

Argued for the respondent;—The defender's offer to take the child

¹ Keay v. Watson, Feb. 19, 1825, F. C., 3 S. 561; Caldwell v. Stewart, (1773) 5 Brown's Supp. 390.

² Brand v. Shaws, (1888) 16 R. 315.

³ Westlands v. Pirie, (1887) 14 R. 763; Corrie v. Adair, (1860) 22 D. 897.

⁴ Ligertwood v. Brown, (1872) 10 Macph. 832; Macdowall v. MacLurg, (1807) M. voce “Prescription,” App. No. 6; Butchart v. Ireland, (1839) 1 D. 1128.

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Ferguson.

into his house after the death of its mother was a good answer to the pursuer's claim for aliment since the date of that offer. The cases as to custody and aliment referred to by the pursuer had no bearing, because in all of them the question was raised between the father—or person assuming the father's responsibility—and the mother herself. In the present case the maternal grandmother was in no different position from, and had no higher rights as to custody than, any third party who might give support to the child. She was simply in the position of a stranger maintaining a pauper child and seeking recourse against the person who was responsible.¹ The mother's right to custody, assuming it to exist, did not transmit to the grandmother.² If the defender had admitted that he was the father of the child, he would still have been entitled to discharge the obligation upon him in the manner least burdensome to himself,³ and he could be in no worse position because he had not made that admission. The rule that the father of an illegitimate child was not entitled to its custody till it was seven years old had no application, since the mother of the child, who alone could maintain this point, had died before that age was attained. In any event, there could be no award of aliment beyond the date of raising the action.⁴

At advising on 27th October 1911,—

LORD DUNDAS.—The pursuer is the mother of Elizabeth Brown, who was delivered of a male illegitimate child in June 1900, and died in June 1904. The action is directed against the defender, on the allegation that he is the child's father, for aliment at the rate of £8 per annum from the date of its birth till it attains the age of fourteen ; but at our bar the claim was restricted to one for aliment down to the date when the action was raised. The defender denies paternity, but he explains on record that, for reasons specified, he offered to take charge of the child and, on this offer being refused, agreed to pay the father's proportion of its aliment, and that in August 1904 (the mother having died in June, as already stated) he renewed his offer to take the child, which the pursuer refused ; and he tenders the arrears of aliment down to August 1904, and repeats his offer to take the custody of the child. The Sheriff-substitute and the Sheriff have upheld the defender's plea as a sufficient answer to the action. The pursuer appeals, and asks that the case should be sent back to the Sheriff Court in order that she may establish by proof, if she can, that the defender is in fact the child's father. She maintains that his offer is not a *bona fide* one ; that he must pay the aliment sued for, unless it is judicially found that he is not the father ; and that he is not entitled to avoid proof upon this matter by accepting the custody of the child.

I think the Sheriffs are right. The pursuer's case resolves itself into a dilemma. If the defender is not in fact the father, it is clear that the pursuer's demand must fail. But if he is the father, I can see no reason why he should not be allowed to implement his obligation as such by taking the

¹ Matheson v. Kirk-Session of Fodderty, (1831) 10 S. 183.

² Brand v. Shaws, 15 R. 449.

³ Corrie v. Adair, 22 D. 897 ; Grant v. Yuill, (1872) 10 Macph. 511 ; Buie v. Stiven, (1863) 2 Macph. 208.

⁴ Den v. Lumsden, (1891) 19 R. 77.

child and putting it in the charge of his mother, against whose ability and fitness to attend to its suitable upbringing there is admittedly nothing to be said. The pursuer's counsel however, contended that, as the defender does not admit paternity, he is not entitled to offer custody in lieu of aliment. I think the argument is fallacious, and is not supported by any of the authorities cited to us. Much reliance was placed by the pursuer's counsel on the case of *Keay v. Watson*.¹ As I read the reports, which are not very full or satisfactory, all that was there decided was that the mother of an illegitimate female child of seven was not bound to accept, as in full of her legal demand for its aliment, an offer to accept its custody made by the defender, who denied paternity but "admitted that he had agreed to become liable for the aliment on the part of the father." One can understand that when the mother in that case sought to establish against the defender by legal process his paternity of the infant and consequent liability at law to contribute to its aliment, a mere offer by him "to take the child into his own house and support it" was rejected by the Court as inadequate "while he denied the paternity." The mother had a clear interest (which the present pursuer has not) to establish, if she could, the fact of paternity while evidence of it was available, as this was the only means she had of relieving herself from the obligation of maintenance which was otherwise legally incumbent upon her. It is also to be observed that in *Keay v. Watson*¹ the child, a female, was only seven years of age, which may well explain why (as Shaw's Report bears) "one of their Lordships expressed an opinion that even the true father of a bastard child had no right of custody." Now, in the present case we are not considering the demand of a mother, but a claim for aliment put forward by a third party, who stands in no legal relationship to the infant, and is under no legal obligation to support it. In a question with her, the defender's offer appears to me to be a sufficient and conclusive answer. I cannot see why, in the admitted circumstances of this case, the defender should be put to his defence in a proof upon the question of actual paternity.

A subordinate argument was advanced for the pursuer as regards the period between the mother's death in 1904 and the date (in 1907) when the child (a boy) reached the age of seven. But this contention, in my opinion, clearly fails, because a mother's right to the custody (even in a question with the father) of her bastard child of tender years is based upon natural considerations, and is purely personal to herself.

For these reasons, I am for affirming the interlocutors appealed against.

The LORD JUSTICE-CLERK concurred, and intimated that LORD SKERINGTON, who was absent at advising, also concurred.

LORD SALVESSEN, who had not heard the case, delivered no opinion.

THE COURT adhered to the interlocutors appealed against, and dismissed the appeal, with expenses.

OLIPHANT & MURRAY, W.S.—THOMAS J. COCHRANE, S.S.C.—Agents.

¹ 3 S. 561, reported also Feb. 19, 1825, F. C.

No. 7.
 Oct. 27, 1911.
 Old Machar
 Parish Council
 v. Aberdeen
 Parish
 Council.

PARISH COUNCIL OF OLD MACHAR, Pursuers (Appellants).—
Sandeman, K.C.—A. M. Mackay.
 PARISH COUNCIL OF THE CITY PARISH OF ABERDEEN, Defenders
 (Respondents).—*Chree—A. R. Brown.*

Poor—Settlement—Derivative settlement—Deserted children—Acquisition by father of new settlement during children's chargeability.

In 1905 four pupil children became chargeable (in respect of their father's refusal to support them) to the parish of Old Machar, where their father had then a settlement. In 1906 the father, who was able-bodied, left that parish and was not traced till 1909, when he was found in Aberdeen, where he had acquired a settlement. The children had in the meantime been supported by Old Machar, and that parish on discovering the father gave notice to Aberdeen of a claim of relief from the future maintenance of the children.

Held that, owing to the location of the father as an able-bodied man with a settlement in Aberdeen, Old Machar ceased to be liable for the maintenance of the children from the date of the notice; that Aberdeen was bound to relieve Old Machar of the sums expended on the maintenance of the children after that date; and that it fell to Aberdeen to take such steps as they might think fit to make the father support his family.

Parish Council of Paisley v. Parish Councils of Row and Glasgow, 1908 S. C. 731, and *Leith Parish Council v. Aberdeen Parish Council*, 1910 S. C. 404, distinguished.

Poor—Relief—"Able-bodied."

Circumstances in which a man, who had supported himself but had not earned, and deponed that he was not able to earn, enough to support his children also, was *held* to be able-bodied in a question as to the poor-law.

Observed (per Lord Dundas) that a man who is able to support himself, but cannot support his children, is "able-bodied" within the meaning of the poor-law.

Observed (per Lord Salvesen)—"I think it would be dangerous to hold that in determining whether a man is able-bodied within the meaning of the poor-law, regard should be had to anything but the physical (in which I include mental) condition of the man himself."

Knox v. Hewat, (1870) 8 Macph. 397, commented on and distinguished.

2D DIVISION.
 Sheriff of
 Aberdeen,
 Kincardine,
 and Banff.

ON 25th February 1910 the Parish Council of Old Machar brought an action in the Sheriff Court at Aberdeen against the Parish Council of the City Parish of Aberdeen. The demand of the pursuers was for decree ordaining the defenders (1) to repay to the pursuers certain sums, with interest thereon, expended by the pursuers on the maintenance of four pupil children of William Taylor since 14th July 1909; and (2) to free and relieve the pursuers of the advances which they might be required to make for the maintenance of these children in the future.

The facts averred on record were not in dispute, and are stated in the following passage from the opinion of Lord Dundas:—"William Taylor, the father of the said children, was born in 1871 in the defenders' parish, but had, by residence in the pursuers' parish, acquired a settlement there prior to 1905. He married in 1894, but he and his wife, though they visited one another, did not live together, Taylor mainly residing with his mother in Old Machar, and his wife

with her parents, latterly in the parish of Dyce. In October 1905 Mrs Taylor became insane, and was removed to the Aberdeen Royal Asylum. Dyce claimed and Old Machar admitted liability for her maintenance. In December 1905 the children, whose maternal grandfather had died, were granted relief by Dyce at the request of the grandmother, and Dyce claimed and the pursuers admitted liability for their maintenance. The pursuers called upon Taylor to make arrangements for the support of his children, and, on his failure to do so, brought a complaint against him to which, on 20th February 1906, he pleaded guilty in the Sheriff Court, and (not having paid the fine) went to prison for thirty days. All that the pursuers managed to recover towards payment of their advances for the children was a sum of £10, which was realised by the sale of some furniture belonging to Taylor's mother. The children were boarded out in the parishes of Dyce and Newmills, and the pursuers have had to pay these parishes for their maintenance. About May 1906 Taylor left Old Machar, and the pursuers' inspector did not trace his whereabouts until 9th July 1909, at which date he was living in the defenders' parish, where he had by that time acquired a residential settlement. On 14th July the pursuers intimated to the defenders that Taylor had lost his settlement in Old Machar and called upon them for relief, as from that date, of the children's maintenance. The defenders disputed, and dispute, liability." It was also admitted that all the children were in pupillarity at 14th July 1909. The defenders averred that William Taylor's health had never been such as to enable him to earn sufficient for his own support, but this was denied by the pursuers.

Oct. 27, 1911.
Old Machar
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Council.

The pursuers pleaded;—(1) In respect the settlement of the said [children] is that of their father, the said William Taylor, who had, prior to 14th July 1909, acquired a residential settlement in defenders' parish, the pursuers are entitled to decree as craved. (2) Alternatively, in respect the settlement of said children is that of their father, whose birth settlement is in the defenders' parish and whose residential settlement in the pursuers' parish had been lost prior to 14th July 1909, the pursuers are entitled to decree as craved.

The defenders pleaded, *inter alia*;—(2) In respect that the said children had at the commencement of said chargeability a derivative residential settlement in the pursuers' parish, and that said chargeability has continued without interruption, the pursuers' parish remains the parish of their settlement. (3) In respect that the pursuers' parish is the parish of settlement of the said children, the pursuers remain liable to maintain the said children so long as they continue chargeable and are proper objects of parochial relief, and the defenders are entitled to absolvitor, with expenses. (4) Alternatively, the said William Taylor, being a pauper in respect of the relief afforded to his children, his settlement remains during chargeability as at the date of its commencement, and the pursuers accordingly remain liable for the maintenance of his said children so long as they continue to be proper objects of parochial relief, and the defenders are entitled to absolvitor, with expenses. The following plea was added at the hearing before the Second Division:—(5) On the assumption that the said William Taylor was an able-bodied man, his children were not proper objects of parochial relief, and the defenders are not liable in repayment of the sums disbursed by the pursuers for the maintenance of the said children.

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The parties not being agreed on the question whether Taylor was an able-bodied man, a proof was allowed and led. The import of the evidence is given in the opinions of Lord Dundas and Lord Salvesen.

On 29th June 1910 the Sheriff-substitute (Henderson Begg) pronounced an interlocutor in the following terms:—"Finds in fact (1) that in the month of December 1905 the four pupil children of William Taylor mentioned on record became chargeable to the pursuers' parish, in respect of the refusal of their said father to support them; (2) that Taylor was then an able-bodied man, with a residential settlement in the pursuers' parish, and that he has continued to be an able-bodied man; (3) that the pursuers prosecuted Taylor for having neglected to maintain his said children, and that they obtained a conviction against him on 20th February 1906; (4) that since December 1905 the pursuers have maintained the said children having, however, recovered £10 out of a small estate to which Taylor succeeded in April 1906; and (5) that the pursuers now claim payment from the defenders of the sums expended on the maintenance of the said children since 14th July 1909, at which date the said William Taylor is alleged by the pursuers to have lost his residential settlement in their parish and acquired a settlement in the defenders' parish: Finds in law (1) that in December 1905 the said children had a derivative settlement, through their father, in the pursuers' parish; (2) that their settlement remained and remains the same during chargeability; and (3) that the pursuers thus remain liable for the maintenance of the said children while continuing to be proper objects of parochial relief: Therefore assoilzies the defenders"

The pursuers appealed to the Second Division, and the appeal was heard on 13th and 14th July 1911.

Argued for the appellants;—Between May 1906 and July 1909 Taylor had deserted his children. He was not during that period accessible to the parochial authority relieving the children; and this was desertion in the sense of the poor-law.¹ Being deserted, the children became entitled to relief in their own right; and the parish which was bound to relieve them was that of the father's settlement at the time when he deserted them. But when Taylor became accessible to the poor-law authorities in 1909 his desertion was at an end.

* "NOTE.—In consequence of the mutual admissions of the parties, the proof has been practically narrowed down to the question whether Taylor has all along been an able-bodied man, and I think that I must answer this question in the affirmative. The only evidence for the defenders on this point is that of two doctors employed by them on 2nd September 1909 to examine Taylor without any previous acquaintance with him. I prefer the evidence of Dr Mitchell who has known Taylor for many years, and of Hutcheon and Nelson who have known him for some years.

"But, nevertheless, I am of opinion that the law is against the pursuers. Their procurator cited several Local Government Board arbitrations in which their view of the law was sustained, viz.:—*Fordyce v. Bellie*, Poor-Law Magazine for 1904, p. 46; *Govan v. Snizort*, Poor-Law Magazine for 1905, p. 31; and *Kilsyth v. Cumbernauld*, Poor-Law Magazine for 1906, p. 147. But the opinions expressed by the arbiters in these cases have been overruled by the Court of Session in two subsequent cases, viz.:—*Paisley v. Row and Glasgow*, 1908 S. C., p. 731, and *Leith v. Aberdeen*, 1910 S. C., p. 404. These cases seem to me to settle authoritatively that even a derivative settlement cannot be altered during chargeability. . . ."

¹ *Anderson v. Paterson*, (1878) 5 R. 904, per Lord Shand, at 907.

His children ceased then to be chargeable in their own right. At Oct. 27, 1911. this date Taylor had acquired a residential settlement in Aberdeen, there being nothing to prevent this, seeing that he was able-bodied,¹ and was not pauperised by the relief given to his children²; and his children took through their father a settlement in Aberdeen. Any relief given after that date to the children was therefore recoverable from the defenders,³ who might have recourse against Taylor himself. The cases relied on by the Sheriff-substitute⁴ were distinguishable. In these there was no change of circumstances, and nothing, therefore, to interrupt the chargeability of the wife or children, whereas here the discovery of the father in Aberdeen did interrupt the children's chargeability.

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Argued for the respondents;—Whether Taylor was or was not able-bodied, the appellants could not recover from the respondents the relief given to his children. *Esto* that Taylor were able-bodied, his children were not entitled to relief unless they were deserted.⁵ Here Taylor was not in desertion, for he could easily have been traced at any time between 1906 and 1909, if reasonable search had been made for him by the appellants. But supposing Taylor was held to be in desertion after leaving Old Machar, that desertion certainly ended when he was discovered in July 1909, and, as the relief which the appellants sought to recover was not given till after that date, it was improperly given and could not be recovered. *Esto*, on the other hand, that Taylor was not able-bodied, then he was the pauper, and as he could not acquire a settlement during chargeability, he remained settled in Old Machar. If it were necessary to consider the evidence as to Taylor's physical condition, it must be held to be proved that he was not able-bodied as he could not by his labour support himself,⁶ or, at all events, himself and his children.⁷

At advising on 27th October 1911,—

LORD DUNDAS.—The pursuers and defenders in this case are the Parish Councils of Old Machar and of the City Parish of Aberdeen respectively. The pursuers in effect claim as against the defenders to be relieved of all liability for the maintenance of four children of the name of Taylor after 14th July 1909, when they gave notice to the defenders of their claim.

The facts of the case, which are, for the most part, undisputed, may be summarised as follows—[Here followed the passage quoted *supra*, p. 26.]

The only fact about which proof had to be led was whether or not Taylor was an able-bodied man in December 1905, within the meaning of the Poor-Law, and has since continued to be so. The Sheriff-substitute found

¹ Jack v. Thom, (1860) 23 D. 173, at 180.

² Leith Parish Council v. Aberdeen Parish Council, 1910 S. C. 404, *per* the Lord President, at 407.

³ Wallace v. Turnbull, (1872) 10 Macph. 675; Anderson v. Paterson, 5 R. 904; Hunter v. Henderson, (1895) 22 R. 331.

⁴ Parish Council of Paisley v. Parish Councils of Row and Glasgow, 1908 S. C. 731; Leith Parish Council v. Aberdeen Parish Council, 1910 S. C. 404.

⁵ M'William v. Adams, (1852) 1 Macq. 120; Lindsay v. M'Tear, (1852) 1 Macq. 155; Jack v. Isdale, (1866) 4 Macph. (H. L.) 1, L. R., 1 H. L. (Sc.) 1

⁶ Jack v. Thom, (1860) 23 D. 173.

⁷ Knox v. Hewat, (1870) 8 Macph. 397.

Oct. 27, 1911. in the affirmative, and I am of opinion that he was right, but as the matter was fully argued, I shall briefly refer to the evidence. The proof discloses that Taylor was invalided home in 1901 from the South African war with a medal and three clasps, but a doctor on board ship allowed him to go home, instead of to Netley Hospital, when he landed. Then he worked for a time at Grandholm, getting eighteen shillings a week. Some years later he was medically passed for the militia, and served for about four years without a break until he was discharged in May 1909, when his conduct was certified as "very good." Taylor says that his plea of guilty in February 1906 was a mistake, and was given only because he could not get an agent to take up his case. At the proof he deponed: "I have been residing in Aberdeen for some time. I have a house of my own, and have paid my poor-rates, 2s. 11d. Since I have been in Aberdeen I have just been travelling about selling tea, and doing work for farmers at odd times." As regards health, Dr Mitchell, who has known Taylor for sixteen years, says: "I don't remember of him being ever ill. I think he was always a healthy man." When Taylor was brought before the Sheriff early in 1906, Dr Mitchell examined him medically, and says, "At that time I had no doubt he was a man fit to maintain his children." As regards Taylor's account of his ailments in South Africa, including alleged sunstroke, Dr Mitchell states a distinct opinion that South Africa made no change or difference on him, that after his return he was "quite an able-bodied man" and "quite an intelligent man," "fit for a normal man's day's work," but "very much indisposed to doing regular work." "I think he is a Weary Willie." "Apart from his laziness, I consider that Taylor is a normally strong man, physically and mentally." The witnesses Hutcheon and Nelson, who have known Taylor for years, also say that his condition appears to have suffered no material change owing to his South African experiences, and that he was and is quite fit for the work of an able-bodied man. Mr Hutcheon states that when he got work for Taylor as a golf caddie about the end of 1905, the latter refused to do it. Taylor admits the work was got for him, but says he "could make nothing out of it." Against all this evidence, there is only the opinion of two medical gentlemen who merely saw Taylor in 1909, and are disposed to put him down as neurasthenic. But their more or less theoretical opinions do not seem to be inconsistent with the facts above set out, and with Dr Mitchell's opinion pronounced with knowledge of the man. Thus Dr Robertson admits that in describing Taylor as not able-bodied he proceeds on the latter's "subjective symptoms," and on the assumed truth of his own story, apart from which there was nothing which would have led him to the same conclusion. I have therefore no doubt that the Sheriff-substitute's decision on this disputed matter was quite right. Even if it be assumed that Taylor could not, or cannot, support his children, it is clear that he could, and can, support himself, as, in fact, he has done. And that is, according to the authorities, a sufficient basis for the proposition that he was, and is, able-bodied, within the meaning of the Poor Law. I may refer to the well-known decisions in the House of Lords, *M'William v. Adams*,¹ and

¹ 1 Macq. 120.

Lindsay v. M'Tear,¹ as establishing that the children of a man who can support himself though he cannot support them, are not, while in family with him, "left destitute of all help," so as to be proper objects of parochial relief; for, as Lord Deas put it in *Hay v. Paterson*,² "the law presumes every able-bodied father to be capable of maintaining his family, however different the fact may be." In *Petrie v. Meek*,³ Lord Justice-Clerk Inglis laid it down as "conclusively and directly determined" by these House of Lords cases, "that by an able-bodied man is meant one who suffers under no personal inability, bodily or mental, to work"; and in *Jack v. Thom*⁴ the same great Judge repeated even more explicitly that "the expression 'able-bodied' is a comparative term. What the statute means by an able-bodied man is a man not labouring under any disability (bodily or mental), to work so as to earn his subsistence." I do not think these authoritative statements (and others to the same effect could be readily furnished) can be held as in any way weakened by certain dicta (the accuracy of which I am, for my own part, disposed to doubt) in a very special and peculiar case, *Knox v. Hewat*,⁵ which was referred to at the discussion.

I assume, then, that Taylor was in 1905, and has continued to be, an able-bodied man. On this footing the learned Sheriff-substitute has decided the case against the pursuers, holding himself bound by two recent decisions to which he refers as settling authoritatively "that even a derivative settlement cannot be altered during chargeability." I cannot help thinking that the Sheriff-substitute has misread, or at least misapplied, the cases on which he founds. They do, I apprehend, lay down a rule (which had already been laid down at least as far back as *Beattie v. Adamson*,⁶ and has been repeatedly followed ever since) that a derivative settlement cannot be lost during chargeability, but they also indicate clearly enough that the rule is subject to this qualification that the state of matters may be altered when a change of circumstances occurs. I gather that the *Paisley* case⁷ was sent to a Court of seven Judges in order to define the scope and effect of the decision by the House of Lords in the *Rutherglen* case,⁸ which "exploded," as Lord Dunedin put it, "the doctrine of desertion as equivalent to death." The *Paisley* case⁷ disclosed that Daniel Wright was born in Glasgow, acquired a residential settlement in Row, deserted his wife and children in 1901, and had not been thereafter heard of. In 1902 his wife received parochial relief from Paisley, which was reimbursed by Row. But, after a due time had elapsed, Row repudiated further liability on the ground that Wright had lost his settlement there by absence for the statutory period, and that his wife's derivative settlement there had therefore lapsed also. The seven Judges unanimously rejected Row's contention, holding (in accordance with *Beattie v. Adamson*⁶) that the wife was the pauper "in her own right," and that her settlement remained unchanged during her chargeability. But the Lord President's opinion, in explaining his

¹ 1 Macq. 155.

² (1859) 21 D. 614, at p. 621.

³ 8 Macph. 397.

⁴ 1908 S. C. 731.

⁵ (1857) 19 D. 332, at p. 339.

⁶ 23 D., at p. 180.

⁷ (1866) 5 Macph. 47.

⁸ (1902) 4 F. (H. L.) 19.

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Oct. 27, 1911. grounds of judgment, seems to foreshadow, by way of distinction and contrast, such a case as the present. His Lordship points out that the deserted wife, by accepting relief, became herself the pauper, and that her derivative settlement was thereby fixed, and remained "until there is a change of circumstances"; and he goes on to say that "the only change of circumstances must consist in the discovery of the husband alive, . . . " when, "if he is able-bodied, it is he who is bound to support his wife, . . . the husband, if able-bodied, however poor, is liable to support the wife." The *Leith* case¹ followed on precisely similar lines, except that the man had not deserted his family, but was incarcerated for a long term of penal servitude. I observe that Lord Dunedin indicated that if, when the father emerged from prison, his children went back to him for a single day and then returned to the Leith Poorhouse, "the change would have operated"; he would by that time have lost his residential settlement, and the children, if still pupils and not forisfamiliarated, would follow his fortunes in the matter of settlement.

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Now, in this case it appears that Taylor had, prior to 14th July 1909, lost his residential settlement in Old Machar and acquired one in Aberdeen. He was, and is, *ex hypothesi* an able-bodied man. He is therefore, "however poor," liable to support his children; and if he fails to do so, it is, in my judgment, for the parish of his settlement (*viz.*, Aberdeen) to do what may be right in the matter. The pursuers are, in my opinion, free, as from the date of their notice, of liability to maintain the children owing to the change of circumstances, *viz.*, the definite location of Taylor as an able-bodied man with a settlement in Aberdeen. It was said that the pursuers' inspector might, by a very little exercise of energy, have traced this man much sooner than he did, or (as was suggested) he chose to do; but I do not think the proof warrants these inferences, assuming the point to be, in any view, a relevant one.

At the discussion, the defenders asked and obtained leave to put upon record the following supplementary plea:—"On the assumption that the said William Taylor was an able-bodied man, his children were not proper objects of parochial relief, and the defenders are not liable in repayment of the sums disbursed by the pursuers for the maintenance of the said children." I do not think this plea is of any material avail to the defenders. On the assumption (well founded, as I hold) that Taylor was, in the end of 1905, when the children were first relieved, an able-bodied man, it may well be that they were not at that time proper objects of parochial relief. But the pursuers' claim has regard only to the period after 14th July 1909. When Taylor disappeared from Old Machar about May 1906, his children became, I take it, proper objects of relief; and when he was subsequently located in 1909, as an able-bodied man with a residential settlement in Aberdeen, I think, as already explained, that the pursuers were entitled to call upon the defenders to relieve them, as from the date of their notice, of the maintenance of these children, who the defenders maintain on record were paupers in their own right, or to take such steps as they might think fit against Taylor.

¹ 1910 S. C. 404.

I am therefore for sustaining the appeal and recalling the interlocutor Oct. 27, 1911. appealed against. We should, in my judgment, re-affirm the Sheriff-substitute's first four findings in fact; and add others to the effect that, in or about May 1906, Taylor left the pursuers' parish, and was not traced until on or about 9th July 1909, when he was found to be residing in the defenders' parish, where he had acquired a residential settlement; and that on 14th July 1909 the pursuers intimated to the defenders that Taylor had lost his settlement in Old Machar, and called on them for relief of future maintenance of the children. We should, I think, also substitute for the Sheriff's second and third findings in law (the first being re-affirmed) findings to the effect that, as from 14th July 1909, the pursuers are not liable for the maintenance of the children; and that the defenders must take such steps to make Taylor support his children, or otherwise in the matter, as they may be advised; and decern against the defenders for payment of the amount sued for.

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LORD SALVESSEN.—In this case the pursuers seek to recover from the defenders certain sums which they have disbursed since 14th July 1909 for the maintenance of four pupil children of a man named William Taylor. Taylor was married on 7th December 1894, but after a year's residence with his wife he went to live with his mother, while his wife went to live with her own parents. The spouses, however, continued to visit each other from time to time, and as the result of their intercourse five children were born. In October 1905 Mrs Taylor became insane, but the children continued to reside with her parents till December 1905, when, their grandfather having recently died, they were granted relief by the parish of Dyce, where they were then residing. A claim was made on the pursuers, who admitted liability, William Taylor having acquired at that time a residential settlement in their parish. They endeavoured to recover from him the cost of his children's maintenance, and in February 1906 took criminal proceedings against him on a charge of neglecting to maintain his children, "he being able to do so." Taylor pled guilty to the charge libelled, and was sentenced to pay a fine of £5 or to a term of thirty days' imprisonment. He served the term of imprisonment.

On 19th April 1906 the pursuers instructed their law-agent to take proceedings to recover from Taylor the advances made by them for the support of his children, and the law-agent succeeded in recovering £10 on account of said advances. This sum of £10 formed part of the share of his mother's estate to which Taylor had then succeeded. No further steps were taken by the pursuers against Taylor, who in the month of May 1906 left the pursuers' parish and went to the adjoining parish of Aberdeen. The pursuers' inspector made certain inquiries to trace him, but according to his evidence he did not actually ascertain his address until 9th July 1909. By this time Taylor had acquired a residential settlement in the parish of Aberdeen, unless he had been already pauperised by the relief given to his children in the pursuers' parish. On 14th July 1909 the pursuers intimated to the defenders that William Taylor had lost his settlement in their parish, and called upon the defenders to relieve them of the future support of the four children then under their charge. This demand was

Oct 27, 1911. refused ; and the present action has been raised to determine the defenders' liability.

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The only question of fact with regard to which the parties are at variance is whether William Taylor was in December 1905 and continued to be an able-bodied person, and this question has been decided in the pursuers' favour by the Sheriff-substitute. The importance of the question is this, that if at the time the pursuers admitted liability to maintain Taylor's children Taylor was himself a pauper, then the chargeability of the pursuers' parish, being once established, could not afterwards be affected by any change of residence on Taylor's part. If, on the other hand, when they admitted liability for Taylor's children, Taylor was in fact able-bodied and not entitled to poor relief but his children were entitled to be maintained owing to his desertion of them, a question of law arises which the Sheriff-substitute has decided adversely to the pursuers.

Up to a certain point there is no difficulty in stating the legal principles that apply here. An able-bodied man is not entitled to poor-law relief either for himself or for his children. If, however, such children have been deserted by their father, they may become proper objects of relief in their own right so long as the residence of the father cannot be ascertained, or where he has succeeded in putting himself beyond the reach of the poor-law authorities. If, on the other hand, relief is granted to the children of a man because he is not able-bodied, the father is the pauper, and the children, as his dependants, take his settlement. It is essential, therefore, in the first instance, for the decision of this case, to determine whether, in point of fact, Taylor was able-bodied in December 1905 and thereafter.

It must be conceded to the pursuers that the first steps which they took after the children were thrown upon them for maintenance were consistent with the view that William Taylor was an able-bodied man. On no other footing were they entitled to bring the criminal complaint against him ; and so far Taylor's attitude in pleading guilty to the charge supports their case. Too much stress, however, must not be laid upon this, as Taylor was without legal advice, and the Court had nothing to proceed upon but his plea of guilty. The subsequent proceedings to recover the estate to which he had fallen heir and apply same in payment of the advances made for the support of his children are consistent with either view. No further proceedings were taken against Taylor, nor was there much time to do so, as he left the parish in May 1906.

Taylor's own account of himself is peculiar. He served in the South African war, but was invalided home in 1901. According to his own evidence he suffered from sunstroke, and has never recovered from the effects. He has never since had a job at which he earned steady wages, except once when he worked for a month, getting 18s. a week. For some time he lived with his mother, who kept a small grocer's shop, in which he assisted her, acting also as a kind of nurse and housekeeper to his mother when she was disabled by illness from attending to her own affairs. Since December 1905, when his mother died, he has supported himself by going round the country as a pedlar selling tea, and also occasionally by doing work for farmers. He says he has never on an average made more than a shilling a day, just enough to keep himself. On the other hand, after he came home from the

South African war he joined the militia, and was passed by the doctor ; and between 1904 and 1909 he served 1 year and 199 days in the Special Reserve, and two years and 166 days in the militia. He has also had a house of his own in Aberdeen, and has paid the poor-rates applicable. The medical evidence is conflicting—Dr Mitchell, who has known him for sixteen years, being of opinion that he is able-bodied and quite fitted to maintain his children if he chooses to work, while two doctors examined for the defenders gave it as their opinion, proceeding mainly on subjective symptoms, that he is not able-bodied, and that he cannot perform a day's work of a normally healthy man owing to the nervous trouble from which he suffers as the consequence of his South African experience. Dr Mitchell admits that he is nervous, and that on the morning of the proof, when he talked with him, he noticed "exceedingly slight tremors in the head," which he attributed to excitement. He also stated, "I believe the man himself is convinced that he is not able to work."

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On these facts I have come with some difficulty to agree with the Sheriff-substitute in holding that Taylor was in 1905 and has since continued to be an able-bodied man in the sense of the Poor Law. It is clear that, if he had had no dependants, he had sufficient capacity for some forms of work to enable him to support himself ; and that he has never required relief from the poor-law authorities. If, therefore, he were not pauperised when his children's support was undertaken by the pursuers owing to his failure to provide for them, he was quite capable of acquiring a residential settlement for himself. It is true that there are some persons who may be able to support themselves without having recourse to the parish who are nevertheless not fit to maintain a family. An illustration of this is to be found in the case of *Knox v. Hewat*.¹ There a man was burdened with a daughter seventeen years of age who was disabled from earning her livelihood by permanent disease. He was able to earn wages in good weather, but was entirely unable to obtain for his daughter the support which she required. The Lord Justice-Clerk in that case said : "I think it is proved that the father is not able-bodied. He could not probably have demanded relief for himself, but when the question arises in regard to his daughter I think it cannot be said that she is the child of an able-bodied man in the legal sense of these words" ; and Lord Benholme, speaking of the father, in that case said : "His position depends not only on the extent of his means, but on the weight of his burdens." These observations, if they are to be regarded as of general application, create some difficulty, for the position of William Taylor is in some respects not unlike that of the invalid's father in the case of *Knox v. Hewat*.¹ But there are two points of distinction which I think justify us in dealing with *Knox's* case¹ as exceptional and special. The first is that the support of a permanently invalided daughter of seventeen is a different kind of burden from the support of children under puberty ; and the second, which is more vital, is that the father was admittedly unable to work in wet weather through physical disability. In Taylor's case there is no physical disablement, although there may be a disinclination for hard work which has become constitutional. I

¹ 8 Macph. 397.

Oct. 27, 1911. think it would be dangerous to hold that in determining whether a man is able-bodied within the meaning of the Poor Law, regard should be had to anything but the physical (in which I include mental) condition of the man himself, and it seems illogical to hold that a person supporting himself by work, and paying poor-rates, and so not entitled to parochial relief in his own right, must be treated as a pauper because of the extent of his family burdens.

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As regards the legal question, I concur with Lord Dundas. The only point in the case which makes it special is that the discovery of the deserting father in an adjoining parish very soon after he had acquired a residential settlement there (which is the change of circumstances relied on) rather suggests a suspicion that no very strict inquiry was made as to his whereabouts till it was likely to prove fruitful. But even so taking it, the change had occurred without the connivance of the relieving parish's inspector and by the act of Taylor himself. This acquisition of a new settlement is a positive fact which is to be distinguished from the mere lapse of the period of time which involves the loss of a residential settlement, and in this case, —as in that figured by the Lord President in the *Leith* case,¹—involved a change of chargeability. I am therefore for recalling the judgment appealed from.

LORD JUSTICE-CLERK.—I concur. I hold that the true test to be applied to such a case as this is found in the question—Has it been proved that the pauper is not able-bodied? If the evidence led, on the part of those who aver that he is not, does not prove as a fact that he is not, they cannot obtain a favourable answer to any plea founded on the averment. I think it would be a very dangerous thing to deal with cases where there is a disinclination to work as being cases of inability, except upon very clear grounds in fact. Here I entirely concur with your Lordships that there is no ground for holding that William Taylor was not to be classed among the able-bodied in the sense of the Poor Law. Taylor's children obtained relief, they being necessitous, and therefore proper objects of relief in their own right, being deserted by their father. He was then, when found, dealt with as able-bodied, and therefore capable of acquiring a settlement.

But for *Knox's* case,² I should have had no difficulty. But as I agree with what your Lordships have said, I do not accept that exceptional case as ruling the present, but concur with your Lordships in holding that this case is distinguishable from that of *Knox*.²

THE COURT pronounced the following interlocutor:—"Sustain the appeal, and recall the said interlocutor appealed against: Find in fact [here followed four findings in the same terms as the first four findings in the Sheriff-substitute's interlocutor] (5) that in or about May 1906 the said William Taylor left the pursuers' parish and was not traced until on or about 9th July 1909, when he was found to be residing in the defenders' parish, where he had acquired a residential settlement; and (6) that on 14th July 1909 the pursuers intimated to the

¹ 1910 S. C. 404.

² 8 Macph. 397.

defenders that the said William Taylor had lost his settle- Oct. 27, 1911.
 ment in Old Machar, and called on them for relief from the Old Machar
 future maintenance of the said children: Find in law (1) that Parish Council
 in December 1905 the said children had a derivative settle- v. Aberdeen
 ment, through their father, in the pursuers' parish: (2) that Parish
 as and from 14th July 1909 the pursuers are not liable for Council.
 the maintenance of the said children; and (3) that it falls to
 the defenders to take steps to make the said William Taylor
 support his said children, or otherwise, as they may be
 advised: Therefore decern against the defenders in terms of
 the crave of the initial writ."

MACPHERSON & MACKAY, S.S.C.—ALEX. MORISON & Co., W.S.—Agents.

JAMES MILLAR, Pursuer (Respondent).—*Watt, K.C.—Mercer.* No. 8.
 THE REFUGE ASSURANCE COMPANY, LIMITED, Defenders (Appellants).
 —*Cooper, K.C.—Morison, K.C.—W. L. Mitchell.* Nov. 1, 1911.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), sec. 1 (1)— Millar v.
Accident arising out of and in the course of the employment—Collector Refuge
falling on stair. Assurance
 Co., Limited.

A collector for an assurance company, whose duty it was to make a door-to-door collection of premiums, fell upon a stair which he had occasion to use while seeking to collect a premium, and was injured.

Held that the accident arose "out of and in the course of" the employment.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), sec. 2 (1) (a)—
Notice of accident—Want of notice—"Mistake or other reasonable cause."

On 9th May 1910 a collector for an assurance company fell on a stair, which he had occasion to use in the course of his employment, and sustained injuries. A day or two after the accident, and again on 8th June, while he still believed that his injuries were merely of a temporary nature, he gave verbal notice of the accident to the manager of his company, but made no claim for compensation. On 29th June he left the service of the company, and from that date onwards he was incapacitated for work. On 12th September, when he had ascertained from medical advice that his condition was much more serious than he had at first supposed, he gave formal notice of the accident to his employers.

Circumstances in which held that the delay in giving notice was due to "mistake . . . or other reasonable cause" within the meaning of section 2 (1) (a) of the Workmen's Compensation Act, and so was not a bar to the maintenance of proceedings for compensation.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58)—A. S., 26th June 1907, sec. 17 (f)—Process—Appeal by stated case—Order for transmission of process.

In an appeal by stated case the Court remitted to the arbitrator for a statement of the facts on which he had based his judgment. The arbitrator having reported, the appellant stated that the evidence in the arbitration had been recorded in shorthand, and moved the Court, in respect of the unsatisfactory nature of the arbitrator's report, to order the process to be transmitted to the Court of Session. The respondent made no objection, and the Court *ordered* the process to be transmitted.

Nov. 1, 1911. **MILLAR v. REFUGE ASSURANCE CO., LIMITED.** IN an arbitration under the Workmen's Compensation Act, 1906, between James Millar, assurance agent, Dundee, and the Refuge Assurance Company, Limited, Oxford Street, Manchester, the Sheriff-substitute at Dundee (Campbell Smith) awarded compensation, and, at the request of the employers, stated a case for appeal.

1ST DIVISION.
Sheriff of
Forfarshire.

The case set forth :—“ The Sheriff-substitute found that the respondent, James Millar, who is sixty-five years of age, entered the service of the appellants, the Refuge Assurance Company, Limited, in December 1899; that his work with the appellants consisted in his going from door to door collecting premiums of assurance on their behalf; that on 9th May 1910, while engaged in the course of his employment with the appellants, and engaged collecting assurance premiums on behalf of appellants, the respondent fell down a stair at 134 Blackness Road, Dundee, thereby sustaining injuries to his left side, shoulder, and arm; that a day or two after the occurrence of the accident, and again on 8th June 1910, the respondent gave verbal notice of the accident he had sustained to appellants' manager in Dundee, and having on the last-mentioned date asked for a week's rest, was informed that he had better resign; that respondent on 15th June 1910 handed in his resignation, dated 8th June 1910, and left appellants' employment on 29th June 1910; that on that date he applied for a situation with another insurance company, but did not receive employment from them; that from 29th June 1910 he became worse and remained at home. Respondent stated that he was 'trying to fight it off, but for six weeks he got no sleep as the pain was so dreadful'; that the pains which he had felt since the date of the accident became so acute that on 6th September 1910 the respondent consulted Dr Crichton, and that on 12th September 1910 the respondent's agent gave the appellants formal notice of the accident; that the want of notice was occasioned by mistake (viz., a mistaken belief that his injuries were of a temporary nature, and were not such as to cause him to ask compensation) within the meaning of section 2 (1) (a) of the Workmen's Compensation Act, 1906; that the accident to respondent on 9th May 1910 arose out of and in the course of his employment with the appellants, and that as a result of the injuries then sustained by the respondent the left side of his face has been paralysed, and he suffers from severe pain in the left side of the body, and has been totally incapacitated for work since 29th June 1910; that the average weekly earnings of the respondent were £1, 9s. 4d; and that the appellants were liable to respondent in compensation at the rate of 10s. per week, commencing as from 29th June 1910; and awarded accordingly.”

The questions of law for the opinion of the Court were:—“(1) Whether the respondent, alleging accident on 9th May 1910, and incapacity for work as from 29th June 1910, and not having given statutory notice of the accident until 12th September 1910, is barred from claiming compensation? (2) Whether the respondent, having voluntarily left the appellants' employment on 29th June 1910 without having given notice of accident as required by section 2 of the Workmen's Compensation Act, 1906, is barred from claiming compensation? (3) Whether there was evidence upon which it could be competently found that the said James Millar sustained an accident arising out of and in the course of his employment on 9th May 1910? (4) Whether there was evidence upon which it could be competently found that verbal notice was on 8th June 1910, or prior thereto,

given by respondent to appellants' manager in Dundee, and whether such notice was sufficient legal notice? (5) Whether there was evidence that the paralysis from which the said James Millar is suffering was a result of the alleged accident, within the meaning of the Workmen's Compensation Act, 1906? (6) Whether the appellants, having suffered prejudice by the delay in giving statutory notice, the respondent is barred from claiming compensation?"

The case was heard before the First Division on 9th March 1911.

Argued for the appellants;—(1) *Notice*.—No written notice of the accident alleged to have occurred on 9th May had been given until 12th September, and no reasonable cause was shown why that notice should be held to have been given "as soon as practicable" as required by section 2 (1) of the Act. Further, that notice was not given before the respondent "voluntarily left the employment" of the appellants, and the onus was on him, and had not been discharged, of showing that they had not been prejudiced in their defence thereby.¹ The sixth question of law showed that in the opinion of the arbitrator the appellants had suffered prejudice. A mistaken belief as to the degree of the injuries sustained was not, by itself, a "mistake" in the sense of section 2 (1) (a) of the Act to which want of notice could be attributed. The use of that word in the section clearly referred only to such mistakes as a mistake in the dispatch or receipt of a notice. Neither could the delay in giving notice be said to have been occasioned by any "other reasonable cause" in the sense of the Act, because it was necessary to read these words as referring to something *ejusdem generis* with "absence from the United Kingdom." In the case of *Rankine v. Alloa Coal Company*² the Court did not find it necessary to consider the difference between "mistake" and "other reasonable cause," and that case was distinguishable from the present. The proviso could not be read so as to make the rule as to notice a practical nullity; as would be the case if it was held to be sufficient excuse for delayed notice by an injured man that his injuries had proved more serious than was at first supposed. (2) *Occurrence of the accident*.—It had not been proved that there had been any accident at all; still less that there had been an accident "arising out of and in the course of" the respondent's employment, because the manner in which the alleged accident happened was left wholly unexplained. The onus of proof was on the respondent, and as he had failed to discharge it he had not established his right to compensation.³

Argued for the respondent;—(1) *Notice*.—Verbal notice of the accident had been given a day or two after it occurred, and that was sufficient to dispose of the allegation of prejudice. But even assuming that the appellants had been prejudiced by delay in serving a statutory notice, the proviso in section 2 of the Act with regard to mistake was independent of prejudice, and the arbitrator had found that the want of notice was occasioned by mistake within the meaning of that proviso. The respondent, therefore, was not barred from obtaining compensation.⁴ (2) *Occurrence of the accident*.—The arbitrator had found that the respondent had fallen down a stair while engaged in

¹ *Hughes v. Coed Taloa Colliery Co.*, [1909] 1 K. B. 957.

² (1903) 5 F. 1164, (1904) 6 F. 375.

³ *Pomfret v. Lancashire and Yorkshire Railway Co.*, [1903] 2 K. B. 718.

⁴ *Rankine v. Alloa Coal Co.*, (1904) 6 F. 375; *Brown v. Lochgelly Iron and Coal Co.*, 1907 S. C. 198.

Nov. 1, 1911. collecting premiums, and that was a finding in fact which was sufficient and final.

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On 9th March 1911 the Court pronounced an interlocutor in the following terms:—" *Hoc statu* remit the cause back to the Sheriff-substitute as arbitrator to state the facts proved before him on which he found that the respondent sustained an accident arising out of and in the course of his employment on 9th May 1910, and to report."

The Sheriff-substitute reported in the following terms:—"The Sheriff-substitute, as arbitrator, found it proved on the evidence of the respondent, and the witnesses Mrs Isabella Lindsay or Hutton and Mrs Kennedy, who resided at 134 Blackness Road, Dundee, that the respondent was in the stair there on 9th May 1910 for the purpose of collecting premiums of assurance due to the appellants by the witness Mrs Kennedy: Found it proved that the respondent fell, that fact never having been denied—the allegation regarding the fall in defence being that sufficient legal notice of it had not been given to the defenders—and sustained injury on the said stair on the occasion above set forth, and from the following facts which I found proved (1) on the evidence of the respondent and that of his wife, that on going home from said stair he at once told his wife of the accident and where and how it had happened; that she at once applied external remedies to the injured parts; that prior to that day respondent had never been indisposed in any way, but had been a strong, healthy man; that respondent ceased to work on account of said accident; that his wife continued to treat respondent's injuries until Dr Crichton, the family doctor, was called in in the beginning of September 1910; (2) on respondent's own evidence and that of the appellants' district manager (Mr Isaac Jones), the respondent informed the district manager within two days after the occurrence of the accident that he had been injured as stated; (3) on the medical evidence of Dr Don and Dr Crichton that the respondent's physical condition was such as was likely to be caused by the fall of which he complained, and was in their opinion due to it."

On the case being put out, on 8th June 1911, for hearing on the report, counsel for the appellants stated that shorthand notes of the evidence in the arbitration had been taken for the parties, and moved the Court, in respect of the unsatisfactory nature of the Sheriff-substitute's report, to order transmission of the process from the Sheriff Court.¹

The respondent did not state any objections to the motion.

The Court ordained the Sheriff-clerk at Dundee to transfer the process in the arbitration to the Clerk of the First Division.

The case was further heard on 17th June 1911.

Argued for the appellants;—Though there was evidence that the respondent had been seen upon the stair in question one day, his presence there on 9th May was not proved. There was no evidence as to the manner in which the alleged accident had happened, and the evidence was consistent with its having happened independently of the respondent's employment. Therefore, the onus which lay upon him of showing how the accident happened so as to establish that it arose "out of and in the course of" his employment had not been discharged.²

¹ Dundee Steam Trawling Co. v. Robb, (1911) 48 S. L. R. 11.

² Pomfret v. Lancashire and Yorkshire Railway Co., [1903] 2 K. B. 718.

Argued for the respondent;—There was sufficient evidence to support the Sheriff-substitute's finding that the accident arose out of the respondent's employment; and this was corroborated by his having gone home and told his wife about it, and having told his employer of it two days later, when he had no object in misrepresenting the fact, because he did not then consider that he had been seriously injured.¹

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At advising on 1st November 1911,—

LORD PRESIDENT.—In this case, after some very unsatisfactory procedure, to which, under the circumstances, I need make no further allusion, your Lordships are in possession of the whole facts in the case; and what may be called the main question is, undoubtedly, whether there was any evidence to show that the claimant met with an accident “in the course of and arising out of” his employment.

According to his own story, he was a collector for the Assurance Company which he sues—that is to say, his business was to go round and collect premiums from the various persons who were assured for small sums in this Assurance Company; and while he was doing his business, and going up a certain stair to get a premium from a lodger who, he thought, lodged at the top of it (as a matter of fact the lodger in question had removed), he fell upon the stair and hurt himself. At the time he did not think the injury serious, but afterwards it developed and, we are told, caused hemiplegia, which incapacitated him for further work.

I do not hesitate to say that this case has given me great difficulty. As far as the law of the matter is concerned, it is one of those cases where, in one sense, there is no difficulty in stating the law. The difficulty is in the application of it. I do not think I need say more about it, because there has been a very recent case in the House of Lords, the case of *Kitchenham*,² where their Lordships approved in terms of the judgment of the Court of Appeal, and the judgment of the Court of Appeal is given in the twin cases of *Kitchenham*³ and *Leach*,³ which, read together, afford a very good contrast and a very good example of the criteria upon which such cases should be decided. And the judgment there which had the special approbation of the House of Lords was the judgment of Fletcher Moulton, L.J.

The distinction that is there drawn is between accidents which happen to a man, and are, so to speak, brought upon him by his business, and accidents which, although a man may be in one sense upon his business, are just accidents which may happen to everybody. Now, the distinction even between those two classes comes to be very fine, and it would be quite impossible to frame any definition or set of rules which *ab ante* would embrace all the cases; and, in particular, there would be an obvious difference according to the class of employment which a man is in. Take the case, for instance, of a street accident. Everyone has to go into the street,

¹ *Kitchenham v. Owners of s.s. “Johannesburg,”* and *Leach v. Oakley, Street, & Co.*, [1911] 1 K. B. 523; *M’Neice v. Singer Sewing Machine Co.*, 1911 S. C. 12; *M’Donald v. Owners of Steamship “Banana,”* [1908] 2 K. B. 926.

² [1911] A. C. 417.

³ [1911] 1 K. B. 523.

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and if a man's business does not actually take him to the street, well, then, although the accident may arise in the course of his employment, it scarcely arises out of his employment. But, on the other hand, there may be an accident to a person whose business actually takes him to the street. For instance, I cannot doubt that if a sandwichman—whose actual business is to wander up and down the streets all day—if a sandwichman in the course of his wanderings was run over by a taxi-cab, I cannot doubt that that would be an accident arising not only in the course of, but also out of, his employment.

Well, now, when you come to the application here, I arrive at the conclusion that if this man was on this stair simply and solely for the purpose of his business, namely, to go to the person whom he was calling upon, this accident fairly arose out of his employment as well as in the course of it.

But there remains the question whether he did meet with his accident on the stair, as he says, and that is the part of the case that has given me personally most trouble, because I must be fair in stating that if I had been the arbitrator I should have come to the conclusion that there was not enough evidence to show that he had been there. But, then, that is not exactly the criterion which I am entitled to apply here. I think that it is well settled that all these questions which depend, so to speak, on pure fact—I do not mean that there are no other considerations as well, but where pure fact underlies them—the duty of this Court is not to reverse the arbitrator unless his judgment, so to speak, cannot be supported. Therefore I say that, although I should have come to another conclusion myself, I cannot hold that there was no evidence on which the arbitrator might go; and therefore I do not feel myself entitled to interfere with his judgment.

There were two subordinate questions in the case, which I do not think give any trouble, as regards the giving of notice. It seems to me here that there was a reasonable excuse, because I think it was quite probable that the claimant was not aware of the seriousness of his accident, and that, when he did come to know of the seriousness of the accident, he did give notice.

Upon the whole matter, therefore, although, I confess, not without doubt and hesitation, I think the judgment the Sheriff-substitute has given cannot be said to be unsupportable, and that your Lordships should dismiss the appeal. I do not think it necessary to answer all the questions as they are put in the stated case.

LORD KINNEAR.—I am of the same opinion. Upon the preliminary question as to whether the statutory provisions have been complied with or not, I should not think of disturbing the Sheriff-substitute's judgment except upon much stronger grounds than I find in this case, because the question whether there has been a reasonable excuse for delay is really a question of fact upon which I do not think we should interfere if there was evidence before the Sheriff on which he could reasonably have reached his conclusion, and in the present case it is impossible to say that there was no such evidence.

Then upon the question whether the accident arose out of and in the course of the employment, I agree with your Lordship that there is diffi-

culty upon the facts. But I cannot say that there was no evidence before Nov. 1, 1911. the Sheriff-substitute upon which he might reasonably find the facts as he did, and I therefore take his findings of fact as conclusive. But then it is a mixed question of fact and law whether the accident—supposing it to have happened as the Sheriff-substitute holds it did—is one that arose out of the workman's employment. As to that the case of *Kitchenham*¹ is, of course, of paramount authority, but the line of division between the two classes of case—those which fall within the rule of *Kitchenham*¹ and those which are outside it—is a fine one, and in this case I think there is some difficulty in applying the rule.

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The general rule, as stated by the Lord Chancellor, is that if an accident arises from a risk that is common to everyone and not specially connected with the work and employment of the person claiming compensation, then it cannot be said to have arisen out of his employment in the sense of the Act. And, accordingly, it is said that this tripping upon a stair is a thing which might happen to anybody who goes up and down a stair, and therefore is a risk which is not specially connected with the particular work of the respondent. I think there is force in that; but then, on the other hand, I think that a risk is specially connected with a man's employment if it is due to the particular place where his employment requires him to be at the time. I think Lord Justice Fletcher Moulton's illustrations of two kinds of case, in the opinion to which your Lordship has referred, bring that distinction out clearly enough. The learned Judge's opinion deals with two different cases which were decided at the same time. In each of these cases a sailor had been on shore with leave, and while returning to his ship fell into the water and was drowned. In one, that of *Leach*,¹ he had reached a gangway which was the means of access to his ship, and fell from that gangway into the water, and it was held that the accident arose out of the employment. In the other—*Kitchenham*¹—the man was shown to have been crossing the wharf, but it was not shown that he had reached the gangway, and if the accident was due to a slip on the wharf when the man might have been engaged in some purpose of his own, it was said that it was not caused by a danger incidental to his employment, because it was not proved that he was in the fulfilment of his employment when the accident happened. Then the learned Judge pointed out that it is not the duty of the Court to speculate as to these matters, but that the applicant must prove his case. But in the present case the accident was due to the means of access to a place where the man was bound to go in fulfilment of his employment. I have come to the conclusion, although not without difficulty, that we ought not to disturb the Sheriff-substitute's judgment, because there was evidence on which he might reasonably hold that the man was hurt in consequence of a risk specially connected with his employment, in respect that he was required by his employment to make use of the stair.

LORD MACKENZIE.—I agree with your Lordship, though I have great doubt in coming to the conclusion that there was sufficient evidence in the

¹ [1911] 1 K. B. 523.

Nov. 1, 1911. case to warrant the Sheriff-substitute in holding that the accident happened as alleged.

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THE COURT pronounced an interlocutor in the following terms:—

“Find that there was evidence upon which the Sheriff-substitute, as arbitrator, was entitled to find for the claimant: Find it unnecessary further to answer the questions of law as stated in the case: Affirm the said arbitrator’s determination: Dismiss the appeal. . . .”

R. S. CARMICHAEL, S.S.C.—CLARK & MACDONALD, S.S.C.—Agents.

No. 9. MRS MARGARET HANNAH KIRK OR MORRISON, Pursuer (Reclaimer).—

Graham Stewart, K.C.—Armit.

Nov. 4, 1911.

ROBERT JOHN KIRK AND OTHERS, Defenders (Respondents).—

Wilson, K.C.—J. G. Jameson.

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Kirk.

Property—Common interest—Pro indiviso ownership—Division of property.

A division of heritable subjects proposed by one of three *pro indiviso* proprietors was resisted by the others on the ground that a bond, which had been granted by the co-proprietors, existed over the subjects, and that the bondholders refused to allocate it in the event of division. The bond contained a provision that £500 should be paid annually towards reduction of the principal sum, and that so long as the interest and this annual payment were made the bond should not be called up or repaid for five years, of which only one had expired.

Held (rev. judgment of Lord Guthrie) that the pursuer was entitled to insist in her common law right to a division, in respect that it did not appear that a division would sacrifice the interests of any of the parties, and that, in entering into the bond, the co-proprietors could not be held to have bound themselves to refrain from resorting to a division during the subsistence of the bond.

Thom v. Macbeth, (1875) 3 R. 161, *distinguished*.

2D DIVISION. ON 16th December 1909 Mrs Margaret Hannah Kirk or Morrison Lord Guthrie. brought this action against Robert John Kirk and others for division or sale of certain heritable properties in Leith, of which the pursuer was *pro indiviso* proprietor to the extent of one-third, and the defenders to the extent of two-thirds.

The defenders opposed the division of the property, and averred;—
“At Whitsunday 1909 the sum of £22,000 was borrowed on the security of all the properties from the Edinburgh and Leith Gas Commissioners, the debtors in the personal obligation in the bond being the pursuer and the said two defenders. It was made a condition of this loan that the loan was not to be called up or repaid prior to Whitsunday 1914, and this condition was confirmed in writing by a back-letter dated 15th May 1909, granted by the Clerk to the said Commissioners. It was a further condition of the loan, confirmed in the same way, that the sum in the bond should be reduced by the sum of £500 annually.” * This loan was, by arrangement between the

* The back-letter was in these terms:—“With reference to the settlement of this loan to-day, I have to explain that, notwithstanding the terms of the security-deed, the loan is not to be called up or repaid prior to Whitsunday 1914, provided that interest thereon at the rate of 3½ per cent, and the necessary fire insurance premiums are duly paid; and further, that

parties, negotiated in order to pay off existing debts over the properties which had been contracted by the previous proprietor, Mr George M. Kirk, the father of the pursuer and the defenders. Nov. 4, 1911.
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The pursuer pleaded, *inter alia* ;—(1) The pursuer and defenders . . . being joint proprietors *pro indiviso* of the said subjects, the pursuer is entitled to insist in the present action against the defenders for division thereof.

The defenders pleaded, *inter alia* ;—(1) The pursuer is barred by personal exception in respect of her actings set forth in the defences, from insisting in the present action *in hoc statu*. (2) In view of the bond over the subjects, and the agreement with regard thereto condescended on, division or sale of the subjects is presently impracticable. The action is premature and ought to be dismissed. (3) In respect that it is impossible or at least impracticable or otherwise would be injurious or prejudicial to the interests of the defenders to divide the properties in question into three equal shares, the defenders should be assoilzied from the conclusion for division of the subjects.

On 17th March 1910 the Lord Ordinary (Guthrie) remitted to Mr Ormiston, land valuator, *inter alia*, “to examine the subjects libelled, and to report whether they are incapable of division among the *pro indiviso* proprietors thereof, and whether it is proper and necessary that they should be sold, with due regard to the interests of the parties.”

Mr Ormiston reported, *inter alia* ;—“(3) The total value of these subjects, in the opinion of the reporter, is Thirty-six thousand six hundred and forty-five pounds (£36,645), all as detailed in valuation. (4) That the subjects libelled are capable of division among the *pro indiviso* proprietors thereof. (5) That they can be divided among three proprietors in three nearly equal divisions, either by choice or by ballot, the one receiving the properties with the slightly larger values paying over the difference in money to those receiving the lesser valued lot. (6) That to attempt to sell the properties now would be greatly to the disadvantage of the estate.”

A correspondence was also lodged, from which it appeared that the Edinburgh and Leith Gas Commissioners refused to allocate their bond on the three lots into which it was proposed to divide the property.

On 8th July 1910 the Lord Ordinary dismissed the action.*

a sum of £500 towards reduction of the principal sum is repaid annually, by instalments of £250 at each term of Whitsunday and Martinmas, during the continuance of the loan.”

* “OPINION.—In this case the pursuer proposes that certain properties in Leith, held *pro indiviso* by her and the defenders, should be divided. A remit was made to Mr Ormiston, ordained surveyor, to consider and report whether the properties are incapable of division among the *pro indiviso* proprietors thereof, and whether it is proper and necessary that they should be sold with due regard to the interests of the parties. Mr Ormiston reports in favour of division and against sale. Had I nothing to consider but his report I should find that the properties can be divided, and give effect to the division which he proposes. All parties agree in the fairness of the division proposed by him, and they also agree that to attempt to sell the properties at present would be to the serious disadvantage of the estate. Nobody proposes that I should order a sale; the question is whether I should order a division, in view of the bond for £22,000 in favour of the

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The pursuer reclaimed, and the case was heard before the Second Division on 27th and 31st October 1911.

Argued for the reclaimer;—The pursuer was entitled as a matter of right to a division of the property¹ unless, owing to some special circumstance, division was impossible without prejudice to the rights and interests of parties.² No such circumstance had been averred. The existence of the bond was no obstacle, and would not affect the defenders' interest in case of division, for if the bondholders proceeded against any one of the three proprietors, that proprietor could get an assignation of the bondholders' rights against the other two.³

Argued for the respondents;—The special circumstances which, in the present case, made division inequitable were, in the first place, that the bondholders refused to allocate, and accordingly the market value of each lot would be diminished in consequence of its share of responsibility for the management of the other two. Further, there

Edinburgh and Leith Gas Commissioners which was borrowed on the security of the properties at Whitsunday 1909. The Commissioners not unnaturally have declined to allow an allocation, and insist on the obligations, at present existing against the pursuer and defenders, remaining down to the expiry of the loan at Whitsunday 1914. The pursuer says that, notwithstanding, she is entitled to have a division of the properties. The defenders reply that division in these circumstances would lead to an inequitable interference with their rights, and therefore should be refused.

“In the leading case of *Brock v. Hamilton* (19 D. 701), Lord Rutherford observed:—‘He does not, however, think the pursuer bound to show equity for division or, where division is impossible, for sale. He considers the pursuer's right in that respect to be clear. But circumstances may easily exist in which the defender may show in equity a good defence against the demand for division or sale.’ His Lordship does not give any indication of what kind of circumstances would raise this equitable defence. But in the case of *Thom v. Macbeth* (3 R. 161), where it was found that division, although physically possible, would be inequitable—the estate was a feuing estate, and its full value could only be realised if it were feued as a whole—the three Judges referred to the kind of case in which this equitable consideration would arise. Lord Justice-Clerk Moncreiff said:—‘The deduction which I draw from the judgment of Lord Rutherford in the case of *Brock* is that, when division is not reasonably practicable without sacrificing to an appreciable extent the interests of some or of all the parties, the only resort is a sale and division of the price.’ Lord Ormidale referred to the case of *Brock* and the other cases of *Anderson* (19 D. 700) and *Craig* (1 Macph. 612), and said:—‘The expressions “impossible” or “impracticable” as used in these cases, clearly means impossible or impracticable, having a due regard to the just rights of all the co-proprietors.’ And, lastly, Lord Gifford said on page 165:—‘Considerations of expediency, of expense, and of deterioration cannot be left out of view, and, in most cases, it is just upon these considerations that the question depends whether a subject shall be specifically divided, or whether it shall be sold and the price distributed.’

“In this case Mr Wilson maintains that, looking to the interests of his clients, the defenders, the division proposed is not reasonably practicable, because it would prejudicially affect their legal rights. He pointed out that, at the present moment, although each of them is liable for the whole debt, nothing can be done without joint consent; each of them has full control

¹ *Brock v. Hamilton*, (1852) 19 D. 701; *Anderson v. Anderson*, (1857) 19 D. 700, at p. 704.

² *Thom v. Macbeth*, (1875) 3 R. 161.

³ *Nicol's Trustee v. Hill*, (1889) 16 R. 416.

was the burden of the payment of £500 a year, and the condition that the bond should not be paid up for five years, and it was an implied stipulation in the family arrangement at the time when the bond was granted that no separation of the property should be made so long as the bond remained unpaid. It was not argued that in every case a bond precluded division, but in view of these special circumstances, division in the present case could not be effected with due regard to the rights of parties.¹

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At advising on 4th November 1911,—

LORD SALVESSEN.—The pursuer and defenders in this case are *pro indiviso* proprietors of certain properties in Leith ; and the pursuer has brought this action for division of the properties ; or, if it should turn out that division is not practicable, to have the properties sold and the price divided. The Lord Ordinary remitted to Mr Ormiston to examine the subjects libelled, and to report whether “they are incapable of division among the *pro indiviso* proprietors thereof, and whether it is proper and necessary that they should be sold with due regard to the interests of the parties.” Mr Ormiston accordingly presented a report, the substance of which is that “the properties can be divided among three proprietors in three nearly equal divisions, either by choice or by ballot, the one receiving the properties with the slightly larger values paying over the difference in money to those receiving the lesser valued lot.” He further reported that “to attempt to sell the properties now would be greatly to the disadvantage of the estate.” The parties were heard upon this report ; and the Lord Ordinary thereafter dismissed the action, thus in effect holding that the pursuer must remain for the present *in communione* with the defenders as proprietors of the common property.

In my opinion this judgment cannot stand. Unless a *pro indiviso* proprietor has barred himself by contract from resorting to an action of division or sale he has an absolute right at common law to insist in such an action. If it should turn out that division is impracticable, or would operate unfairly, then his remedy is to have the properties sold and the price divided. The defenders pleaded a family arrangement under which they say it was implied that none of the co-proprietors should resort to an action of this kind until at least the year 1914. Under this arrangement a loan of £22,000 was obtained in 1909 for five years over the whole properties,

over the whole properties subject to the debt. If the proposal is carried out, and the property is divided, and the debt is left unallocated, then each of them will have full control over his own portion, but no control over the other two-thirds. In the parts of the properties not under their control dilapidation might take place ; the subjects might be applied to speculative and unremunerative purposes, and even such a matter as keeping up the fire insurance might, from inattention, not be looked after. In short, the defenders say that they would lose all control of the other parts of the property, a control which is in the market recognised as representing a valuable asset.

“It seems to me that, following the views which were given effect to in the case of *Thom v. Macbeth*, I am bound to hold that the division here, although physically practicable, is not reasonably practicable, with due regard to the interests of the parties, and in particular the interests of the defenders. I must therefore dismiss the summons.”

¹ *Thom v. Macbeth*, 3 R. 161.

Nov. 4, 1911. on the footing that so long as the interest was punctually paid, and also an annual instalment of £500 in reduction of the principal, the loan should neither be called up nor paid up during that period. Under this arrangement one of the defenders factored the properties; but after a year's trial the pursuer complained of his failure to keep proper accounts; and he was superseded by a judicial factor appointed in the Bill-Chamber. This gentleman is now managing the properties, and of course charging for his services in doing so.

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In my opinion there is no relevant averment of any agreement by the pursuer that she should not resort to her common law rights as a *pro indiviso* proprietor. A division of the properties now cannot affect in any way the rights of the bondholders. All the properties will continue to be the subject of their security whether they form a common property or are divided among the owners. The personal obligation of the three borrowers will also be available to the bondholders. The Lord Ordinary seems to have taken the same view, because it is not on this ground that he has dismissed the action. He seems, however, to be apprehensive that if the subjects were divided one or other of the owners might allow dilapidation to take place, or apply the subjects to speculative and unremunerative purposes. That is a risk, however, which the pursuer runs just as much as the defenders; and it might be said in every case where there was a bond over undivided properties which could not be called up or paid up for a period of years. The risk besides does not appear to be a very real one, as it is of course in the interest of each proprietor to make the most out of his or her property. The matter of the fire insurance, I think, need scarcely be considered, because the bondholders will of course see to it that the premiums are duly paid. Considerations of this kind have never been regarded as sufficient to exclude the common law right to have the property divided; and the case of *Thom v. Macbeth*,¹ to which the Lord Ordinary refers, is no authority for such a view. There the estate was a feuing estate, the full value of which could only be realised if it were feued as a whole; and while division was refused as inequitable to some or all of the parties, the Court directed the property to be sold and the price divided. In the face of Mr Ormiston's report it would never do to resort to a sale of the properties, with which we are here dealing, in the present state of the property market; and the only alternative seems to be to grant the pursuer's demand for division.

The only point which at one time gave me a little concern has reference to the stipulation that a sum of £500 is to be repaid annually to the bondholders towards reduction of the principal sum half yearly. These instalments have hitherto been paid out of the surplus rents belonging to the whole proprietors *pro indiviso*; and it is conceivable that the pursuer might not contribute her proportion out of the property which was handed over to her on a division, with the result of endangering the continuance of the loan. I cannot think that there is very much substance in this objection. In the first place, the pursuer runs exactly the same risk as the defenders in this matter. Either or both of them might equally fail to contribute his

¹ 3 R. 161.

proportion of each instalment. If so, however, any of the proprietors might Nov. 4, 1911.
pay up the balance, or leave the bondholders to take action against the pro-
prietor who had failed to pay his or her proportion of the instalment due. Morrison v. Kirk.

It is scarcely to be assumed that the bondholders would act capriciously or
inequitably in such a matter; or that if one proprietor paid up more than
his share of an instalment he would not be entitled to a remedy against the
defaulting proprietor *quoad* that proportion. At all events, I think it cannot
be affirmed that division will sacrifice the interests of some or all of the
parties, which was the ground on which it was refused in *Thom's* case.¹ I
am therefore of opinion that we must recall the Lord Ordinary's inter-
locutor; and remit to him to give effect to the division which Mr Ormiston
proposes. Lord Salvesen.

LORD DUNDAS.—I am of the same opinion. The pursuer here—I quote
Lord Deas' language in the case of *Anderson*²—"seeks to enforce his
common law rights, which entitle the *pro indiviso* proprietor to have the
subject divided, and, if not divisible, to have it sold. The ordinary rule is
that no man is bound to remain longer in communion than he pleases."
The Lord Ordinary was of opinion that, though the subjects are physically
divisible, "the division proposed is not reasonably practicable"; but owing,
as I gather, to some misapprehension, instead of pursuing this view to its
logical conclusion by ordering sale, he dismissed the action. It appears to
me that neither the considerations which the Lord Ordinary deals with, nor
the further objections stated by the defenders' counsel at our bar, form any
sufficient answer to the pursuer's demand for division. The grounds of my
opinion are substantially these which have been so fully explained by my
brother Lord Salvesen. I agree, therefore, that the interlocutor reclaimed
against ought to be recalled, and the case sent back to the Outer House, in
order that the subjects may be divided at the sight of the Lord Ordinary.

LORD JUSTICE-CLERK.—I entirely concur. I do not think any grounds
have been stated why this *pro indiviso* proprietor, who wishes the subjects
divided, should not have them divided.

THE COURT pronounced this interlocutor:—"Recall the inter-
locutor reclaimed against, and remit to the said Lord Ordinary
to give effect to the report by Mr William Ormiston, No. 9 of
process, with due regard to the interests of the parties, and to
proceed in the cause as accords: Find the pursuer entitled to
expenses, and remit the same," &c.

CLARK & MACDONALD, S.S.C.—GARDEN & ROBERTSON, S.S.C.—Agents.

¹ (1875) 3 R. 161.

² (1857) 19 D., at p. 704.

No. 10. WILLIAM SCHULZE AND ANOTHER (Hugh Lees' Trustees) AND OTHERS,
 Pursuers (Reclaimers).—*M' Lennan, K.C.—A. M. Stuart.*
 Nov. 4, 1911. JOHN SANDERSON DUN AND OTHERS, Defenders (Respondents).—
Constable, K.C.—C. H. Brown.
 Lees' Trustees
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Trust—Liability of trustees—Negligence of original trustee—Action by assumed trustees—Alleged delay and contributory negligence of pursuers—Right to maintain action for behoof of beneficiaries—Mora—Personal Objection.

One of the original trustees acting under a trust-disposition and settlement died in 1887, and in the same year two new trustees were assumed, one of whom was also a beneficiary under the trust. In 1909 these new trustees, suing in their capacity as trustees, brought an action against the representatives of the deceased trustee for recovery of funds which they alleged had been lost to the trust-estate through his negligence. The defenders pleaded that the pursuers were barred by *mora*, and by the fact that they had themselves been guilty of negligence which had contributed to the loss.

Held (rev. judgment of Lord Mackenzie) that, assuming the truth of the allegations against the pursuers, they were still entitled to prosecute the action for behoof of the beneficiaries whom they represented.

Held further that, although one of the pursuers was a beneficiary under the trust, the question whether her rights as a beneficiary were excluded by her conduct as a trustee could not be decided in an action to which as an individual she was not a party.

Raes v. Meek, (1889) 16 R. (H. L.) 31, *distinguished*.

Observations (per Lord Salvesen) on the elements necessary to support the plea of *mora*.

Interest—Rate of interest—Rate where trustees personally liable.

Circumstances in which the representatives of a trustee, who were found liable to refund to the trust-estate a sum of money which had been lost through his negligence, were ordained to pay interest thereon at the rate of 3½ per cent.

2D DIVISION. Lord Mac-
 kenzie. ON 27th April 1909 William Schulze and Mrs Mary Lees or Schulze, his wife (trustees under the trust-disposition and settlement of the deceased Hugh Lees, writer, Galashiels), Mrs Schulze (as an individual), and Mrs Elizabeth Lees or Brown, brought an action against John Sanderson Dun and others, being beneficiaries, and the representatives and trustees of beneficiaries, in the estate of the deceased John Dun of Gilston. The summons concluded against the defenders jointly and severally, or to the extent to which each of the defenders was *lucratus* from John Dun's estate, for payment to Hugh Lees' trustees of the sum of £1040, with compound interest thereon from 31st May 1870.

Mr Hugh Lees died on 3rd December 1858, survived by his widow and by four children, Eleanor (who died in minority), Richard (who died in 1902 as aftermentioned), and the pursuers—Mrs Elizabeth Lees or Brown and Mrs Mary Lees or Schulze.

By his trust-disposition and settlement Mr Lees, *inter alia*, provided that upon his eldest child attaining the age of twenty-five, his trustees should realise his whole estate and divide it among his children equally, and that in the event (which happened) of his wife surviving him and being alive when his oldest child attained the age of twenty-five, his trustees should, previous to making the above divi-

sion of the capital of his estate, provide for her "such free yearly income as my estate may appear to them to be able to afford." The testator further conferred on his son Richard, on attaining the age of twenty-five, the right of purchasing his dwelling-house in Abbotsford Road, at a price to be fixed by valuation, but under the obligation, if he bought it, of finding a suitable house for his mother and unmarried sisters if they did not live with him. The will further declared that "neither trustees, tutors, nor curators shall be liable in any way, excepting only for his own actual intromissions with the funds of my estate."

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The following narrative of the circumstance which gave rise to the action is taken from the opinion of the Lord Ordinary (Mackenzie):— [After referring to the provision in the testator's will with regard to the purchase of the house in Abbotsford Road by his eldest son] "His eldest son Richard intimated to the trustees some time before attaining the age of twenty-five, which he did on 20th May 1870, that he wished to avail himself of this provision in his favour. The acting trustees at that date were Mrs Lees, the widow, Mr George Lees, Mr Robert Lees, Mr William Sanderson, and Mr John Dun. A meeting of the trustees was held on 26th April 1870, at which Mr Dun was not present. The trustees gave instructions that a valuation should be obtained of the house, and directed that, thereafter, a conveyance should be prepared in favour of Mr Richard Lees. The trustees further directed 'that the agents proceed to prepare states of their intromissions and of the funds of the estate for submission to a meeting of the trustees, preparatory to the period of division.'

"The agent who had been appointed by the trustees was Mr Stewart, the partner of the truster. When Richard Lees attained the age of twenty-one he had been assumed as a partner by Mr Stewart. Though never appointed as such, the firm thereafter acted as agents in the trust, and Richard Lees was regarded by trustees and beneficiaries alike as the agent who looked after the trust affairs.

"He was in 1870 engaged to be married to a lady in England, and he proposed to convey the Abbotsford Road house to the marriage-contract trustees. The English solicitors of the lady requested Messrs Fyfe, Miller, & Fyfe, S.S.C., Edinburgh, to attend to her interests. A valuation was got, and the price to be paid, after allowing a deduction, was £1040. On 25th May 1870 Richard Lees wrote to Mr Miller, S.S.C., asking him to get the draft disposition he enclosed extended, as he could not get a stamp of the necessary amount in Galashiels. Mr Miller had the deed extended on plain paper, and returned it saying they could get the stamp impressed afterwards. On 28th May 1870 Richard Lees wrote to the two trustees resident in Galashiels, and got them to sign the conveyance. His mother had signed it on the 26th, both as trustee and as a consenter. The present pursuer Mrs Schulze, a daughter, also signed as a consenter. On 28th May Richard Lees wrote the following letter to John Dun, who then resided at Eskbank:—'Will you oblige me by signing the enclosed conveyance by my father's trustees in my favour of the property in Abbotsford Road, and by sending it in the enclosed envelope to Messrs Fyfe, Miller, & Fyfe. I am in course of preparing states, &c., to be laid before a meeting of the trustees preparatory to a winding-up of the trust, but this is a deed that I require to have executed sooner.' Mr Dun signed the deed on the 31st. It does not appear what he did with it after signing, and, from a letter

Nov. 4, 1911. **Lees' Trustees v. Dun.** Richard Lees wrote on 31st May 1870 to Mr Miller, it is possible the former went to Eskbank and got it from Mr Dun. Mr Sanderson did not sign it. The disposition was recorded on 2nd June 1870, the warrant for registration being signed by Richard Lees. Thereafter the house was conveyed by Richard Lees to his marriage-contract trustees, who were infeft.

"The disposition bore that the price (which was therein erroneously stated to be £1060 instead of £1040) had been 'instantly paid.' Certain cross entries were made in Richard Lees' books at a much later date, but, in point of fact, the price was never paid or accounted for by Richard Lees to his father's testamentary trustees.

"Richard Lees died insolvent in November 1902. Mrs Hugh Lees, his mother, died on 27th April 1902. Mr John Dun died on 22nd October 1887.* Mr George Lees had died in 1879, Mr William Sanderson in 1880, and Mr Robert Lees in 1883. Mr and Mrs Schulze (the present pursuers) were assumed as trustees by an informal deed on 16th August, and by a formal deed on 25th November, 1887.

"In these circumstances, the pursuers sue John Dun's representatives for payment of £1040, the price of the house, with compound interest since 31st May 1870."

The pursuers averred;—(Cond. 8) "The late John Dun was guilty of gross negligence in delivering the said disposition in favour of Richard Lees, and enabling the said Richard Lees to record the same in the Register of Sasines, without obtaining payment of the price and without taking any precautions to secure that the said Richard Lees should pay the price and fulfil the conditions of his father's will thereanent. The disposition was sent to each of Hugh Lees' trustees in succession for signature. The last of the said Hugh Lees' trustees to sign the said disposition was the said John Dun, and it was he who, after it had been executed by himself, on the request and for behoof of the said Richard Lees, delivered it over to the agents of the said Richard Lees' marriage-contract trustees, to whom the said Richard Lees was to convey the property, without any price being paid by or on behalf of the said Richard Lees to the said Hugh Lees' trustees.

. . . It was the duty of the said John Dun to take precautions that the said Richard Lees should pay to the trustees the price or value of the property, in terms of the disposition, before delivery thereof was made to him or for his behoof. The said John Dun, however, entirely failed in this duty, and omitted all reasonable precautions to secure payment of the price or value. The said John Dun, neither at the time of delivering over the said disposition as aforesaid nor subsequent thereto, made any inquiries as to whether the price had been duly paid, nor took any other means to secure that payment of the price, which formed the consideration for granting the said disposition in favour of Richard Lees, had been or would be duly made by him to them. By his gross negligence in delivering the deed as aforesaid without obtaining payment and in omitting all reasonable inquiries and precautions as aforesaid, the said John Dun put it in the power of Richard Lees to make a fraudulent use of the said disposition, and, without having paid the stipulated price, or any part thereof, to record the said disposition in the Register of Sasines, to deal with the property thereby conveyed as his own, and to make an

* It was stated at the bar that intimation of Mr John Dun's resignation from the office of trustee was sent to the pursuers in August 1887.

effective conveyance of the same to third parties as he did, all as above mentioned. The said John Dun ought to have retained the disposition in his own hands, or in the custody of the Hugh Lees' trust, or have put it in neutral custody, until the disponent Richard Lees had paid the price; but he negligently and carelessly omitted these and all other reasonable precautions which might have been taken to protect the interest of the trust-estate on which he was a trustee." Nov. 4, 1911.
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The defenders lodged a statement of facts, in which they averred; —(Stat. 6) "For some time prior to the year 1887 the pursuers were suspicious of the actings of the said Richard Lees with regard to the trust, and in that year Mr and Mrs Schulze procured their own assumption as trustees for the special purpose of enabling them to make investigations into the position of the trust. With this object the pursuers employed a firm of law-agents in Edinburgh to press the said Richard Lees to render an account of his intromissions with the trust-estate, with the result that what purported to be an account of his intromissions to date was at length obtained in 1888. The said account credited the trust-estate with the price of the said Abbotsford Road property, under date 12th May 1882, and brought out a balance of £2143, 1s. 10d. at the credit of the trust-estate. The pursuers were aware that this sum was not represented by investments, and the pursuers Mr and Mrs Schulze were warned by the said agents as to their responsibility with regard thereto. Nevertheless, for private reasons of their own unconnected with the interests of the trust, they took no steps to have the trust-estate put upon a proper footing. They did not insist upon production of any trust securities, or on the amount admittedly due to the trust being paid over or invested, or security being given therefor. The pursuers further failed to intimate the state of affairs to the representatives of Mr Dun. If the trustees had at the time, as was their duty, taken proceedings against the said Richard Lees, or intimated his irregularities to Mr Dun's representatives so that the latter might have done so, it is believed and averred that the trust-estate could and would then have been fully vindicated, the financial position of the said Richard Lees being such that up till within a very short time before his death in 1902 he had ample credit and was in receipt of a large professional income. After obtaining the said account, the pursuers Mr and Mrs Schulze, and the testator's widow, nevertheless, in breach of their duty as trustees, allowed nearly fifteen years to elapse without taking any steps to recover the trust-estate. Ultimately, in the year 1902, they raised an action of count, reckoning, and payment against the said Richard Lees, but did not proceed with the same, and again allowed the matter to lapse. The pursuers Mr and Mrs Schulze were thus grossly negligent in the discharge of their duty as trustees, and their negligence was the direct and proximate cause of the loss alleged to have been sustained by the trust-estate." (Stat. 7) "The present claim which was first made against the defender John Sanderson Dun, by letter dated 5th December 1905, and which was then allowed to drop, has only now been advanced for the first time against the present defenders, some thirty-nine years after the date of the said disposition, and more than twenty years after the pursuers were in possession of the facts on which they now base their claim. All the parties to the said disposition, except the pursuer Mrs Schulze, are now long dead. No oral evidence as to the transactions which took place with

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regard to the acquisition of the said property by the said Richard Lees, and the application of the price thereof, is now available, and the documentary evidence is to a large extent no longer extant. Further, in consequence of the death of the said Richard Lees, insolvent, in 1902, not only was his evidence irretrievably lost, but the defenders' right of relief against him, which could have been made good had the present claim been substantiated in 1888, is now worthless, and the funds then held by him for Mrs Hugh Lees, which would have then been available *pro rata* for the relief of her co-trustees, are no longer extant."

In reply to the charges of negligence and delay on the part of the assumed trustees, the pursuers averred that Mrs Hugh Lees till her death in 1902, and the pursuers until 1904, never knew that the property had been alienated from the Hugh Lees' trust; that John Dun never informed the trustees that he had parted with the conveyance without obtaining payment; and that this fact only came to the knowledge of the pursuers in 1905, during the course of an action against Richard Lees' marriage-contract trustees.

The pursuers pleaded;—The pursuers having suffered the loss and damage claimed through the negligence and wrongful actings of the deceased John Dun, and the defenders being beneficiaries of the said deceased and *lucrati* as condescended on, the pursuers are entitled to decree as craved for.

The defenders pleaded, *inter alia*;—(1) The pursuers Mrs Schulze, as an individual, and Mrs Brown having no title to sue, the action, so far as laid at their instance, should be dismissed. (4) The pursuers are barred by *mora*, taciturnity, and acquiescence from insisting in the present action. (5) *Separatim, esto* that the principal sum sued for was lost through the negligence of the trustees, the pursuers, or one or more of them, being parties to such negligence, are barred from insisting in the present proceedings. (7) The said John Dun not having himself intromitted with the said sum of £1040, the defenders are not liable to account therefor in respect of the immunity clause contained in the trust-disposition and settlement of the said deceased Hugh Lees. (10) Further, and in any event, the defenders are not liable in interest on the sum sued for prior to 27th April 1902, in respect that the interest prior to that date was applied to the purposes of the trust.

On 8th February 1910 the Lord Ordinary sustained the first plea in law for the defenders, and allowed a proof before answer.

Proof was taken on 12th, 13th, and 14th July 1910. The import of the evidence, so far as relating to the averments of negligence on the part of Mr Dun, is contained in the narrative above stated, and in the opinions of the Court. With regard to the facts bearing on the defenders' plea of *mora*, it was held to be established that at or shortly after the date of their assumption in 1887, Mr and Mrs Schulze knew, or at least had the means of knowing, the facts necessary to enable them to sue the previous trustees for the price of the house; that they had no excuse for delaying to press this claim, and that if liability had been established against Mr Dun's representatives in 1887, or at any time down to 1902, the latter could have had recourse against Richard Lees, and could, in all probability, have succeeded in recovering the money from him. The details of the evidence are summarised in the opinions of the Lord Ordinary and of Lord Salvesen.

On 22nd July 1910 the Lord Ordinary sustained the fourth plea Nov. 4, 1911.
in law for the defenders, and assoilzied them from the conclusions of
the summons.*

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* "OPINION.—[After the narrative of facts quoted *supra*—It appears to me that, if the trustees and the representatives of those who had died had been sued within a reasonable time after the assumption of the present pursuers to make good the price to the trust-estate, there would have been liability. In the first place, the disposition was delivered without getting payment of the price, or setting against the price part of the residue to which Richard Lees was entitled. In the next place, from the date of the meeting on 26th April 1870 the trustees did nothing, so far as appears, to see whether the price had been paid by Richard Lees or not, until 14th December 1887. This is the date of the next minute of meeting of the trustees. There were present at that meeting Mrs Hugh Lees and Mr and Mrs Schulze.

"There was thus a failure on the part of Mr Dun to supervise the affairs of the trust. This would have involved a liability on his part. The assumed trustees could have sued him whenever the facts came to their knowledge. If they delayed to do so after they knew, and if their delay was to the prejudice of the defenders, the question is whether they are not now barred from insisting in the action.

"The legal principles applicable to such a case as the present appear to me to be stated in the case of the *Assets Company*, 6 F. 676. Lord Kyllachy, at p. 685, pointed out that a pursuer who has a cause of action, 'must bring his action within a reasonable time—at all event, must do so if delay is fitted to prejudice his opponent's position. The defence thus arising may be variously described. It may come under the head of *mora* or under the head of bar.' The Lord President (Kinross) said, at p. 705, it appeared to him that 'the plea of *mora* cannot be successfully maintained merely on account of the lapse of time, but that the person stating it must also be able to show that his position has been materially altered, or that he has been materially prejudiced, by the delay alleged . . . Where, coupled with lapse of time, there have been actings or conduct fitted to mislead, or to alter the position of the other party to the worse, the plea of *mora* may be sustained. But, in order to lead to such a plea receiving effect, there must, in my judgment, have been excessive or unreasonable delay in asserting a known right, coupled with a material alteration of circumstances to the detriment of the other party.' Lord Trayner, at p. 740, says that delay *per se*, short of prescription, does not bar a pursuer's claim; that to avail a defender the delay must be in prosecuting a claim known to the pursuer to exist; and that the delay must have been prejudicial to the defender in depriving him of evidence. It was natural in the *Assets* case to refer only to prejudice by loss of evidence, as the claim could only have been made against one party. Where, as here, the claim might have been made against a party who had a right of relief, it is obvious that prejudice would arise if, through the delay, the benefit of the right of recourse has been lost.

"On the assumption that Mr Dun and his representatives could have been made liable if an action had been brought in time, the question is whether the pursuers, who are trustees, can now maintain the action in face of the pleas of *mora* or personal bar. The defence may also be stated by saying that the facts involve an election on the part of the trustees to accept Richard Lees alone as the debtor to the trust. This, however, seems to me to impose an undue onus on the defenders. The defence is really founded on *mora* or bar. It is necessary to observe that the pursuers who remain in the case are trustees, not beneficiaries. Though Mrs Schulze is also a beneficiary, she sues as a trustee. The result of sustaining the defence

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The pursuers reclaimed, and the case was heard before the Second Division on 24th, 25th, 26th, and 27th October 1911.

Argued for the pursuers;—That Mr Dun had acted negligently and in breach of trust was obvious and was scarcely disputed. To deliver the conveyance of the house to Richard Lees was an actual intromission with the trust-estate, and accordingly Mr Dun could not plead the immunity clause in the will.¹ The only question in the case was whether Mr and Mrs Schulze, as trustees, had been guilty of negligence on their part, and, if so, whether that afforded any defence to their claim against Mr Dun's representatives. The Schulzes, considering the peculiar circumstances in which they were placed, had not acted negligently, and in any event, they were protected by the immunity clause. They could not have sued Richard Lees, for *ex hypothesi* he had paid the price, which Dun had received, and for which Dun was the debtor to the trust. But even on the

would not necessarily mean loss to the trust-estate. If Mr and Mrs Schulze knew in 1887, when they were assumed as trustees, all the facts necessary to found a claim against Mr Dun or his representatives, if, through their delay, they are now barred from insisting in that claim, the result may be that it is they—the pursuers and not the defenders—who are the proper parties to restore the money to the trust-estate.

“ I think the facts establish that Mr and Mrs Schulze knew, at or shortly after the date of their assumption, the facts necessary to enable them to sue the previous trustees, including Mr Dun, for the price of the Abbotsford Road house. The disposition had been recorded in 1870 in the Register of Sasines. As pointed out by the Lord President in his opinion in the action against Richard Lees' marriage-contract trustees, knowledge of the contents of the disposition must therefore be imputed to them. It is not, however, necessary to found upon that, because it is evident from the terms of the correspondence which passed in 1886 and 1887 between Richard Lees and his mother and Mr Schulze that Mrs Lees and Mr and Mrs Schulze were then made aware that Richard Lees had got a disposition of the Abbotsford Road house, and that he had made it over to his marriage-contract trustees. In his letter of 4th October 1886 to his mother, Richard Lees calls it his house. On 14th October 1886 he writes that he had to send to Bristol for the extract of his father's will and the conveyance by the trustees to him of the Abbotsford Road property, which he says he acquired in May 1870 for £1060. At this time Mrs Lees was living in family with her daughter Mrs Schulze and her husband. Looking to the terms of the correspondence, it is impossible to believe that both the pursuers were not quite well aware at that time of the disposition of the house. On 26th October 1886 Mrs Lees pressed her son for a statement of her affairs. It appears from the letter of 1st November that both the will and the disposition had been sent by Richard Lees to his mother. The undated letter, No. 566 of process, from Mr Schulze to Richard Lees states that 'the deed' is returned (this must, I think, refer to the disposition), and he is asked what about providing a house for his mother. This is significant of the extent of Mr Schulze's knowledge, because under Hugh Lees' will the obligation on Richard Lees to provide a house for his mother only emerged if and when he took advantage of the clause in the will entitling him to acquire the Abbotsford Road house for himself. In his letter of 26th November Richard Lees, answering a question that had been put, informs his mother that the reason why the extract of his father's will is with the Bristol

¹ Seton v. Dawson, (1841) 4 D. 310, *approved* in Ferguson v. Paterson, (1900) 2 F. (H. L.) 37, *per* Lord Davey, at p. 46; Thomson v. Christie, (1849) 12 D. 179, *aff.* (1852) 1 Macq. 236.

assumption that it was their duty to have raised the question before the death of Richard Lees, that was an irrelevant consideration in the present action. As assumed trustees they had no responsibility for the acts of their predecessors.¹ Conversely their negligence could not affect the liability of the previous trustee for a breach of trust as in a question with the beneficiaries.² The present action must be regarded as if it were an action by a judicial factor on Mr Hugh Lees' trust-estate. In this light it was clearly immaterial, in considering the defenders' responsibility, whether or not the Schulzes were also to blame in neglecting to take action against Richard Lees. It was equally irrelevant to consider whether the Schulzes had unduly delayed to press the claim against Mr Dun. This—the foundation of the plea of *mora*, upon which the Lord Ordinary had decided the case—might be important in a claim of relief by the defenders against the pursuers, but it was out of place in the present action. In any

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solicitors is that it forms part of the titles to the property in Abbotsford Road which belongs to his marriage-contract trustees. I believe that Mr Schulze as well as his wife at the time knew the facts contained in these letters.

"On 14th September 1887 Mr Schulze wrote pressing Richard Lees for trust accounts, which he says must be made up not later than within eight days. On 26th October Mr Schulze consulted Mr Thornton, solicitor, Dundee, how he is to compel Richard Lees to render accounts. In that letter he refers to the fact that Richard Lees availed himself, the very day he became twenty-five years of age, of the advantage he had under his father's will of acquiring the dwelling-house. Mr Schulze in the witness-box could give no satisfactory explanation of how he had got this information. How untrustworthy the account of the pursuers is of this matter is shown by their statements on record, cond. 5 :—'Mrs Hugh Lees and Miss Mary Lees had no knowledge that the transaction had ever been completed. They did not know the purport of the said disposition, and continued in the belief, until the death of Richard Lees, that the house belonged to the Hugh Lees' trust.' Answer to stat. 7—'Mrs Hugh Lees, until her death in April 1902, and the pursuers, until immediately prior to the raising of the said action against the marriage-contract trustees, believed that the said property had never been alienated from the Hugh Lees' trust.' These statements are entirely negatived by the evidence.

"Mr Schulze thereafter consulted Mr Prosser, W.S. In his letter of 10th November 1887 he says that until lately he did not know that Richard Lees had acquired the dwelling-house under the will. Notwithstanding this, in the first letter he wrote to John Dun making a claim, on 5th December 1905, he says that down to the end of 1902 he considered the house belonged to Hugh Lees' trust. Not only did he know in 1887 that Richard Lees had acquired the house, but he also knew that the house had subsequently been made over, as Mr Schulze puts it in his letter to Mr Prosser of 10th December 1887, to Richard Lees' wife by his marriage-contract. His opinion, further, was, as expressed in the same letter, that Richard Lees had not paid for it, and this opinion was shared by Mrs Lees.

"He now admits that the trust accounts which were rendered in 1888 prove that Richard Lees never paid the price. He further admits that he knew when he got these accounts that the trust funds were uninvested. Down to 1889 he was making repeated efforts to get Richard Lees to account. There was then a cessation of his attempts down to 1902.

"There can be no doubt that the reason why, during all these years,

¹ Ogilvie v. Boswell, (1850) 12 D. 940.

² Smith v. Patrick, (1901) 3 F. (H. L.) 14.

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event, the facts did not support the plea of *mora*. The defenders' obligation to account was not extinguished by the mere lapse of time,¹ and there was nothing to suggest that it had ever been discharged otherwise. The defenders had not shown that their position had been prejudiced by loss of evidence or otherwise. It was very unlikely that Richard Lees could have found the money even if he had been pressed for it. The pursuers had no duty to intimate to Dun his own breach of duty, and he knew the facts better than they did. Although by inquiry the pursuers might have ascertained in 1887 their right to sue Dun, in fact they did not learn of it till 1905. Thus any failure on their part to prosecute this claim did not avail the defenders, since it was not failure to prosecute a known claim.² The pursuers were entitled to sue Dun's representatives without calling the representatives of the other trustees.³ The effect of Mrs Schulze's conduct as trustee in barring her as an individual beneficiary from

Mr Schulze acquiesced in the state of matters was because his co-trustee Mrs Lees would not allow her son to be sued. Immediately upon her death an action was launched. This was not proceeded with, as Richard Lees became bankrupt and died. Mr and Mrs Schulze then brought an unsuccessful action against Richard Lees' marriage-contract trustees. No claim was intimated against Dun's trustees until 1905, and the present action was not raised until 1909. It is therefore established in this case that there was, to quote again the opinion of the Lord President in the *Assets* case, an 'excessive or unreasonable delay in asserting a known right.'

"The next question is whether this delay prejudiced the position of the present defenders. I am of opinion that it did. The assumed trustees neither sued Richard Lees, nor did they intimate to Dun's representatives that there was a claim against them. If liability had been established against Dun's representatives in 1887, or at any time down to 1902, they would have had recourse against Richard Lees. The pursuers say that they could not have recovered from Richard Lees. The onus is upon them to show this. He was outwardly solvent for fifteen years after 1887. During that period he was carrying on what is described as a good business as a solicitor in Galashiels with an average annual professional income of £1484, which, in the year preceding his death, rose to £2800. His life was insured for considerable amounts, and down to 1896 the policies had not been assigned in security of loans. Mr Rutherford, who knew him well, gave evidence that he had not the least doubt, if the claim had been pressed against him, the trust-estate would have been vindicated. In confirmation of this view, it is proved that a claim for £500 was made and met in 1900, and a sum of £1000 was found by Richard Lees in July 1902 to meet a claim by a body of trustees. The evidence of the other witnesses for the defence corroborates the view expressed by Mr Rutherford. By the end of 1902 Richard Lees had become insolvent and died. There was by that time a material alteration of circumstances to the detriment of the defenders. In these circumstances, the elements necessary to sustain a plea of *mora* or personal bar are, to my mind, present in this case.

"The pursuers attempt, however, to avoid the plea of *mora* and personal bar by averring that there are grounds for holding there was special negligence on the part of Mr Dun. They say he was the last trustee to

¹ Allan v. Allan's Trustees, (1851) 13 D. 1220; Gourlay v. Wright, (1864) 2 Macph. 1284; Assets Co., Limited, v. Bain's Trustees, (1904) 6 F. 692, (1905) 7 F. (H. L.) 104.

² Assets Co., Limited, v. Bain's Trustees, 6 F. 692, *per* Lord Trayner, at p. 740.

³ Allen v. M'Combie's Trustees, 1909 S. C. 710.

claiming any part of the sum sued for, could not be considered in Nov. 4, 1911. this action. If it were held that the pursuers were barred from suing these defenders, the beneficiaries would be left without any remedy, ^{Lees' Trustees} _{v. Dun.} for, under the well-established rule that a beneficiary could not sue a debtor to the trust, the pursuers were the only persons who could prosecute the claim. Decree should be granted for the price of the house, with compound interest from the date on which the conveyance was signed.

Argued for the defenders;—*Prima facie* there was no negligence in a trustee handing a completed conveyance to the partner of the agent of the trust without actually seeing the cash paid. In any event, the Schulzes were not the persons entitled to call the defenders to account. They themselves had been guilty of negligence which had contributed to the loss, and of unjustifiable delay in suing Mr Dun's representatives—for the defence could be stated in either

sign the disposition, and that it was he who delivered it without seeing that the price was paid. These acts, according to Mr Schulze, were only discovered by him in the course of the action against Richard Lees' marriage-contract trustees. As regards the delivery by Mr Dun, I do not think it is proved that he did deliver the disposition to Messrs Fyfe, Miller, & Fyfe. The letter written by Richard Lees on 31st May 1870 leaves this in doubt. Even if Mr Dun did, the purpose was that the deed might be properly stamped. It was Richard Lees who put on the warrant for registration, and it does not seem of importance whether the deed passed through the hands of Messrs Fyfe, Miller, & Fyfe or not. It is said that Mr Dun was the last trustee to sign. In the view I take this is not material to the issue; if it is, then it could have been ascertained by Mr and Mrs Schulze in 1887. The disposition had been recorded. The fact is that the incident of Mr Dun having been the last to sign does not affect his liability. What does affect it is the fact that the disposition was delivered without getting payment of the price, and also the failure to supervise the trust thereafter. It was suggested that there was no need to intimate to Dun, because he knew what he had done in 1870. He did not, however, know that advantage had been taken of this by Richard Lees to defraud the trust. Mr Dun died in 1887, and his trust was wound up by 1898. His son, who was examined as a witness, did not even know that his father had been one of Hugh Lees' trustees. One argument which was urged on behalf of the pursuers has a certain amount of force, viz., that there were no trust funds in 1887, and that Mr Schulze was not bound to vindicate the trust-estate at his own expense. This made it all the more necessary that Dun's representatives should get notice of the claim. They would then have been in a position to judge whether proceedings should have been taken against Richard Lees.

"There are circumstances in the case which make it by no means certain that Mr Dun would have withheld the disposition from Richard Lees even if he had been told that there was not to be an immediate settlement of the price. Both the minute of 26th April 1870 and the letter of 28th May 1870, already referred to, indicated that states were being prepared with a view to winding-up the trust. Richard Lees was entitled to one-third of the residue of his father's estate, or about £1700. I do not think the pursuers have proved that by 1870 he had got payment of more than £500. I cannot regard the earlier payments as having been made to account of his share of residue. The trustees could not have debited him with these payments, unless they had first come to the conclusion that the annual produce of the trust-estate paid to the widow under the second purpose of the settlement was inadequate for the maintenance, education, and upbringing of the children. There is no evidence they ever did so.

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way. Their negligence consisted in failing to call Richard Lees to account between 1887 and 1902, when, as the evidence showed, he could have found the money if he had been pressed for it. The delay which barred them from now suing the defenders was their failure to call them to account, whereby not only did the defenders lose their chance of recourse against Richard Lees, but also there was a strong probability of evidence having been lost¹—such as evidence of an agreement between the beneficiaries and Richard Lees—which would have shown that the claim against him had been abandoned or discharged. In the circumstances such abandonment or discharge might be inferred, to the effect of enabling the plea of *mora* to be sustained.² The pursuers must be presumed to have known from 1887 onwards that Mr Dun and his fellow trustees were to blame in not having secured the price of the house—and in fact they did know it. Even though the pursuers' fault might not be a good defence to the defenders in a question between the defenders and the beneficiaries, it was a sufficient defence in the present action. The assumed trustees were bound to give an account of the intromissions of their predecessors, and from their delay it was to be inferred that they had abandoned or discharged the claim against the defenders—an abandonment or discharge which was binding on the beneficiaries whom they represented.³ While one only of a defaulting body of trustees might be singled out for attack, that did not affect the right of relief of the trustees *inter se*.⁴ The pursuers got no protec-

These payments were not so treated in the accounts. Mr Dun could therefore have pleaded in justification of what he did in 1870, that sufficient residue belonging to Richard remained in the trustees' hands to set off against the price of the house. Another point is that it appears, from the opinion of Mr (afterwards Lord) Shand given in 1870, that Richard Lees had a claim against the trustees for £1908, profits of the law business which had been credited to the trust, but which should have been credited to him. It was contended on behalf of the defenders that it was not proved that Mr Dun knew of the existence of this claim. After such a lapse of time, however, it cannot be assumed in favour of the pursuers that he did not know of it. I do not think it necessary to go into the merits of the claim, and mention it merely as an element which might have affected Mr Dun in delivering the deed.

"It appears to me that there is no separate ground of action against the defenders founded on any special negligence on Mr Dun's part. His negligence was the same as that of the other trustees, and consisted in allowing Richard Lees to get the disposition and then not taking steps to see that the price was paid or accounted for. This ground of liability, for the reasons already stated, is met by the defenders' plea of *mora* or personal bar.

"I am of opinion that the defenders' fourth plea in law should be sustained, and that they should be assoilzied with expenses."

¹ *Assets Co., Limited, v. Bain's Trustees*, (1904) 6 F. 692, (1905) 7 F. (H. L.) 104; *Buckner v. Jopp's Trustees*, (1887) 14 R. 1006, L. J.-C. Moncreiff, at p. 1024; *Rocca v. Catto's Trustees*, (1876) 4 R. 70, L. J.-C. Moncreiff, at p. 72.

² *Moncrieff v. Waugh*, (1859) 21 D. 216; *Cuninghame v. Boswell*, (1868) 6 Macph. 890; *M'Laren on Wills*, 3rd ed., ii. 1364.

³ *Sommerville's Trustees v. Wemess*, (1854) 17 D. 151.

⁴ *Pearson v. Houstoun's Trustees*, (1868) 6 Macph. 286; *Croskery v. Gil-mour's Trustees*, (1890) 17 R. 697; *Palmer v. Wick and Pulteneytown Steam Shipping Co., Limited*, (1894) 21 R. (H. L.) 39, *per* Lord Watson, at p. 46.

tion from the immunity clause,¹ and, for the reasons stated, were Nov. 4, 1911.
 wholly barred from claiming against the defenders. This did not
 mean that the beneficiaries were left without a remedy. This was ^{Lees' Trustees}
 one of the cases in which the beneficiaries had a direct right of _{v. Dun.}
 action against the debtor to the trust.² Even if they had not such a
 right, they had a direct right of action against the present trustees
 as the persons whose negligence in failing to sue Richard Lees was
 the proximate cause of the loss. In any event, Mrs Schulze's con-
 duct as a trustee barred her from making any claim as a beneficiary,
 and effect could be given to this plea in the present action, even
 though she was not pursuing as an individual.³ There was no justi-
 fication for the claim for compound interest. In any event, interest
 should not be charged except from the date of Mrs Lees' death, for
 up to that date all the income from the trust-estate had been
 accounted for to her.

At advising on 4th November 1911,—

LORD DUNDAS.—The Lord Ordinary's careful and elaborate opinion sets
 out so clearly the general outlines of this case and the salient facts with
 which it is concerned that it is unnecessary to repeat or even summarise
 them. I agree with his Lordship's conclusion (and indeed it was scarcely
 disputed by the defenders' counsel) that the evidence establishes that there
 was such failure on the part of the late Mr Dun to supervise the affairs of
 the trust as to involve liability against him if a timeous demand for repara-
 tion had been made by persons entitled to make it. I should also be dis-
 posed to agree with the Lord Ordinary (if it were necessary to do so) in
 holding that no separate ground of action against Mr Dun or his repre-
 sentatives is disclosed, founded upon any special negligence on his part, as
 distinguishing his liability from that of his co-trustees. But the Lord
 Ordinary has sustained the defenders' plea that "the pursuers are barred
 by *mora*, taciturnity, and acquiescence from insisting in the present action,"
 and has assoilzied them upon this ground. I am unable to agree with the
 Lord Ordinary upon this vital point.

The pursuers are the assumed trustees acting in the trust. Even upon
 the hypothesis that they have been guilty of negligence in not taking due
 steps to have the loss to the trust-estate made good, or that it was owing to
 their action or want of action that that loss ceased to be merely potential
 and became an actual fact, I do not see how this should result in absolving
 the defenders. The consequence would, in my judgment, rather be that
 the pursuers, as well as Mr Dun and his co-trustees, would be involved in
 joint and several liability to make good the loss to the trust-estate, although
 practical effect could not be given to this conclusion in the present action.
 It seems to me that the pursuers, as the acting trustees, are the proper
 persons, and indeed primarily the only persons, entitled to call the defenders
 to account. If the pursuers had refused to do so, or to lend their instance
 (upon due security as to expenses), it might have been open to beneficiaries
 to sue such an action; but that is not the case here; nor can I see that the

¹ Knox v. Mackinnon, (1888) 15 R. (H. L.) 83.

² Watt v. Roger's Trustees, (1890) 17 R. 1201.

³ Rees v. Meek, (1889) 16 R. (H. L.) 31.

Nov. 4, 1911. position of matters, even assuming all that the defenders allege against the
Lees' Trustees pursuers to be well founded, is at all analogous to that which I have figured.
v. Dun. It follows, in my opinion, that many of the considerations which were
Lord Dundas. anxiously canvassed at our bar are irrelevant. I should (as at present
advised) be prepared, if it were necessary, to agree with the Lord Ordinary
in holding, upon the evidence before us, that the pursuers (contrary to their
record) "knew at, or shortly after, the date of their assumption, the facts
necessary to enable them to sue the previous trustees, including Mr Dun,
for the price of the Abbotsford Road house"; and also that they could have
recovered the money from Richard Lees, if due pressure had been applied,
in 1887, or at any time during a good many years subsequent to that date.
But these are not, to my mind, matters relevant for consideration or decision
in the present action. In the same way we are, I think, absolved from the
necessity of forming or expressing any opinions upon a number of interesting
and perhaps difficult topics on which arguments were submitted by counsel,
e.g., as to the precise nature of the elements necessary to the success of a
plea of *mora* and taciturnity; whether or not the knowledge by a pursuer
of his claim must be knowledge in fact as well as in law; how far such a
plea can be available to a trustee or executor in a case of this sort; and
whether (as was contended) the immunity clause in the truster's settlement
would be sufficient to protect the present pursuers, assuming them to have
failed in due supervision of the affairs of the trust. It appears to me that
none of these considerations have any place in this action. The pursuers
are, as I think, entitled to call the defenders to account, even if they them-
selves may be also accountable; and there is really no defence here upon
the merits of the case, which the Lord Ordinary would have decided adversely
to the defenders apart from the plea of bar. In my judgment, therefore,
though the case may be a very hard one for the defenders, decree must go
out against them . . . for the capital sum sued for.

As regards interest, the pursuers' claim for compound interest seems
scarcely stateable, and was not much insisted on by counsel. I think that,
looking to the facts disclosed in the proof, it will be sufficient if we decern
for payment of simple interest as from 27th April 1902, the date of Mrs
Hugh Lees' death. The pursuers' counsel asked that the rate should be five
per centum per annum, and nothing was said to the contrary during the
discussion at our bar. But if this was an omission due to some misappre-
hension (as I think it must have been), counsel will have an opportunity of
mentioning the matter before judgment is pronounced.

It is important to add in conclusion—what indeed was frankly conceded
by the pursuers' counsel—that our decision in this case will in no way affect
any rights of relief which the defenders may be able to instruct outside this
action against the former trustees (other than Mr Dun) or their representa-
tives, or any of them, or against the assumed trustees, or against the repre-
sentatives of the late law-agent of the trust, or otherwise.

LORD SALVESEN.—The first question in this case is whether the late John
Dun incurred personal liability as a trustee on the estate of the late Hugh
Lees, and on this question I am so entirely in accord with the Lordordi-
nary, and with his statement of the facts, that I deem it unnecessary to go

into any detail. It is difficult to conceive a more serious violation of duty Nov. 4, 1911.
than for a body of trustees to sign a disposition of a heritable property Lees' Trustees
belonging to the trust and to deliver it to the purchaser without payment v. Dun.
of the price, and without ascertaining during the course of seventeen years Lord Salvesen.
whether the price had ever been accounted for to the trust or remained in
the hands of the purchaser. It is no doubt true, as the Lord Ordinary
points out, that the fact that Richard Lees was a beneficiary on his father's
trust, and was also the agent of the trustees, might justify the delivery to
him of the disposition without demanding instant payment of the price;
but there can be no excuse for a body of trustees handing over the whole
trust funds to the agent or permitting them to be uplifted by him without
seeing that any part of them was properly invested. It appears that for
seventeen years the trustees, of whom the late John Dun was one, never
attended a trust meeting, and never took any steps to have the trust funds
transferred to their names. In short, they appear to have delegated their
whole duties to Richard Lees, in whose hands they had already placed the
complete control of the entire capital of the trust. In these circumstances
it is plain that they are not protected by the immunity clause, which is in
this case expressed in the barest form: "Declaring that neither trustees,
tutors, nor curators shall be liable in any way excepting only for his own
actual intromissions with the funds of my estate." I adopt on this matter
the opinion of Lord Davey in the case of *Ferguson v. Paterson*,¹ "Where
trustees" (he says) "give a joint receipt for trust money, though it is, in
fact, received by the hand of an agent, it is the intromission of the trustees
themselves." And again: "If trustees think fit to delegate their duties to
their law-agent in a matter in which they cannot properly authorise him to
act for them . . . they are not, in my opinion, protected by a clause of
immunity from liability for the intromissions of factors or agents." These
observations were made in a case where the fault of the trustees was
absolutely venial, as compared with that to which John Dun was a party
as a trustee of the late Hugh Lees. Had, therefore, the action been raised
shortly after John Dun's resignation of his office of trustee, I cannot doubt
that he would have been found liable to restore to the trust the price of the
house, the conveyance of which he was the last to sign, leaving him to
operate such relief as he could against Richard Lees, who still remained the
debtor to the trust for the entire price.

The next question is, whether what happened during the administration
of the present trustees has freed the defenders from the responsibility which
would otherwise have attached to them. The Lord Ordinary has sustained
the fourth plea in law, and has accordingly held that the pursuers are barred
by *mora*, taciturnity, and acquiescence from insisting in the present action.
In dealing with this plea it is necessary to summarise the facts as I hold
them proved, although I do not materially differ from the Lord Ordinary
in his statement of them. The pursuers were assumed as trustees in the
end of 1887, and at once took steps to ascertain the position of the trust.
They ascertained, at all events by 1889, that the whole of the trust funds,
including the price of the house conveyed in 1870, remained uninvested,

¹ 2 F. (H. L.) 37.

Nov. 4, 1911. and were in the hands of Richard Lees, and they were informed by him
Lees' Trustees that the house had been shortly thereafter transferred to his marriage-contract
v. Dun. trustees. They were advised by Mr Prosser that it was their duty to call
LordS Ivesen. Richard Lees to account, and to invest in proper trust investments the sums
that he was owing to the trust. They did not, however, take any action
against him until 1902, and the action then taken proved abortive, as
Richard Lees shortly thereafter died, leaving his affairs in a state of hope-
less insolvency. I further agree with the Lord Ordinary that their inaction
is to be explained by the fact that Mrs Hugh Lees remained a trustee until
1902, and would not allow her son to be sued. Had this difficulty been
overcome, and drastic steps been taken against Richard Lees, I think it
probable that he would have been able to raise sufficient money to meet his
indebtedness to his father's trust.

On the other hand, it is fair to say that the position of Mr and Mrs Schulze, when they were assumed into the trust, was an extremely difficult and invidious one. No funds of any kind were transferred to them by their predecessors, nor were there any invested in the names of the trustees. They would therefore have had to litigate at their own personal risk. Moreover, it is plain that they could not have sued Richard Lees without creating a breach between them and Mrs Schulze's nearest relatives. Further, Richard Lees was at that time in good credit, and was conducting a large and prosperous business as a country solicitor. No doubt Mr Schulze had reason to believe that Richard Lees, for all his seeming prosperity, had difficulty in meeting his obligations, and he says that he was all along afraid that if he had raised an action against his brother-in-law, it would probably have resulted in the latter's bankruptcy. Perhaps, notwithstanding, it was the duty of the pursuers to have sacrificed their family ties, and by taking judicial proceedings against Richard Lees, to have put the administration of the trust beyond cavil. It may also be that their failure to take such proceedings constituted negligence, for which they may be answerable to the beneficiaries ; but we are not here concerned with any question between the beneficiaries and the pursuers, but only with the question whether their negligence as trustees is sufficient to relieve the defenders of the consequences of their author's breach of trust as in a question with the beneficiaries whom the pursuers represent. This is an aspect of the case that the Lord Ordinary does not appear to have considered, although I humbly think that it is decisive of the case.

Had the pursuers been the sole beneficiaries as well as the trustees, there would have been a stronger case for the application of the doctrine of *mora* and taciturnity. Even on this assumption, however, there are two matters to which the Lord Ordinary has not, in my opinion, given due weight. The first is, as Lord Cowan expressed it, that in order to sustain a plea of *mora* and taciturnity "there must not only be the mere lapse of time, but the whole circumstances must be such as are consistent with a presumption of the claim having been fully satisfied or settled and abandoned as no longer due."¹ Here there is no suggestion that the price of the property was ever

¹ Moncrieff v. Waugh, 21 D. 216, at p. 218 ; see also Cuninghame v. Boswell, 6 Macph. 890.

paid to the trustees by Richard Lees. On the contrary, it is admitted that Nov. 4, 1911. it was allowed to remain in his hands ; and there is nothing to suggest that ^{Lees' Trustees} the pursuers either discharged Richard Lees or the defenders of their ^{v. Dun.} indebtedness to the trust. But then it is further said that as the result of ^{Lord Salvesen.} the pursuers' inaction during this period of thirteen years the defenders have been prejudiced by losing their right of relief against Richard Lees ; and on the assumptions of fact on which the Lord Ordinary proceeds, this may be said to be established ; but it by no means follows that this kind of prejudice can be founded on by the person who was directly responsible for the act of maladministration which ultimately resulted in the loss to the trust-estate. The case for the defenders would have been just as strong had Lees died ten years earlier, for there would have been some three years in which the pursuers might have made good their claim against him. In my opinion, unless it can be alleged that it was the duty of the pursuers, as in a question with John Dun and his representatives, to have intimated their claim against him as soon as they were in a position to ascertain the facts, no plea of personal bar can be maintained. For seventeen years Mr Dun had neglected the very duty which it is said that the pursuers on their assumption as trustees ought instantly to have discharged. He was, or must be presumed to have been, aware that the heritable property of the trust had been conveyed to one of the beneficiaries without any price being paid, and yet he never took any steps to restore the trust against the loss to which he had exposed it. It is said that after he resigned office he was not in a position to take steps to recover the price from Richard Lees. This is true in the sense that he could not have sued Richard Lees for the price ; but he was not therefore entirely without a remedy. He could have called upon his successors to sue for the price ; and if he had restored the money to the estate they could not have refused him an assignation which would have enabled him to proceed directly against Richard Lees. Even if he had been in the position of a cautioner for Richard Lees, the failure of the pursuers to proceed against the principal would admittedly not have relieved him from responsibility ; for the pursuers never gave Richard Lees time nor acted in such a way as to relieve a cautioner of liability. I cannot conceive that the position of a co-obligant, which was in effect that of Mr Dun, can be more favourable than that of a cautioner. If there are two or more obligants bound for a debt, the delay of the creditor to sue one of them may result in the other having to meet the whole debt ; but I never heard it suggested that such delay had the effect of extinguishing the debt. The pursuers undoubtedly had a direct right of action against Richard Lees, as being in possession of trust-estate, to account for what he had in his hands, and they had also a concurrent right against the trustee who had so intromitted with the estate as to put it entirely beyond his own control ; but the latter had no need to be informed of the facts, for he knew them better than his successors in office ; and the defenders cannot found upon their own ignorance when they are asked to make good the liability which their ancestor had incurred.

The next point on which I do not agree with the Lord Ordinary is in his view that the right of action which the pursuers possessed against the present defenders was a known right. It may be conceded that in 1889

Nov. 4, 1911. they had the means of ascertaining just as readily as in 1909, when the present action was brought, the facts upon which their claim is based, and that all the material facts were already within their knowledge. On the other hand, I think it is plain that the idea of suing Mr Dun's representatives never occurred to Mr Schulze until after he had raised the unsuccessful action against the marriage-contract trustees, when the true nature of his remedy was suggested by the Court. Where a discharge or abandonment is to be presumed from mere silence, there must, I think, in the ordinary case be "actual" and not merely "imputed" knowledge. A man cannot be presumed to discharge or abandon a claim which he did not know existed, even where it may be said that he could easily have ascertained what his rights were on inquiry. The presumption which arises from *mora* and taciturnity is a presumption of fact and not a presumption of law. On these several grounds I am of opinion that the Lord Ordinary has erred in sustaining the fourth plea in law.

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Even on the assumption that the plea of *mora* would have been well founded against the pursuers had they been the sole beneficiaries in the trust, it does not follow that the present claim is excluded. The defenders boldly maintained that as the administration of the trust was vested in the pursuers, their implied discharge or abandonment of the claim against the defenders is binding on the beneficiaries. No authorities were cited in support of this proposition except two—*Somerville v. Wemess*,¹ and *Pearson*.² These cases appear to me to have no application. They merely decided that the existing trustees are liable to render an account, not merely of their own intromissions, but of the intromissions of their predecessors as in a question with a beneficiary. They did not establish that the liability of one set of trustees to the trust arising from maladministration may be sopited or extinguished by the similar maladministration of their successors in office. Even if the pursuers here had given John Dun a formal discharge of the claim which is now made, such a discharge, being without consideration, would not have been binding upon the trust-estate. This was expressly decided in the case of *Smith*.³ The present action is not at the instance of the pursuers as individuals, for it has been dismissed so far as it was brought at the instance of individuals on the ground of no title. It is brought by them as administrators of the trust-estate, to recover trust funds which, but for the negligence of the previous trustees, would now have been in the pursuers' possession. It might equally well have been brought at the instance of a judicial factor who had superseded the pursuers, and I can see no reason for holding that an action at the instance of such a factor would have been excluded because of the intervening negligence of the trustees whom he superseded. There is no case where this point has been fully considered, but in *Thomson v. Christie*⁴ the point might equally well have been raised, and indeed was argued in the Outer House. The charge against Thomson, the trustee there, was that, having in 1829 sold property belonging to the trust to a Mr Alison, he conveyed the property to the purchaser without enforcing a condition in the articles

¹ 17 D. 151.

² 6 Macph. 286.

³ 3 F. (H. L.) 14.

⁴ 12 D. 179.

of roup that caution should be found for the price within twenty-one days, Nov. 4, 1911. and thereafter allowing the price to remain in the hands of the purchaser until it was lost by his bankruptcy in 1837. It appears that Thomson died in 1831, and that a judicial factor (Mr Grieve) was appointed on the estate in 1834. Mr Grieve apparently made no attempt to recover the amount due by Alison prior to the latter's bankruptcy in 1837. The Lord Ordinary in his opinion says: "The main defence, however, which the defender pleads is that in point of fact no loss arose from anything done by her father previous to his death in 1831. Mr Alison was then solvent, and continued solvent until towards the end of the year 1837. She even carries her argument so far as to maintain that the loss has arisen from misconduct on the part of Mr Grieve, who was appointed judicial factor in 1834." The Lord Ordinary did not find it necessary to dispose of this plea, as he absconded the trustee, but his decision was reversed by the First Division, whose judgment was affirmed on appeal by the House of Lords.¹ The contention which the Lord Ordinary characterised as the main defence was either not repeated before the Inner House, or it was disregarded as entirely unsound. The facts of that case bear a somewhat striking similarity to the present, except that the interval of time during which the judicial factor was in the saddle before the debtor's bankruptcy was only three years instead of thirteen, but there would have been ample time during that period to have taken steps for recovery of the debt. It may be that Mr and Mrs Schulze have incurred a joint liability because of their failure to take steps against Richard Lees. On this matter I pronounce no opinion, but I cannot see that it affords any defence against a claim by the beneficiaries whose rights are being maintained, and can only be maintained, by the trustees now in office.

It was further argued that in any case Mrs Schulze's rights as a beneficiary are excluded by her conduct as a trustee. That is a matter which we cannot decide in the present action. Apart from the fact that she is not before us in her character as an individual, there are no materials to enable us to estimate with any accuracy the extent of her interest in the trust-estate. The case of *Raes v. Meek*² was cited in support of the view that the Court may deal with the individual rights of trustees in an action which is directed against them in their representative capacity. I do not think that that is the true effect of the judgment. In that case Mr and Mrs Rae had been parties *qua* trustees to an act of maladministration in respect of which a decree for damages was given against Mr Meek. The only interest that the pursuer of the action had was to get the money that had been lost to the trust-estate restored, so that it would be available on the death of Mr and Mrs Rae, who were entitled to the income. The only way in which this could be effectively done was by ordaining Mr Meek to consign the fund; and it was only proper that as in a question with the pursuer the interest derived from the investment of Mr Meek's money should be appointed to be paid over to him during the joint lives of Mr and Mrs Rae.

The only other question is as to whether the pursuers are entitled to interest upon the sum sued for after deducting from that sum the amount

¹ 1 Macq. 236.

² 16 R. (H. L.) 31.

Nov. 4, 1911. recovered from Richard Lees' estate. The claim for compound interest is, in my opinion, not stateable, and we were not referred to any case where compound interest had been given. As regards the claim for simple interest, it must be kept in view that Mrs Lees was entitled to "such free yearly annuity as my estate may appear to them [that is, the trustees] to be able to afford." Under this clause the trustees were entitled to have given her the free income of the whole estate; and although they passed no formal resolution on the subject, what they did was to distribute only a part of the estate, and to leave the remainder in the hands of Richard Lees, who regularly paid his mother a sum of £100 per annum, besides allowing her during the greater part of the time to occupy the house the price of which is here sued for. There is no suggestion that the other beneficiaries ever claimed any part of the income while their mother was alive; and I think it was the understanding of all parties that the estate in Richard Lees' hands was no more than sufficient to yield his mother a suitable annuity. As from Mrs Lees' death, however, the defenders cannot resist the payment of some interest.

LORD JUSTICE-CLERK.—I have had an opportunity of considering this case along with your Lordships, and your Lordships have so fully and clearly expressed the grounds of judgment that it is unnecessary for me to add anything.

Parties were then heard on the question of the rate of interest to be charged.

Argued for the defenders;—Penal interest at the rate of 5 per cent was only exacted when there was proof that trustees had committed fraud or had appropriated trust money to their own use. Otherwise, and in circumstances such as the present, the rule was that the trustee was only bound to pay what the money would have earned had it been invested at the legal rate of interest, which between the years 1902 to 1911 averaged $3\frac{1}{2}$ per cent.¹

Argued for the pursuers;—The defenders were bound to pay penal interest at the rate of 5 per cent. Since 1902 the money in question had been in their possession and at their disposal.²

THE COURT pronounced this interlocutor:—"Recall the . . . interlocutor reclaimed against: Decern against the defenders . . . jointly and severally, but that only to the extent to which each of the said individual defenders and the other defenders, as trustees, are *lucrati* from the estate of the late John Dun of Gilston, for payment to the pursuers of the sum of £1040, with interest thereon at the rate of $3\frac{1}{2}$ per centum per annum from 27th April 1902—the date of the death of Mrs Helen Maxwell or Lees, widow of the deceased Hugh Lees, writer, Galashiels . . . Find the pursuers entitled to expenses, and remit the same," &c.

ANDREW TOSH, S.S.C.—RONALD & RITCHIE, S.S.C.—Agents.

¹ Baird's Trustees v. Duncanson, (1892) 19 R. 1045; Heritable Securities Investment Association, Limited, v. Miller's Trustees, (1893) 20 R. 675; Bryson v. Bryson's Trustees, (1907) 14 S. L. T. 750.

² Christie's Factor v. Hardie, (1899) 1 F. 703.

MRS JOICEY MARION BROWN OR FOOTE, Pursuer (Reclaimer).—

No. 11.

Morison, K.C.—J. G. Jameson.

SIR HUGH SHAW STEWART, BART., AND OTHERS (Directors of Greenock Hospital), Defenders (Respondents).—*Wilson, K.C.—MacRobert.*

Nov. 4, 1911.

Reparation—Negligence—Public Hospital—Unskilful treatment of patient—Responsibility of governing body—Contract.

Foot v.
Directors of
Greenock
Hospital.

Apart from special contract the managers of a public hospital are not responsible to the patients whom they receive (whether paying or non-paying) for unskilful or negligent medical treatment, provided they have exercised due care in the selection of a competent staff.

In an action against the managers of a hospital by a patient the pursuer averred that, after an accident by which her leg was broken, she was advised by her doctor to apply for admission to the hospital, that after an interview with the resident surgeon, to whom she explained the circumstances, she was received as a paying patient, and that she was negligently and unskilfully treated at the hospital and suffered injury in consequence, in respect of which she claimed damages from the defenders. She did not dispute that due care had been exercised in the selection of the staff, but maintained that the defenders, by special contract made on their behalf by the resident surgeon, had guaranteed competent treatment of her case.

The Court, applying the rule above stated, *dismissed* the action, holding that the pursuer had not sufficiently averred any special contract with the defenders.

Hillyer v. Governors of St Bartholomew's Hospital, [1909] 2 K. B. 820, *followed*.

ON 23rd June 1910 Mrs Joicey Marion Brown or Foote brought an action against Sir Hugh Shaw Stewart, Bart., and others, the office-bearers and directors of, and as representing, the Greenock Hospital and Infirmary. The summons concluded for payment of £1000.

2D DIVISION.
Lord
Skerrington.

The pursuer averred:—(Cond. 2) "On or about 19th February 1910 the pursuer, who was residing at an hotel in Gourock, had a very severe fall there, by which her leg was broken above the knee, the lower part of her thigh bone being fractured." (Cond. 3) "After the accident the pursuer finding she was severely hurt sent for a doctor in Gourock. The said doctor found the pursuer suffering from a serious injury to her leg in the region of the knee, and advised her to go at once to the Greenock Infirmary in order to have the advantage of the medical appliance there, and in order to have the injury examined and treated, and, if necessary, to have the Röntgen rays applied. She accordingly applied to the defenders' Infirmary, and on or about 20th February was received as a paying patient therein at the rate of £2, 2s. per week for board and medical treatment *by arrangement with the defenders' resident surgeon on the defenders' behalf, to whom she explained the circumstances as above set forth.*"* (Cond. 4) "On her admission to the Infirmary the pursuer's injuries were examined by the house surgeon, Dr Greaves, and thereafter by Dr Mackay, another surgeon upon the staff of the defenders' Infirmary. The defenders' surgeons did not use the Röntgen rays, though the pursuer expected and requested them to do so, but assured her that

* The words in italics were added by amendment during the debate on the reclaiming note.

Nov. 4, 1911. they had made a sufficient and correct diagnosis of her injuries, and treated her for a sprain of the knee-joint followed by synovitis. . . .
 Foote v. The said diagnosis, treatment, and directions of the defenders' said Directors of doctors were wholly wrong. The said doctors failed to make an Greenock. adequate examination of the pursuer's leg and culpably and negligently Hospital. failed to ascertain that her thigh bone was fractured as they ought to have done if they had acted with reasonable skill." (Cond. 6) "As a result of the unskilful treatment received in the defenders' Infirmary; the pursuer is still under medical treatment, and will be under medical treatment for a considerable time. She has suffered severe pain, and been put to great expense for medical attendance and necessities, and will incur further expense. . . ." (Cond. 7) "The said injuries were due to the negligence and unskilful treatment of the defenders' doctors and surgeons on the staff of the said Infirmary, for whom the defenders are responsible. It was the duty of said doctors to have attended the pursuer with skill and have made an adequate examination of her leg. This duty the said doctors and surgeons wholly failed to discharge. . . ."

The pursuer pleaded ;—(1) The pursuer having suffered loss, injury, and damage through the fault of the defenders, or of those for whom they are responsible, is entitled to reparation therefor in terms of the conclusions of the summons with expenses. (2) The defenders having undertaken to treat the pursuer for her said injuries, and having failed to do so with proper care and skilfulness, and the pursuer having suffered loss in consequence, they are bound to make reparation therefor to the pursuer.

The defender pleaded, *inter alia* ;—(3) The averments of the pursuer being irrelevant, the action should be dismissed.

On 4th November 1910 the Lord Ordinary (Skerrington) sustained the third plea in law for the defenders and dismissed the action, with expenses.*

* "OPINION.—The pursuer alleges that she entered the Greenock Infirmary as a paying patient in consequence of having met with an accident to her leg, and she further alleges that the doctors in the Infirmary failed to diagnose her injuries correctly, and treated her for a sprained knee, whereas, in point of fact, she was suffering from a broken thigh. She accordingly claims damages from the directors of the Infirmary upon the footing that the defenders are responsible for the doctors whom they employed. It is not alleged that the defenders failed to employ competent doctors, nor is it alleged that the pursuer received any treatment in the Infirmary except what was in conformity with the directions of the Infirmary doctors. In these circumstances the pursuer cannot succeed unless she has relevantly averred that the doctors were the servants of the defenders, or unless she has relevantly averred a contract on the part of the defenders, not merely to supply competent medical men, but also a contract that these medical men should treat the pursuer with skill and care. As regards the first ground of liability there is, in my opinion, no relevant averment that these doctors stood to the Infirmary managers in the relation of servants. The pursuer's counsel, however, rested his case principally upon the ground of contract, and he founded on the statement in the third article of the condescendence, to the effect that the pursuer was received into the Infirmary as a paying patient 'at the rate of £2, 2s. per week for board and medical treatment.' I read that as meaning that in return for £2, 2s. per week the pursuer was to receive board and medical treatment from the physicians and surgeons in the Infirmary, and the defenders' duty as regards medical treatment was, I think, fulfilled if they provided her with competent surgeons and physicians

The pursuer reclaimed, and the case was heard before the Second Nov. 4, 1911. Division on 28th and 31st October 1911.

Argued for the reclaimer;—As a general proposition it was true that the only duty undertaken by the governors of a public hospital towards a patient who was treated in the hospital was to use due care and skill in selecting their medical staff. But in the present case the defenders had entered into a special contract with the pursuer to give her treatment for her particular case. It was to get this treatment that she applied for admission to the hospital, and this was what she paid for. The defenders did not merely undertake to give the pursuer accommodation in the hospital, in which case their duty was fulfilled by supplying a competent doctor. They undertook to provide special treatment for a special injury, and this imposed on them a higher degree of responsibility. The presence of this special contract differentiated the case from the authorities on which the defenders relied, and took it out of the general rule. The contract was sufficiently averred, and there should be inquiry into the facts.¹

Foot v.
Directors of
Greenock
Hospital.

Argued for the defenders;—The general rule according to which the defenders were responsible for the selection of a competent doctor, but not for the conduct of the treatment, was well established² and was not called in question. The pursuer founded on a very special contract, which would require very specific averment. There were no such averments on record, and it was not even said that the resident doctor, with whom the alleged contract was made, had any authority to bind the defenders. On record the pursuer's case was laid on delict and not on contract. No case for inquiry had been stated.

At advising on 4th November 1911,—

LORD DUNDAS.—The pursuer of this action sues the office-bearers and directors of the Greenock Hospital and Infirmary, as representing that institution, for damages in respect that, while she was a paying inmate in the infirmary, the house surgeons treated her case in an unskilful and negligent manner, to her great physical and pecuniary loss and injury. The question is whether or not the pursuer has set forth on record a case against the defenders relevant to be admitted to probation. The Lord Ordinary decided that question in the negative, and the pursuer has reclaimed, and asks that the case be remitted to his Lordship, with instructions to allow a proof before answer of her averments. It will, therefore, be necessary to examine these averments with care and in some detail. But the ground may with

to attend to her case. The pursuer's counsel, however, argued that the contract went further, and that the defenders, by receiving the £2, 2s., undertook that the treatment which the pursuer should receive from their doctors would be reasonably skilful and careful. There is no averment of any such express contract and I am unable to find within the four corners of the record any facts and circumstances which would give rise to the inference that that was in fact the footing upon which this lady was received into the Infirmary. In these circumstances it would be useless to have an inquiry either before a jury or before a Judge. I accordingly dismiss the action with expenses."

¹ Hall v. Lees, [1904] 2 K. B. 602; Beven on Negligence, 3rd ed. ii. 1165.

² Evans v. Liverpool Corporation, [1906] 1 K. B. 160; Hillyer v. Governors of St Bartholemew's Hospital, [1909] 2 K. B. 820.

Nov. 4, 1911. **Foot v. Directors of Greenock Hospital.**
 Lord Dundas. advantage be cleared by considering at the outset the general rules, apart from special averments, concerning the liability, in such a case, of the governing bodies of institutions like the Greenock Infirmary in a question with their patients. It is clear enough, and was admitted by the pursuer's counsel, that the medical men on the staff of the establishment are not the servants of the governing body. The pursuer's case must rest, as it was rested in the argument at our bar, upon contract express or implied. Where no special terms are expressed, the limits of legal responsibility attaching to the governing body are, I take it, confined to a due and careful selection by them of a competent staff, and do not extend to the supervision by them of the professional actings of members of the staff, or to any sort of guarantee that these will be performed with skill and care in any given case. The institution offers and undertakes to furnish to the public the services of competent medical and surgical practitioners, and nothing more. Considerations of reason and good sense seem to negative any further degree of responsibility on the part of the governing body. It is obvious that they have, and can have, no means and no ability of control,—no power or capacity of supervision,—over the professional treatment of their patients. The medical staff must *ex necessitate rei* act on their own responsibility; they are not appointed as in room and stead of the governors, to perform duties which the latter might or could themselves undertake. It follows that, though the governors appoint and may dismiss the medical staff, they cannot be held responsible for the degree of skill or care exercised by the latter in the treatment of any patient. They undertake to furnish their patients—whether paying or non-paying—with the services of a competent staff; they do not undertake indemnity against errors of treatment arising from want of skill or from negligence on the part of practitioners whom they have reasonably and properly appointed as persons competent for their posts. There is not, so far as I know, any Scottish decision on this matter, but the law has been clearly and authoritatively laid down in England in the sense I have endeavoured to indicate by a series of decisions, and particularly by the Court of Appeal in the recent case of *Hillyer v. Governors of St Bartholomew's Hospital*.¹ The learned Judges there approved and confirmed the pithily expressed opinion of Walton, J., in *Evans v. Liverpool Corporation*,² to the effect that persons in the position of the present defenders “do not undertake the duties of medical men or to give medical advice, but they do undertake that the patients in their hospitals shall have competent medical advice and assistance.” I entertain no doubt that the doctrine laid down in England is sound, and is the law of Scotland. Mr Morison, indeed, in his able and temperate argument for the pursuer, disavowed any intention of disputing the general rules of law applicable to such cases, but devoted himself to the effort of distinguishing the case before us from their scope and effect.

One must therefore turn to the pursuer's record to see what is the alleged contract with the defenders upon which her case depends. It appears that about 19th February 1910 the pursuer had a severe fall, “by which her leg was broken above the knee, the lower part of her thigh bone being

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² [1906] 1 K. B. 160.

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¹ [1909] 2 K. B. 820.

² [1906] 1 K. B. 160.

fractured." She sent for a doctor in Gourrock, where she was residing, who Nov. 4, 1911. "advised her to go at once to the Greenock Infirmary in order to have the advantage of the medical appliances there, and in order to have the injury examined and treated, and, if necessary, to have the Röntgen rays applied." I pause to observe that in argument no point was attempted to be made of the fact that the Röntgen rays were not applied in the hospital. The pursuer proceeds to aver that "she accordingly applied to the defenders' Infirmary, and on or about 20th February was received as a paying patient therein at the rate of £2, 2s. per week for board and medical treatment." This is the sole statement on record of the contract founded upon; and it is certainly very bald and meagre. The rest of the condescendence is taken up with the pursuer's story of the alleged maltreatment of her case by the house surgeons, their negligent and unskilful diagnosis, actings, and advice, and of the injury and damage thereby resulting to her. It is to be observed that no suggestion is made that the defenders were not justified in appointing the surgeons as men competent for their respective positions. I confess that I read the pursuer's crucial averment as meaning, according to the ordinary use and interpretation of language, that she was to pay £2, 2s. per week during her stay in the infirmary, and was to receive board after the scale and fashion usually supplied to their paying patients, and the medical (and surgical) treatment available to all patients in the infirmary—that is (as I read the matter), the services of a competent staff of medical men. I cannot take it off the pursuer's hands, in the absence of much more specific averments than she makes, that her payment of £2, 2s. per week was to ensure to her a special degree of medical care and attention, or a guarantee of skill on the part of the house surgeons. I agree with the clearly and concisely expressed opinion of the Lord Ordinary, and shall not attempt to elaborate or improve upon its language. At our bar the pursuer's counsel asked and obtained leave to add by way of amendment at the end of Cond. 3 a statement to the effect that the contract was arranged on the defenders' behalf by Dr Greaves, the house surgeon, to whom the pursuer explained the circumstances above narrated in her condescendence. I do not think the amendment makes any substantial difference as regards the relevancy of the pursuer's case. It is not said (and, in the absence of averment, I decline to assume) that the house surgeon had power to bind the defenders by entering into an unusual contract with a patient; and I do not think that the statement that he was made aware by the pursuer of what had passed between her and her professional adviser in Gourrock serves at all to supply the radical deficiency of the crucial part of her condescendence. I hold with the Lord Ordinary that it would require very full and precise averments, which are here totally lacking, to justify us in allowing proof of a special and abnormal contract from which the ordinary rules of legal liability are to be excluded. To desiderate a due degree of precision in the statement upon record of so peculiar a case does not, to my mind, impose any harsh or unfair burden upon the pursuer. To relax proper requirements in that direction might, I think, expose governing bodies of public institutions to much harassing and unnecessary litigation. For these reasons I am of opinion that we ought to adhere to the interlocutor reclaimed against.

Footnote v.

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Greenock
Hospital.

Lord Dundas.

Nov. 4, 1911. LORD SALVESSEN.—I am of the same opinion.

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Hospital.

LORD JUSTICE-CLERK.—The facts of the case have been so fully and clearly stated by my brother Lord Dundas, that I pass over what I had written of narrative.

There was at the debate only one argument stated which appeared to have any plausibility. The pursuer's counsel urged that the hospital doctor made a bargain with the pursuer under which the pursuer was to be received as a paying patient. The argument was based upon the view that the doctor, who was the official who saw her, arranged a bargain with her for the hospital. I am very clearly of opinion that this is a fallacious contention. It was quite natural that, the pursuer and the doctor being brought into contact, he should give information as to the fixed tariff of the managers for the reception of paying patients. In doing so, he was not making any bargain at all, but simply communicating the terms, as regards board and lodging, on which she could be received under the fixed rules of the establishment. The case was, I think, in that matter practically in the same position as if the facts had been that at the gate of the hospital the pursuer had been informed by the gatekeeper of the terms of board and lodging for paying patients.

Upon the general question I concur entirely with what your Lordship has said. I do not think that the law of the case could be better stated than in the words of the American Chief Justice in *Glavin v. Rhode Island Hospital*,¹ words with which Farwell, L. J., expressed his concurrence in the case of *Hillyer*²: "Here the physicians or surgeons are selected by the corporation or the trustees. But does it follow from this that they are the servants of the corporation? We think not. If A out of charity employs a physician to attend B, his sick neighbour, the physician does not become A's servant, and A, if he has been duly careful in selecting him, will not be answerable to B for his malpractice. The reason is that A does not undertake to treat B through the agency of the physician, but only to procure for B the services of the physician. The relation of master and servant is not established between A and the physician. And so there is no such relation between the corporation and the physicians and surgeons who give their services at the hospital. It is true the corporation has power to dismiss them, but it has this power, not because they are its servants, but because of its control of the hospital where their services are rendered. They would not recognise the right of the corporation, while retaining them, to direct them in their treatment of patients."

This seems to me to be absolutely sound. What would be the case if the managers interfered with the surgeon in his work, if they refused to allow him to proceed with an operation which he thought necessary? Is it not plain that the patient would have ground for complaint against the managers if they interfered, and the interference led to bad consequences? Again, if they insisted that the surgeon should obey them as to the conduct of an operation, would he not be entitled to refuse, and to decline to act as their employee any longer, and to complain of their conduct?

¹ 34 Amer. Rep. 675.

² [1909] 2 K. B. 820, at p. 825.

The matter is illustrated by the fact that in assisting at an operation, Nov. 4, 1911. nurses, though the servants of the managers in their ordinary work, must at the operation obey the doctor's directions absolutely. This view is very clearly brought out in the opinion of Farwell, L. J., in the case of *Foot v. Directors of Greenock Hospital*.
Hillyer.¹

On these grounds, and on those stated by your Lordship, I concur in adhering to the Lord Ordinary's interlocutor.

THE COURT adhered.

ALLAN M'NEIL, Solicitor—CADELL & MORTON, W.S.—Agents.

ANDREW BOLTON AND ANOTHER (Hugh M'Phee's Trustees), First Parties.—*Maclaren*.

No. 12.

JAMES M'PHEE AND ANOTHER, Second Parties.—*Lippe*.

Nov. 7, 1911.

Charitable and Educational Bequests and Trusts—Uncertainty—"Religious and charitable institutions in Glasgow and neighbourhood." M'Phee's Trustees v. M'Phee.

A testator directed his trustees to "pay and divide" a sum of £250 "among such religious and charitable institutions in Glasgow and neighbourhood as they may select, and in such proportions as they may think proper."

Held that the bequest was to be construed as a bequest to institutions in the locality of which it could be predicated that they were both religious and charitable, and that it was not void from uncertainty.

THE late Hugh M'Phee, Glasgow, left a trust-disposition and settlement which contained, *inter alia*, the following clause:—"I direct and instruct my trustees to pay and divide the sum of £250 sterling, free of legacy-duty, among such religious and charitable institutions in Glasgow and neighbourhood as they may select, and in such proportions as they may think proper." EXTRA DIVISION.

A question having arisen as to the validity of the bequest, a special case was presented for the opinion of the Court, to which the trustees of the testator were the *first parties* and the residuary legatees under the settlement the *second parties*.

The case contained the following statement of the contentions of the parties:—" (7) The first parties maintain that they are entitled to select any institution or institutions in Glasgow and neighbourhood, each of which has for its object works of a combined religious and charitable character, and to pay over to such institution or institutions the said legacy of £250 in such proportions as they may think fit. (8) The second parties contend that the directions as to paying and dividing the said sum of £250 are too vague and indefinite to receive effect, and that the legacy is void in respect that the beneficiaries sought to be benefited cannot with reasonable certainty be ascertained. They accordingly maintain that the said sum becomes part of the residue of the testator's estate, and falls to be divided among them as residuary legatees."

The questions of law were:—" (1) Are the testator's directions as to paying and dividing the foresaid sum of £250 sterling sufficiently definite to receive effect, and are the first parties entitled to pay and

¹ [1909] 2 K. B. 820, at p. 825.

Nov. 7, 1911. divide the same in terms of said directions? or (2) Does the said sum of £250 sterling become part of the residue of the testator's estate, and fall to be divided among the second parties as residuary legatees?"

M'Phee's Trustees v. M'Phee.

The case was heard before the Extra Division (consisting of LORD KINNEAR, LORD DUNDAS, and LORD MACKENZIE) on 7th November 1911.

Argued for the first parties;—It was settled beyond dispute that a bequest to "charitable" institutions or for "charitable" purposes was definite and good¹; it was also equally well settled that a bequest to "religious" institutions or for "religious" purposes was indefinite and bad; and it had further been decided that where the expression was "religious *or* charitable" the bequest was bad,² as in such a case the whole bequest might be applied to the "religious," i.e., the indefinite, purposes. The expression "religious *and* charitable" was, however, in quite a different position. This had been clearly recognised in many of the cases.³ The word "and" fell to be read, as it was natural to read it, conjunctively and not disjunctively, and accordingly the definiteness which attached to the word "charitable" was sufficient to give a definite significance to the whole expression "charitable and religious." The case of *M'Conochie's Trustees v. M'Conochie*,⁴ which appeared to be a decision somewhat adverse to this contention, was distinguishable from the present, as the consideration which in that case weighed most with the Court was the vagueness of the expression "purposes" as compared with the expression "institutions." Further, the restriction here to "Glasgow and neighbourhood" tended to make the bequest still more definite.⁵ All that was really required to make a bequest good was "that the description of the class to be benefited shall be sufficiently certain to enable men of common sense to carry out the expressed wishes of the testator."⁶ That requisite was present here.

Argued for the second parties;—The bequest was too vague and indefinite to receive effect. Admittedly, on the authorities, a bequest to "charitable *or* religious" institutions was bad; but here,—especially looking to the expression "divide,"—the word "and" was really equivalent to "*or*,"⁷ the intention of the testator being that part of the bequest was to be expended on religious and part on charitable institutions, a bequest which was clearly bad.⁸ Even if "and" was to be read conjunctively, the bequest was still bad, the word "religious" being so vague and incapable of definition as to vitiate the whole expression used by the testator.⁹ If it was impos-

¹ *E.g.*, *Dick's Trustees v. Dick*, 1907 S. C. 953.

² *Macintyre v. Grimond's Trustees*, (1905) 7 F. (H. L.) 90; *M'Growther's Trustees v. Lord Advocate and Others*, (1907) 15 S. L. T. 652.

³ *Blair v. Duncan*, (1901) 4 F. (H. L.) 1, *per* Lord Davey, at p. 3; *Macintyre v. Grimond's Trustees*, (1904) 6 F. 285, *per* Lord Trayner, at p. 291; *Smellie's Trustees v. Glasgow Royal Infirmary*, (1905) 13 S. L. T. 450.

⁴ 1909 S. C. 1046.

⁵ *Smellie's Trustees v. Glasgow Royal Infirmary*, 13 S. L. T. 450.

⁶ *Weir v. Crum Brown*, 1908 S. C. (H. L.) 3, Lord Chancellor Loreburn, at p. 4.

⁷ *Hay's Trustees v. Baillie*, 1908 S. C. 1224, Lord M'Laren, at p. 1233.

⁸ *M'Conochie's Trustees v. M'Conochie*, 1909 S. C. 1046, Lord Ardwall, at p. 1049.

⁹ *Macintyre v. Grimond's Trustees*, 6 F. 285, Lord Moncreiff, at p. 292; *Williams v. Kershaw*, (1835) 5 Cl. and Fin. 111.

sible to determine what constituted a "religious institution," it was equally impossible to tell what constituted "a religious and charitable institution."

Nov. 7, 1911.
M'Phee's
Trustees v.
M'Phee.

LORD DUNDAS.—The question raised in this special case is a short one, and, speaking for myself, I do not find it to be attended with serious difficulty. We are asked to construe a clause in a settlement whereby the testator directs his trustees "to pay and divide the sum of £250 sterling, free of legacy duty, among such religious and charitable institutions in Glasgow and neighbourhood as they may select, and in such proportions as they may think proper." The question we have to decide is whether that bequest is void from uncertainty, or whether it is sufficiently definite to receive legal effect.

If one approached the question simply as a matter of ordinary construction, and in total ignorance of the decided cases, I should say that the bequest was sufficiently specific, and was one which the trustees would have no practical difficulty in carrying into effect; and I should regard it as meaning that they were to divide this not very large sum of money among such institutions of a religious and charitable character in Glasgow and the neighbourhood as they might select. But we have been referred, and quite properly, to a number of cases more or less similar to the present, and we must, of course, pronounce our judgment having regard to what has been already decided by the Court. It seems clear enough that a bequest to such "charitable" institutions as the trustees might select would be good. There is no dispute about that, the word "charitable" has an ascertained meaning in law, and such a bequest would be beyond question. On the other hand, if it had been to such "religious or charitable" institutions as the trustees might select, without any limitation as regards locality or otherwise, the bequest, I take it, must have been held bad on the authority of the case of *Macintyre v. Grimond's Trustees*.¹ In that case the House of Lords decided that, owing to the very vague character of the word "religious" as used in the settlement without any qualification as to locality or other aid to its understanding, it could not be given effect to; and as it was disjunctively used in connection with "charitable," the whole bequest was bad. Here, we have not "religious or charitable" but "religious and charitable" institutions; and we have the further feature that the field is not the whole world but is confined to Glasgow and the neighbourhood. As I have said, *prima facie* I should hold that the words mean institutions of a religious and charitable character, and that there is no division into two classes, as distinct from one another, of religious institutions and charitable institutions. We were referred to dicta in decided cases which seem to show that the phrase "religious and charitable" stands, as one would have thought, in a better position than "religious or charitable." Lord Davey, in the case of *Blair v. Duncan*,² thought that a bequest to "charitable and public purposes" might have been quite good, whereas one to "charitable or public purposes" was, in his Lordship's opinion, and in that of the House, invalid. In the same way, Lord Trayner expressed an opinion in the case of *Grimond*³ (and the weight of his dictum is not affected by the

¹ 7 F. (H. L.) 90.

² 4 F. (H. L.) 1, at p. 3.

³ 6 F. at p. 291.

Nov. 7, 1911. fact that the judgment of the Court of Session was reversed on appeal)
 M'Phee's that "if the trust-deed had said 'charitable and religious societies,'
 Trustees v. there would have been no question that the bequest was valid." We
 M'Phee. must also keep in view that, in the present case, the "religious and
 Lord Dundas. charitable institutions" are expressly confined to a very definite neigh-
 bourhood, and I think that is a circumstance of considerable weight in the
 matter. We were referred to a decision of my own in the Outer House in
Smellie's Trustees v. Glasgow Royal Infirmary,¹ where I sustained a bequest
 to "other benevolent and religious societies in Glasgow and the west of
 Scotland." I see no reason to differ from what I then said as to the effect
 and weight of such limiting words. The case most pressed upon us by
 counsel for the second parties was that of *M'Conochie's Trustees v.*
*M'Conochie*² in the Second Division, where the words used were "educa-
 tional, charitable, and religious purposes within the city of Aberdeen."
 Every case must be decided on its own language, and I am far from saying
 that I would have differed from the decision in *M'Conochie's Trustees*.² But
 what I think turned the scale, certainly in the opinion of Lord Low, was
 that the word used was "purposes" and not "institutions." That is the
 ground of Lord Low's opinion, and I think the circumstance must neces-
 sarily have affected the minds of the other learned Judges who decided that
 case. There are many other cases bearing more or less on the matter. The
 First Division alone have quite recently decided three, viz., *Hay's Trustees*
v. Baillie,³ *Mackinnon's Trustees v. Mackinnon*,⁴ and *Paterson's Trustees v.*
Paterson,⁵ but I do not think any good purpose would be served in discuss-
 ing them in detail; the cases are merely illustrations of the way in which
 the Court will approach a question like the present. In *Weir v. Crum*
*Brown*⁶ the present Lord Chancellor put the rule in this way:—"All
 that can be required is that the description of the class to be benefited
 shall be sufficiently certain to enable men of common sense to carry
 out the expressed wishes of the testator"; and in the subsequent case
 of *Allan's Executor v. Allan*,⁷ Lord Kinnear, having quoted these words of
 Lord Loreburn, says:—"That is, therefore, the rule which is held to be
 established by *Crichton v. Grierson*⁸ and the subsequent cases, and the
 question to be put in each particular case is whether the description of the
 class to be benefited is sufficiently exact to enable an executor of common
 sense to carry out the expressed wishes of the testator." Applying this
 criterion, I think only one answer can be given to the question before us;
 because I cannot suppose that trustees of common sense would have any
 difficulty in carrying out the directions which this testator has expressed.
 The Court, I take it, is always more inclined to sustain than to destroy a
 testament. I think there is ample ground, without in any way trenching
 upon decided cases, for upholding this bequest. I accordingly propose to
 your Lordships that the first question should be answered in the affirmative,
 and the second in the negative.

LORD MACKENZIE.—I concur. I should only add, with reference to the

¹ 13 S. L. T. 450.

² 1909 S. C. 1046.

³ 1908 S. C. 1224.

⁴ 1909 S. C. 1041.

⁵ 1909 S. C. 485.

⁶ 1908 S. C. (H. L.) 3.

⁷ 1908 S. C. 807, at p. 814.

⁸ (1828) 3 W. & S. 329.

argument which was first stated by Mr Lippe, that I am unable to give the effect which he desired to the word "divide." According to that argument the word "divide" was said to compel us to read the word "and," coming between "religious" and "charitable," as disjunctive and not conjunctive. I am unable to assent to that view. It appears to me that the intention of the testator was that the objects of his benefit were to be institutions, in Glasgow and neighbourhood, of which it could be predicated that they were both religious and charitable, and that the selection of the particular institutions and the proportion that each institution was to get was left to his trustees. So construing the expression "religious and charitable institutions" I entirely agree with the opinion of Lord Dundas.

LORD KINNEAR concurred.

THE COURT answered the first question in the affirmative and the second in the negative.

JOHN N. RAE, S.S.C.—ERSKINE DODS & RHIND, S.S.C.—Agents.

THE RIGHT HONOURABLE JOHN SUTHERLAND, EARL OF CAITHNESS,
First Party.—*Macphail, K.C.—Hon. W. Watson.*

No. 13.

THE HONOURABLE NORMAN M. SINCLAIR, Second Party.—
D.-F. Dickson—H. P. Macmillan.

Nov. 7, 1911.

Succession—Destination—Clause of devolution—Mortis causa disposition of heritage—Condition—Validity—Public policy.

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A clause in a *mortis causa* disposition of heritage provided that each of the heirs, who should succeed to the lands, should be obliged in all time to use the disposer's name and arms, and that "in case any of the said heirs shall succeed to a peerage, then, when the person so succeeding, or having right to succeed, to my said lands shall also succeed to a peerage, they shall be bound and obliged to denude themselves of all right" in the lands, and the same should devolve on the next heir.

Held (1) that this clause was not void as against public policy; (2) that it was effectual, although not protected by the fetters of an entail, and (3) that it applied to, and excluded, an heir who, prior to the opening of the succession to the lands, had succeeded to a peerage.

Fleeming v. Howden, (1868) 6 Macph. (H. L.) 113, and *Fleming v. Lord Elphinstone*, (1804) M. 15,559 followed.

Egerton v. Earl Brownlow, (1853) 4 H. L. (Clark) 1, distinguished.

THIS was a special case brought with reference to the succession to the estate of Auchmacoy under a disposition executed by Mr James Buchan in 1873.

The disposition was in favour of Mr Buchan's only child, Miss Louisa Buchan, and the heirs whomsoever of her body, whom failing his nephew, James Augustus Sinclair, and the heirs-male of his body, whom failing, to other heirs and substitutes therein mentioned.

The disposition contained no clauses of prohibition against alienation, contracting debt, or altering the order of succession, fenced with irritant and resolute clauses, nor did it contain an express clause authorising registration of the deed in the Register of Tailzies. It contained, however, a name and arms clause, and a clause of devolution, in the following terms:—"And under this condition always

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that the husband of my said daughter and each of the heirs and the husband of each of the female heirs who shall succeed to the lands before disposed under the destination herein contained shall be obliged in all time after they or their wives succeed to the said lands to use and retain the surname of Buchan and the arms and designation of Buchan of Auchmacoy and no other surname, arms, or designation, and that in case any of the said heirs shall succeed to a peerage, then when the person so succeeding or having right to succeed to my said lands shall also succeed to a peerage, they shall be bound and obliged to denude themselves of all right, title, and interest which may be competent to them in or to my said lands, and the same shall thenceforth *ipso facto* accrue and devolve upon the next heir for the time being who shall be entitled to succeed under the destination herein contained as if the person so succeeding to a peerage were naturally dead."

The disponent, James Buchan, died on 28th November 1874. His daughter, Miss Louisa Buchan, completed her title to Auchmacoy by recording the disposition in the Register of Sasines. She died unmarried on 18th April 1910. A small portion of the property comprised in her father's disposition was sold by her, but, apart from this, she did not execute any deed evacuating the destination in the disposition.

The person next called in the destination after Miss Louisa Buchan and the heirs of her body was James Augustus Sinclair. He succeeded to the peerage, as sixteenth Earl of Caithness, in 1889. He predeceased Miss Buchan in 1891, leaving issue, of whom the seventeenth Earl of Caithness, the *first party* to the case, was the eldest son, and Norman Macleod Sinclair, the *second party* to the case, the second son.

The first party contended that Mr Buchan's disposition did not contain any clauses on the true construction of which his right to succeed to the estate of Auchmacoy on the death of Miss Louisa Buchan was defeated; that the clause of devolution did not apply to the circumstances which had occurred, and that, in any event, the absence of irritant and resolute clauses, or their equivalent, precluded any question being successfully raised as to the right of the first party to enter into possession of, and complete his title to, the estate. The second party contended that the clause of devolution formed an integral and operative part of the destination of the estate, and that on a sound construction thereof the first party, by his succession to the peerage, was excluded from the succession to the estate, which had accordingly devolved upon the second party. He further contended that it was a condition of the succession to the estate that the party succeeding thereto should use and retain the name and arms of Buchan, and that the first party, not being in a position to implement that condition, was consequently not entitled to take up the succession to the estate, and the second party, who was prepared to implement the condition, was thus in right thereof.

The questions of law were:—“(1) Is the first party, on a sound construction of the terms of the said disposition, excluded, in the circumstances which have occurred, from the succession to the estate of Auchmacoy? (2) In the event of the first question being answered in the affirmative, is the second party now in right of the said estate?”

The case was heard before the First Division on 14th, 27th and 28th January 1911.

Argued for the first party;—(1) As Mr Buchan's disposition contained merely a simple and unprotected destination, the clause of devolution was not enforceable. In all the cases¹ in which such a clause had been held effectual, the deed in which it had appeared had been, or had purported to be, an entail. There was no instance of a clause of this nature receiving effect in connection with a simple destination.² If the destination was not protected, there was nothing to prevent the heir in possession of the lands from alienating them before the event occurred which involved forfeiture; and the clause was accordingly nugatory. (2) Assuming, however, that the clause was in itself effectual, it did not apply in the circumstances of this case. The phrase "shall also succeed" and the provision that the heir should be bound to "denude" limited the operation of the clause to the case of an heir succeeding to a peerage after he had succeeded to the estate of Auchmacoy. Here, on the other hand, the first party was already a peer when the succession to the lands opened to him. A clause of forfeiture was to be strictly construed, and to extend the scope of such a clause by construction was permissible only where this was necessary in order to bring the clause into conformity with a declaration of intention in the deed in which it appeared; and there was no such declaration in Mr Buchan's disposition. In *Fleming v. Lord Elphinstone*³ the decision was based on the special terms of the clause before the Court, and no general rule was there established. (3) The condition imposed in the clause was contrary to public policy and must, therefore, be held *pro non scripto*⁴; and, *separatim*, was too capricious and irrational to receive effect. The devolution was to take place if the heir succeeded to any peerage whatsoever. But peers were "hereditary counsellors of the Crown"⁵; and attendance in Parliament was a service rendered to the Sovereign. If the Sovereign desired a subject to undertake the duties devolving on a peer, the subject could not refuse obedience.⁶ But the effect of the present clause was to penalise succession to the peerage; and it was contrary to public policy that a testator or donor should be allowed to attach to his gift any condition which might induce the legatee or donee to regard with disfavour an opportunity of serving the Sovereign. The case fell accordingly within the principle recognised and enforced in *Egerton v. Earl Brownlow*⁷ and *In re Beard*.⁸

¹ Reference was made to *Fleming v. Lord Elphinstone*, (1804) M. 15,559; *Lockhart v. Gilmour*, (1755) M. 15,404; *Hay v. Marquis of Tweeddale*, (1771) M. 15,425, *aff.* 2 Pat. 322; *Simpson and Home v. Earl of Home*, (1697) M. 15,353; *Bruce-Henderson v. Henderson*, (1790) M. 4215; *Stirling v. Stirling*, (1834) 12 S. 296; *Marquis of Hastings*, (1844) 7 D. 1, *aff.* 6 Bell's App. 30; *Earl of Eglinton v. Hamilton*, (1847) 9 D. 1167; *Viscountess Hawarden v. Elphinstone's Trustee and Dunlop*, (1866) 4 Macph. 353.

² *Munro v. Butler Johnstone*, (1868) 7 Macph. 250, *per* Lord Cowan, at p. 255.

³ M. 15,559.

⁴ Bell's Prin. (10th ed.) sec. 1785.

⁵ Erskine May's Parliamentary Practice, (11th ed.) pp. 49 and 61.

⁶ Cruise on Dignities, (2nd ed.) 95-97; Hatsell's House of Commons Precedents, (1818), (3rd ed.) vol. II. p. 370; Lord Shaw's opinion in *Amalgamated Society of Railway Servants v. Osborne*, [1910] A. C. 87.

⁷ (1853) 4 H. L. (Clark) 1, at pp. 160-4, 201, 241, also at pp. 72, 79, 88, 97, 99, 114, 129, 153-4.

⁸ [1908] 1 Ch. 383.

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This question had not hitherto been considered in Scotland. In *Fleming v. Lord Elphinstone*¹ both parties explicitly disclaimed any intention of raising the question whether a clause providing that succession to the peerage (and not to a specified title) should involve a forfeiture of the estate was effectual; and Lord President Campbell in his manuscript note indicated a doubt "if it be not *contra bonos mores* to exclude a peer merely *qua* such from succeeding to an estate." In the present case the following features of the clause rendered it invalid. In the first place, the forfeiture clause referred to succession to the peerage generally and not to succession to a particular title. Secondly, the forfeiture was to take place if the heir succeeded to the title and dignity of a peerage, although there might be no estate which went with the peerage.² And, thirdly, there was no general declaration in the deed of any intention on the part of its author that his estates should not be merged in another estate; and a declaration of this kind had been held to be of importance in some of the earlier cases.³ In one or other of these respects the present case was distinguishable from all the cases in which effect had been given to clauses of forfeiture. Finally, the condition here was of the most capricious and irrational nature. If the heir in possession were created a peer, he would not forfeit the estate, for in that case he would not "succeed" to the peerage. But his eldest son would "succeed" to the peerage and would thereupon forfeit the estate.

Argued for the second party;—(1) The fact that the destination here was not protected was no ground for holding that the devolution clause was ineffectual. In *Fleeming v. Howden*⁴ effect was allowed to a clause of this nature, although the destination was in reality simple, as the entail was not recorded. In *Munro v. Butler Johnstone*,⁵ where the decision turned on a specialty in the clause of devolution, Lord Neaves observed that there might be an effectual clause of this nature in a simple destination. There was no difficulty in the application of the clause. Before the event which led to forfeiture occurred, the heir possessed the estate subject to the condition of the grant; and when the event happened, he held as trustee for the conditional substitute.⁶ (2) The clause applied, notwithstanding that the first party's succession to the peerage preceded his succession to Auchmacoy. This point was discussed and finally settled in *Fleming v. Lord Elphinstone*.⁷ (3) There was nothing capricious or contrary to public policy in the clause. It subjected the heir to a two-fold condition. He was to use the name of Buchan and no other surname. There was nothing contrary to public policy in this branch of the condition.⁸ The heir might become Lord Buchan of Auchmacoy without infringing this condition; but he could not assume any other name than Buchan. As he had become

¹ M. 15,559, Ilay Campbell's Collection of Session Papers, vol. 112, No. 8, manuscript note.

² Marquis of Hastings, 7 D. 1, *per* Lord Justice-Clerk (Hope), at p. 16, *aff.* 6 Bell's Appa. 30.

³ *E.g.*, Earl of Eglinton v. Hamilton, 9 D. 1167, at p. 1189; Marquis of Hastings, 7 D. 1, *per* Lord Justice-Clerk, at p. 17.

⁴ 6 Macph. (H. L.) 113.

⁵ 7 Macph. 250, at p. 257.

⁶ *Fleeming v. Howden*, 6 Macph. (H. L.) 113, *per* Lord Westbury, at p. 121.

⁷ M. 15,559.

⁸ *Hunter v. Weston*, (1882) 9 R. 492.

Earl of Caithness, he had forfeited the estate. Nor was the second Nov. 7, 1911. branch of the condition—regarding succession to a peerage—contrary to public policy. The Court ought not to extend the doctrine of public policy beyond the limits of the existing decisions.¹ Clauses of devolution had been used from the most ancient times. They had been frequently considered in the Court of Session and in the House of Lords, but no objection had ever been taken to them on the score of public policy. There was no feature of this clause which distinguished it from the clauses which had been discussed in these cases. In *Earl of Eglinton v. Hamilton*,² for example, the condition was that the heir should forfeit the estate if he succeeded to any peerage whatsoever, and there was no mention of lands attached thereto—if he succeeded to the dignity, the devolution came into operation. The case of *Egerton v. Earl Brownlow*³ was decided on the ground that the clause there in question might induce the heir to attempt to attain to the peerage by corrupt means. This objection could not be urged against the clause in Mr Buchan's deed.

At advising on 7th November 1911,—

LORD PRESIDENT.—[After stating the facts]—The argument of the first party resolved itself into three points. In the state of the authorities it would be idle to contend that a clause of this sort was feudally inefficacious. But the first party contended (1) that the clause in question was inefficacious because it was not protected by the fetters of a valid entail; (2) that it did not apply, because the Earl did not succeed to the Earldom after the succession opened; and (3) that the clause was against public policy and should therefore be held *pro non scripto*.

I am of opinion that the first question is really settled by authority, viz., by the judgment of the House of Lords in the case of *Fleeming v. Howden*.⁴ The facts of that case were these:—

John Fleeming was served heir of tailzie and provision and was duly infeft in certain estates known as the Wigtown Estates in 1841. The entail was a good and valid entail, but it contained a clause which provided that in case any of the heirs (with certain exceptions which were not brought into question) should succeed to a peerage, then the person so succeeding and also succeeding, or having right to succeed, to the Wigtown Estates should be bound to denude in favour of the next heir, and the estates should *ipso facto* accrue and devolve on the next heir of tailzie. In 1860 John Fleeming became by succession Lord Elphinstone. At that date a Mr Dunlop was in possession of the lands under a trust-deed granted by John Fleeming. In October 1860 Lady Hawarden, sister of John Fleeming, raised an action to have the lands transferred to her as next heir of entail. In 1861 John Fleeming, Lord Elphinstone, died, and his estates were sequestrated after his death. The action of Lady Hawarden was then

¹ Richardson v. Mellish, (1824) 2 Bing. 229, *per* Burrough, J., at p. 252; Janson v. Dreifontein Consolidated Mines, Limited, [1902] A. C. 484, *per* Lord Lindley, at p. 507. Reference was also made to Pollock on Contracts, (8th ed.) chap. 7, and Anson on Contracts, (12th ed.) pp. 221 *et seq.*

² 9 D. 1167.

³ 4 H. L. (Clark) 1, at pp. 162, 172, 177, 198, 200, 203, 235.

⁴ 6 Macph. (H. L.) 113.

Nov. 7, 1911. defended by Dunlop and by James Howden, the trustee in the sequestration. The case went to the Whole Court, who decided that the clause of devolution took effect immediately on John Fleeming's succession to the peerage, and that in equity Lady Hawarden's right was superior to that of Earl of Caithness v. Sinclair. (This case is reported under the name of *Viscountess Hawarden v. Elphinstone's Trustee*.¹) There were also some other lands called Duntiblae which had been held by John Fleeming under another entail. This entail had the same clause of devolution as that quoted, but the entail had never been recorded in the Register of Tailzies and was therefore a bad entail, that is to say, none of the prohibitions or irritancies were enforceable against a singular successor or against creditors of any heir who executed diligence against the lands. The trustee on the sequestrated estate accordingly raised an action against the trustee under the private deed and against the heir of entail of the said Lady Hawarden, she having meantime died. The Court of Session by a majority, distinguishing this case from the former on the ground that it was an unrecorded entail, gave decree in his favour. But the judgment was reversed by the House of Lords. Now the value of this judgment was that a clause of this kind was in no sense an irritancy or forfeiture which could only be effectual if the entail were unimpeachable; but was a condition of the right which operated *ipso facto* the moment that the event occurred. The validity or invalidity of the prohibitive and irritant clauses was therefore a consideration irrelevant to the question of the efficacy of the clause, which *inter hæredes* was always binding.

The next question is, I think, equally settled by authority, viz., by the old case of *Fleming v. Elphinstone*.²

The remaining question is whether the condition is against public policy and should therefore be disregarded. But it never seems to have occurred to the Bar or Bench in the long series of cases with clauses of this sort to take such a plea: and I agree with the opinion which has been more than once expressed, that the argument of public policy should be most cautiously applied by Judges; indeed, I would say, should hardly be applied unless there is exact precedent to bind them. But further in the cases which were cited, of which *Egerton v. Earl Brownlow*³ and *In re Beard*⁴ may be taken as examples, the illegality always lay in this, that the condition, if held to be valid, would prompt the legatee to a certain course of action—whether that action was positive, as in *Egerton's* case,³ or negative, as in *Beard's*⁴—which action was against public policy. But here the condition affects no course of action. The succession to a peerage is a thing which the succeeding person cannot help. On the other hand the legality of a wish on the part of a testator that his estate should remain the appendage of a distinct family, bound to bear a certain name and arms, and not to be merged in the family of a peer, has been recognised by the numberless instances mentioned in the books.

I am therefore of opinion that the questions must be answered in the affirmative. Had the father of the first party succeeded to the estate before

¹ 4 Macph. 353.

² M. 15,559.

³ 4 H. L. (Clark) 1.

⁴ [1908] 1 Ch. 383.

he succeeded to the peerage he might have altered the destination. But so Nov. 7, 1911.
 might Miss Louisa Buchan. She did not do so, and therefore the destina-
 tion must take effect as it stands in accordance with the rules which I have ^{Earl of}
 sought to explain above. ^{Caithness v.}
^{Sinclair.}

LORD KINNEAR.—I agree with your Lordship upon all the points which you have stated. The first question seems to me to be whether the clause of devolution is applicable to the position of the first party as having succeeded to a peerage before the succession to the estate of Auchmacoy had opened to him. That appears to me to be a mere question of construction to be determined according to the intention of the *mortis causa* settlement. So considering it, I should, without authority, have come to the conclusion that the clause was directly applicable to the case of the first party. But then, I agree with your Lordship that it is unnecessary to go further than to say that the question is really settled by the case of *Fleming v. Lord Elphinstone*.¹

Upon the second question; which is the more important question in the case, as to the legal efficacy of the clause of devolution, I also agree with your Lordship that that is settled by the judgment of the House of Lords in *Fleeming v. Howden*.² We were referred to the observations of the Judges in *Munro v. Butler Johnstone*,³ where it was doubted whether a clause of devolution could be sustained where the conveyance contained only a simple destination and not a strict entail. I apprehend there can be no doubt that the deed in question contains only a simple destination. There are no prohibitions fettered by the irritant and resolute clauses of a strict entail, nor are there any prohibitions directed against the heirs of entail which would be good *inter hæredes*, though they might be ineffectual against onerous creditors. It is a simple destination which might undoubtedly be evacuated by the first taker or any subsequent holder making up a title as heir of provision. But, then, I think it is settled by the case of *Fleeming v. Howden*,² that in order to sustain a clause of devolution of this kind it is not necessary that it should be connected with a strict entail. What was held in that case was that the clause must be sustained although there were no fetters effectually imposed upon the heirs of entail, because, the deed not having been registered, the heir in possession, before the contingency which brought into force the clause of devolution, might have dealt with the estate so as to disappoint the next substitute after him. It was pointed out by Lord Colonsay that the clause of devolution has no necessary connection with the entail clauses at all, that it is a condition of the right conferred by the deed, and, accordingly, that it may be sustained notwithstanding that there is no valid entail. I think it follows that it may be sustained even although the deed in which it occurs was never intended to be an entail at all, because the whole point of the decision is that, so long as the heir in possession possesses by virtue of the gift which contains the clause of devolution, and has, in fact, done nothing effectually to discharge that condition, he holds the estate under the obligation which the granter lays upon him. I take it that the real principle is that a gratuitous donee

¹ M. 15,559.² 6 Macph. (H. L.) 113.³ 7 Macph. 256.

Nov. 7, 1911. must accept the gift subject to the conditions which are imposed upon it by the granter. He binds himself, by his acceptance of the gift, to give effect to the conditions attached to it. And, accordingly, I think it is clear upon the decision that a simple destination is quite as effectual to support a clause of devolution as a strict entail would be.

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In the present case, the question does not arise exactly in the same way as if the present Lord Caithness had possessed the estate for a certain period and then been called upon to convey it to the next heir substitute; but it depends upon exactly the same rule. He has not, so far as the case before us shows, made up a title to the estate. The real question is whether it is he or whether it is the next heir who is now entitled to take up the succession as heir of provision; and the view I take of the case is this, that he is not so entitled because the destination, under which he would otherwise have been heir of provision, expressly excludes him by reason of his having succeeded to a peerage.

Upon the third question I agree also with your Lordship; and I should be very unwilling to proceed upon any personal notion of public policy with reference to a question which has been so often before the Court without any difficulty of that kind having ever been suggested. I think the rule to be extracted from the case of *Egerton v. Earl Brownlow*,¹ is that the force of any objection on the ground of policy depends upon the tendency of the testamentary dispositions in question to affect conduct. But as your Lordship has pointed out, the succession to an existing peerage does not depend upon the conduct of anyone. It is not a thing which the heir to the peerage directs his conduct to obtain. It happens to him whether he will or not. And, accordingly, I think the principle of *Egerton v. Earl Brownlow*¹ is quite inapplicable.

LORD JOHNSTON.—I come to the same conclusion as your Lordship. But I prefer to reach it in a somewhat different way.

Miss Buchan died in 1910. On her death the succession to Auchmacoy opened to the heir of provision under her father's settlement of the estate, which contained a tailzied destination, though it was not a strict entail. The heir to Miss Buchan has to be sought in that destination. The present Earl of Caithness cannot serve heir of provision to Miss Buchan, because by the fact of his being already a peer at the date of her death he is, on the authority of *Fleming's* case,² not the heir of investiture. In the circumstances the case is one of exclusion, not devolution. And as a case of exclusion it is, I think, simple.

Had the present Earl succeeded to the estate, on Miss Buchan's death, prior to his succession to the peerage, a case of devolution would have arisen, which I am glad I am not called on to consider. The authority of *Fleming's* case³ is, I must assume, conclusive. Yet I have, unfortunately for myself, entirely failed to grasp how,—consistently with the principle of Scots law that, without a trust or the fetters of an entail, you cannot give an absolute right, and yet control or forfeit that right,—a fee-simple proprietor who is so absolutely master of his estate that he can burden and dispose of it at

¹ 4 H. L. (Clark) 1.

² M. 15,559.

³ 6 Macph. (H. L.) 113.

will, without any breach of trust, can suddenly find himself deprived of property so absolutely vested in him, and reduced by implication to a mere trustee for someone else.

Nov. 7, 1911.
Earl of
Caithness v.
Sinclair.

LORD MACKENZIE.—I am of opinion that both questions should be answered in the affirmative. Although in the event which has happened, of the Earl succeeding to the peerage before the succession to Auchmacoy opened to him, the language of the conveyance does not directly apply, the proper construction to be put upon it has been concluded by authority adversely to the contention of the first party. This was decided in the case of *Fleming v. Lord Elphinstone*.¹ It makes no difference whether an heir of entail in possession succeeds to a peerage or a peer succeeds to the estate. The clause of devolution is meant to apply upon the co-existence of the two events, without regard to which happens first.

Nor is it necessary, in order that the clause of devolution shall operate, that it should be in a recorded deed of entail—*Fleeming v. Howden*.² It takes effect as a condition of the gift, which must qualify its terms.

It was contended that it was contrary to public policy for a person to adject as a condition to a bequest of his estate that it shall not be held by one who succeeds to a peerage, and shall not be taken by one who is already a peer. It has however been held that a similar condition is effectual if directed against particular peerages. I am unable to say there is a valid distinction between the one case and the other. The case of *Egerton v. Earl Brownlow*³ was different. Here what is provided against is not acquisition, but succession, and there is no interference with the prerogative of the Crown. In the case of *In re Beard*⁴ a direct inducement was held out to a legatee not to enter the naval or military service of the country. This was held void as striking against the security of the State. There is no such inducement here.

There is thus sufficient to conclude the case against the first party.

THE COURT answered both questions of law in the affirmative.

TODS, MURRAY, & JAMIESON, W.S.—F. J. MARTIN, W.S.—Agents.

ROBERT CUMMING (Robert Smart's Trustee), First Party.—*Maclaren*.
JOHN FORGAN AND OTHERS (Miss Jessie Smart's Trustees), Second Parties.—*Mercer*.

No. 14.

Nov. 9, 1911.

Succession—Testament—Construction—Provision of “liferent use and enjoyment” of house, coupled with direction for immediate distribution of the residue—Liferent or occupancy—Liability for proprietor's burdens.

Smart's
Trustee v.
Smart's
Trustees.

A testator directed his trustee, after payment of the expenses of administering the trust, to give the “liferent use and enjoyment” of a dwelling-house and furnishings to his sister, to pay certain legacies, and to realise and divide the whole residue of his estate among certain residuary legatees; and he directed that on the death of his sister the house and furnishings should be sold and the proceeds divided between the residuary legatees.

¹ M. 15,559.

² 4 H. L. (Clark) 1.

³ 6 Macph. (H. L.) 113.

⁴ [1908] 1 Ch. 383.

Nov. 9, 1911.

Smart's
Trustee v.
Smart's
Trustees.

A question having arisen as to the liability for the proprietor's burdens affecting the house in question, the trustee maintained that they fell to be paid by the sister, in respect that the right conferred upon her was a liferent proper and not a mere right of occupancy, and founded upon the use by the testator of the word "liferent," coupled with the direction to divide the residue at the date of his death, the effect of which would be to leave no fund in the hands of the trustee out of which the proprietor's burdens could be paid.

Held that the sister's right in the house was one of occupancy only, and that the trustee was bound to repay out of the general residue the sums expended by her on proprietor's burdens.

Observations (per the Lord President) on *Johnstone v. Mackenzie's Trustees*, 1911 S. C. 321.

1ST DIVISION. ON 11th January 1911 a special case was presented for the opinion of the Court on the effect of certain testamentary provisions of the late Robert Smart. The parties to the case were:—*First party*, Mr Smart's testamentary trustee, and *Second parties*, the testamentary trustees of Miss Jessie Smart, the testator's sister.

Mr Smart died on 10th March 1905, leaving a trust-disposition and settlement, whereby he bequeathed his whole means and estate to the first party, as trustee for the following purposes:—“(First) That my said trustee shall pay all just and lawful debts that may be owing by me at the time of my death, my sickbed and funeral expenses, and the expenses attending the execution of this trust: (Second) That my trustee shall give to my sister, Miss Janet or Jessie Smart, residing with me, in the event of her surviving me, during all the days of her life, the liferent use and enjoyment of the dwelling-house Number nine Denham Green Avenue, Trinity Road, Leith, recently purchased by me for my own occupation, together with the whole household furniture and plenishing belonging to me at the time of my death, including books, pictures, linen, china, plate, plated articles and others, without any obligation upon her to replace articles broken or perishing with the using, and after the death of my said sister the said dwelling-house, furniture, plenishing, and others shall form part of the residue of my said means and estate and be disposed of as aftermentioned.” The third and fourth purposes directed the payment of certain legacies at the first term of Whitsunday or Martinmas which should occur six months after the testator's death. “(Fifth) That my trustee shall realise and convert into money the whole residue and remainder of my means and estate, and divide the same into seven equal parts or shares, and shall pay and make over one of said parts or shares to each of the following persons, viz., (first) my sister, the said Miss Janet or Jessie Smart” [then followed the names of six other persons]. “And (Sixth) That on the death of my said sister, Miss Janet or Jessie Smart, in the event of her surviving me, my trustees shall realise and convert into money the said dwelling-house, Number nine Denham Green Avenue, and furniture, plenishing, and others liferented by her, and divide the same into six equal parts or shares, and pay and make over one of said shares to each of the” [six residuary legatees other than Miss Jessie Smart mentioned in the fifth purpose]. The will conferred full powers of sale, realisation, administration, and management of the estate upon the trustee.

On the death of Mr Smart the first party entered into possession of the trust-estate, which consisted of the house No. 9 Denham Green

Avenue, valued at £900, other heritable property amounting in value to about £700, and moveable estate to the value of about £9300. He duly paid the legacies bequeathed by the third and fourth purposes of the will, allowed Miss Smart to have the liferent use and enjoyment of the house and furnishings in terms of the second purpose, and realised and divided the residue of the estate as directed by the fifth purpose. Nov. 9, 1911.
Smart's
Trustee v.
Smart's
Trustees.

Miss Smart died on 26th June 1909, leaving a trust-disposition and settlement and codicils, under which she appointed the second parties to be her trustees and executors.

The following statements were made in the case:—

"11. After the death of the said Janet or Jessie Smart, the first party sold the said dwelling-house for the sum of £810 for settlement at Whitsunday 1910, and he also sold the said furniture, the amount realised therefor being £58, 2s. The first party has duly received payment of the prices of the said house and furniture, but he has not yet divided and paid and made over the same in terms of the sixth purpose of Mr Smart's trust-disposition and settlement.

"12. During the period that the said Janet or Jessie Smart survived her brother, the said Robert Smart, she occupied the said dwelling-house, No. 9 Denham Green Avenue, and paid the feu-duty, taxes (landlord's and tenant's) payable in respect of said house, and also the fire insurance premiums and cost of repairs.

"13. The said Janet or Jessie Smart paid the said feu-duty, taxes, insurance premiums, and cost of repairs in the belief that she was liable to do so, but the second parties maintain that the said feu-duty, the said taxes in so far as they were proprietor's taxes, the said insurance premiums, and the costs of said repairs in so far as they were costs falling to be paid by a proprietor, were paid by her in error. They maintain that the said Janet or Jessie Smart had merely a personal right of occupancy of the said dwelling-house, and that she was therefore not liable to make the annual payments above mentioned, and that these were payable, and ought to have been paid from time to time, either out of the general residue and remainder of the said Robert Smart's trust-estate, or by charging the same against the fee of the said house. They maintain that as the price of the said house is still in the hands of the first party, and is divisible among and payable to the same persons as the general residue and remainder of the said Robert Smart's trust-estate, except the said Janet or Jessie Smart herself, the amount of the said annual payments, with periodical interest thereon, ought to be repaid to them out of the said price to the extent of the whole amount of said payments, or, alternatively, to the extent of six-sevenths thereof. The first party maintains that the said Janet or Jessie Smart was liferentrix of the said dwelling-house, and was as such liable in payment of the said annual burdens."

The questions of law for the determination of the Court were:—

"1. Was the said Janet or Jessie Smart entitled to the liferent use and enjoyment of the said dwelling-house free of feu-duty, proprietor's taxes, fire insurance premiums, and cost of proprietor's repairs, and, if so, (a) ought the said annual burdens to have been made a charge upon the general residue and remainder of the testator's trust-estate, and are the second parties therefore entitled now to get repayment of the amount thereof, with periodical interest thereon, to the extent of six-sevenths thereof, out of the funds still remaining in the hands of the first party, or (b) ought the said annual burdens to have been

Nov. 9, 1911. charged upon the fee of the said house, and are the second parties therefore entitled now to get repayment of the whole amount thereof, with periodical interest thereon, out of the funds still remaining in the hands of the first party? or, 2. Were the said annual burdens payable by the said Janet or Jessie Smart herself?"

Smart's
Trustee v.
Smart's
Trustees.

The case was heard before the First Division (consisting of the Lord President, Lord Johnston, and Lord Cullen) on 9th November 1911.

Argued for the second parties;—The expression "liferent use and enjoyment" and other similar expressions had been the subject of construction in a series of cases, and it was now well settled that the effect of these words was to confer a right of occupancy only, not one of liferent proper.¹ The special circumstances founded on by the first party were not sufficient to except the case from the operation of the general rule.

Argued for the first party;—The mere use of the expression "liferent use and enjoyment," was not sufficient to instruct a limited right of occupancy, where, as here, a different intention was to be read from the general terms of the deed in which the expression occurred. The truster directed that his whole estate, other than the house, should be realised and divided at the date of his death, and that the proceeds of the sale of the house should be divided at the death of the liferentrix. There was accordingly no provision for any continuing trust fund out of which the feu-duties and other proprietor's burdens could be paid. Such expenses might properly be met out of residue if there had been any provision creating a continuing residue fund, but they were not proper charges of administration falling under the first purpose. An intention must therefore be inferred that they were to be paid by the liferentrix. The case was distinguished in this respect from those cited for the second parties. In all of these (with the exception of *Johnstone's* case²) the trustees were continuing to hold the residue of the estate. In *Clark's* case,³ in addition to the circumstance that there was a continuing trust fund, the expression under construction was "use," and it was to be inferred that in *Rodger's* case⁴ the Lord President would have given a different construction to the expression "liferent use" had it not been that the terms of the will in that case expressly absolved the liferenter from payment of proprietor's burdens. In *Johnstone's* case,² though the residue of the estate, as here, fell to be divided at the death of the testator, there still remained a surplus revenue from the fund set apart to secure the widow's annuity from which proprietor's burdens could be met, and it was on this ground that the judgment of the majority of the Court in that case proceeded.⁵

LORD PRESIDENT.—I think this is a matter which is entirely settled by authority. The second purpose of the settlement of the late Robert Smart was that his trustee should give to his sister, Miss Jessie Smart,

¹ *Clark and Others*, (1871) 9 Macph. 435; *Rodger's Trustees v. Rodger*, (1875) 2 R. 294; *Bayne's Trustees v. Bayne*, (1894) 22 R. 26; *Cathcart's Trustees v. Allerdice*, (1889) 2 F. 326; *Johnstone v. Mackenzie's Trustees*, 1911 S. C. 321.

² 1911 S. C. 321.

³ 9 Macph. 435.

⁴ 2 R. 294.

⁵ Counsel also referred to *Betty v. Attorney-General*, [1899] 1 Ch. 821, at p. 824.

residing with him, in the event of her surviving him, during all the days of Nov. 9, 1911. her life, "the liferent use and enjoyment" of the dwelling-house No. 9 Danham Green Avenue, Trinity Road, Leith, recently purchased by him for his own occupation. Then after payment of expenses there was to be a distribution of the residue into seven shares, and then there is another provision that after the death of Miss Smart the dwelling-house and its furniture are to be realised, and the proceeds divided among the other six residuary legatees. Now, it is settled by a series of cases that a provision in this form gives a right of occupancy to a beneficiary but not a proper liferent. It was first of all so held in the case of *Clark*,¹ where the expression was "to give her (the testator's wife) the use of my house No. 36 Drummond Place, with the whole furniture and effects contained therein," so long as she remained a widow. Then in the case of *Rodger*² it was "the liferent use and enjoyment of the house"; though the case of *Rodger*² is not of so much value as *Clark*,¹ because there was a special clause superadded "free of all feu-duty, ground-annual, taxes, and all other deductions." But in *Bayne*³ there was a direction that the house was to be given "during all the days of her natural life." In *Cathcart*⁴ the expression was "the liferent use of any one house" the testator might die possessed of; and the final case was *Johnstone v. Mackenzie's Trustees*,⁵ where there was given "the liferent use and enjoyment."

Smart's
Trustee v.
Smart's
Trustees.
—
Ld. President;

Counsel for the first party wished to draw a distinction between the cases where the expression "liferent" was used and the cases where "liferent" was not used. He said that Lord President Inglis decided *Clark*¹ in the way he did because there was an absence of the word "liferent"; and he draws the conclusion that Lord President Inglis would have decided *Rodger*² the other way if it had not been for the special words "free of all feu-duty, ground-annual, and taxes." I do not myself think so. But this is quite certain that, if that is the true view of these two cases, both *Bayne*³ and *Cathcart*⁴ were wrongly decided. "Liferent" is not a word which had to be used like the word "dispone" in a disposition. At any rate, *Bayne*³ and *Cathcart*⁴ certainly bind us much more than the consideration of what Lord President Inglis might have decided in *Rodger*.²

Then we come to *Johnstone v. Mackenzie's Trustees*.⁵ In that case Lord Guthrie decided the other way. He had drawn a distinction from the fact that in all the earlier cases there was always a continuing fund in the hands of the trustees, and therefore there was something out of which the trustees might meet necessary outgoings upon the property in respect of the widow's occupancy of the house; whereas in *Johnstone v. Mackenzie's Trustees*⁵ there was a direction, as here, to divide the residue of the estate after the testator's death. Mr Mercer said that the only thing that made the Second Division reverse Lord Guthrie's judgment was that in that case there was a very ample sum to meet the annuity, and that there was enough out of the surplus revenue of that sum to meet the outgoings.

I cannot say that I put anything upon that fact. In the first place, so far as Lord Ardwall is concerned, he says that the moment you construe the clause in that way the trustees would have had a perfect right to keep back

¹ 9 Macph. 435.

² 2 R. 294.

³ 22 R. 26.

⁴ 2 F. 326.

⁵ 1911 S. C. 321.

Nov. 9, 1911. a certain sum before dividing residue. No doubt it is true that Lord Dundas says that he does not think that this could have been met out of residue, and the Lord Justice-Clerk concurred with Lord Dundas and intimated that Lord Salvesen also concurred. It is a little unsafe to take the opinion of a concurring Judge as adopting in so many words each and every proposition which another Judge has stated where that proposition is not necessary for reaching the judgment. So far as I am concerned, I am bound to say I cannot agree with Lord Dundas. I agree with Lord Ardwall. It seems to me that the construction of the direction to the trustees to allow the lady the use of the house cannot be altered by the fact that they are told to divide the residue. Whether trustees, as a matter of fact, should retain part of the residue in order to meet these burdens is a question for themselves, and a question of circumstances. I cannot see how the mere existence of a direction to divide the residue can possibly affect the true construction of a direction that you are to give a certain person one thing or another. As a result, I think Miss Smart's testamentary trustees are entitled to repayment of six-sevenths of the feu-duty and proprietor's taxes which she paid.

Smart's
Trustee v.
Smart's
Trustees.
—
Ld. President.

LORD JOHNSTON and LORD CULLEN concurred.

THE COURT answered branch (a) of question 1 in the affirmative.

CUMMING & DUFF, S.S.C.—JOHN FORGAN, S.S.C.—Agents.

No. 15. GEORGE BAINBRIDGE, Petitioner (Respondent).—*Sandeman, K.C.*—*H. P. Macmillan.*
Nov. 9, 1911. JOHN CAMPBELL AND OTHERS, Objectors (Appellants).—*Chree—Macquisten.*
Bainbridge v. Campbell.

Property—Building restriction—"Villas or dwelling-houses"—Legality of erecting tenements.

In a disposition of a plot of building ground the disponent prohibited the erection of houses or buildings "other than villas or dwelling-houses with offices and such enclosing walls as my said disponent may think proper to build."

Held (diss. Lord Johnston) that the erection of a tenement of dwelling-houses was not prohibited.

1ST DIVISION. IN September 1910, George Bainbridge, florist, Rothesay, the proprietor of a plot of building ground on the east side of Mill Street, Rutherglen, proposed to erect thereon three tenements of dwelling-houses, and presented a petition in the Dean of Guild Court there for warrant to do so.

Dean of Guild
Court,
Rutherglen.

The petitioner's ground was part of an area at one time held by a single proprietor, who, between 1872 and 1877, conveyed certain portions of it to various feuars and disponents, including the petitioner. The disposition in favour of the petitioner, granted in 1877, provided as follows:—"And providing, as it is hereby provided and declared, that no houses or buildings of any kind shall be erected on the said ground other than villas or dwelling-houses with offices and such enclosing walls as my said disponent may think proper to build, but this shall not imply a prohibition against using the ground for

nursery purposes for the rearing of trees, plants, shrubs, fruits, and flowers, nor shall it imply a prohibition against the erection of green-houses or conservatories, which, if erected, shall be constructed of iron or wood of an ornamental character, except to the extent of 4 feet above the surface of the ground, which may be of neat brick or stone work." Nov. 9, 1911.
Bainbridge v.
Campbell

Objections were lodged to the petition by John Campbell, Park Villa, Rutherglen, and four others, being the proprietors of the other portions of the area given off between 1872 and 1877, and the representatives of the common author who still retained a portion of the area. It is unnecessary for the purposes of this report to refer to the particular terms of the titles of the objectors.

The objector John Campbell pleaded;—The petitioner being prevented by the terms of his title from erecting the buildings proposed by him, and the objector being entitled, and having an interest to object thereto, the warrant craved should be refused, with expenses.

Similar pleas were stated by the other objectors.

On 6th November 1910 the Dean of Guild granted a lining by an interlocutor in the following terms:—"Finds that the buildings proposed by the petitioner are not in violation of restrictions contained in his title: Therefore repels the objections stated for the respondents, and grants warrant as craved." *

* "NOTE.—The petitioner is proprietor of a piece of ground extending to 6300 square yards lying on the east side of Mill Street, Rutherglen, and he asks authority to erect thereon three tenements of dwelling-houses of single apartments and rooms and kitchen. That ground was part of an area of 10 roods which at one time belonged to a Mr Warnock, the ancestor of the respondents the Misses Warnock, and the author of the other respondents. The remainder of the 10 roods is now held by the respondents. The ground held by the respondent Rodger was given off by Warnock in 1872. The ground held by the respondent Campbell was given off later in the same year. The ground now belonging to the respondent M'Mahon was given off along with the ground now belonging to the petitioner in November 1877. The Misses Warnock made up a title in 1895 to the ground now held by them. [The Dean then referred to the terms of the various titles, and continued:]"

"A long and interesting argument was addressed to the Dean of Guild as to whether the respondents had a *jus quæsitum* to enforce restrictions in the petitioner's title. Several interesting topics were touched upon in the consideration of that question, for example, the effect of the consolidation effected in the title of the ground belonging to the respondent M'Mahon—the effect of the discharge of the ground annual in the title of the respondent Campbell—and the freedom from the common restriction of the ground belonging to the respondents the Misses Warnock, and so on. But, in the view which the Dean has come to take in this case, it is unnecessary for him to decide the question of *jus quæsitum* or to deal further with the topics alluded to. The Dean thinks this case can be determined upon the main issue between the parties, viz., the effect of the restrictive covenant in the petitioner's title.

"It was maintained for the respondent Campbell that the expression 'villas or dwelling-houses,' must be read along with the context; that the word 'villas' followed by the word 'dwelling-houses' really was equivalent to 'villas and dwelling-houses like villas,' or 'villas and dwelling-houses of that class,' and that the words must be read with reference to the objects of the deed in which they were found. The Dean of Guild cannot accept that mode of interpretation which would make him read the expression 'villas

Nov. 9, 1911. The objectors appealed, and the case was heard before the First Division (consisting of the Lord President, Lord Johnston, and Lord Cullen) on 8th November 1911.

Bainbridge v.
Campbell.

Argued for the appellants;—Flatted tenements were not dwelling-houses within the meaning of the exception contained in the petitioner's title. Though there might be circumstances in which such tenements could be regarded as dwelling-houses,¹ they could in no case be regarded as villas.² For the purposes of the petitioner's title the words "dwelling-houses" were to be construed as referring to buildings *ejusdem generis* with "villas," and this construction necessarily excluded tenements. Moreover, dwelling-houses "with offices and enclosing walls" clearly referred to dwelling-houses of the nature of villas and not to tenements. All deeds granted by the common author of the petitioner and the objectors might competently be referred to for the purpose of construing building restrictions im-

or dwelling-houses' as contended for. He agrees that the context of the deed must be looked at, and to some extent that words of restriction must be read with reference to the objects of the deed; but, allowing for that, he can find nothing in the context and nothing from the objects of the deed which would force him to limit the phrase or expression 'dwelling-houses' to 'villas or dwelling-houses like villas.' It was maintained for the other respondents that it was evident that some restriction was meant, and that if the expression 'dwelling-houses' was not limited as contended for, then the restriction was without meaning. The conclusive answer to that argument is that there could quite well be a restriction without a limitation to villas. There could be a limitation to buildings with the quality of residence, which by contrast would exclude buildings of a business character. And that, it seems to the Dean, is the essence of the restriction in the deed in question. It was next maintained that the phrases 'villas' and 'dwelling-houses' were exegetical of each other and not alternative. The first observation which occurs upon that is that the exegesis is not too happy. Dwelling-houses certainly connote residence, but it was not necessary for a word like 'villa' to have an exegetical definition of that nature. But the argument strongly pressed upon the Dean was that if the language used in the restrictive covenant was not self-explanatory, the Dean must put himself in the place of the parties to that covenant so as to arrive, if possible, at the true construction. In other words, the contention amounted to this, that in construing the restriction intention must be looked to. The Dean thinks that the answer to such a contention is found in the words of Lord Rutherford Clark in the case of *Cowan v. The Magistrates of Edinburgh*, (1887) 14 R., at p. 686: 'Any such prohibition must be clearly expressed, but I cannot find any clear expression of it—indeed I doubt if there is any expression of prohibition in the deed at all. It is said that we may gather what may have been the intention of the framers of the deed, and from that intention may gather what the deed proposed to do. That is a mode of construing a feucharter to which we are unaccustomed, and there is here nothing in favour of that mode of construction; on the contrary, the rule is in favour of liberty to the vassal. All such clauses of prohibition must be strictly construed.'

"Even if there were room for two constructions, the construction which laid the less restriction or no restriction at all would fall to be preferred. *Russell v. Cowpar*, (1882) 9 R. 660, Lord Deas, at p. 666. But the Dean does not think that within the four corners of the deed in question there is

¹ *Assets Co., Limited, v. Ogilvie* (1896) 24 R. 400.

² *Millar v. Church of Scotland* (1896) 23 R. 557; *M'Arthur v. Magistrates of Edinburgh*, (1906) 8 F. 1123.

posed by him, and when the petitioner's title was construed in the light of the terms used in these deeds it did not justify the Dean of Guild's conclusions. Nov. 9, 1911.
Bainbridge v.
Campbell.

Argued for the respondent;—All dwelling-houses, including those in tenements, might be erected with offices and enclosing walls, so the presence of these words did not help the appellants' case. The petitioner's title contained no restriction to self-contained houses, as it would have done if such a restriction had been intended.¹ The term "villas" was intended to mean something different from "dwelling-houses"; and flatted tenements, as defined by the Lord Justice-Clerk in the case of *M'Arthur v. Magistrates of Edinburgh*,² were dwelling-houses within the meaning of the petitioner's title.³ It could not be argued that each plot was only to contain one villa or dwelling-house, for there was no limitation as to the number of dwelling-houses which the petitioner might erect. If the terms of the restriction imposed were open to more than one construction, that construction was to be preferred which was in favour of freedom. In any event there was no community of interest between the petitioner and the appellants.

At advising on 9th November 1911,—

LORD PRESIDENT.—This is an appeal from a decree of lining of the Dean of Guild of the burgh of Rutherglen. In granting the decree of lining the Dean of Guild decided adversely to the objections of certain coterminous proprietors.

The erection of houses for which warrant is sought is an erection of what is generally known as tenement houses, that is to say, a structure in which there are separate sets of rooms forming separate dwelling-places for families.

In the title of the petitioner there is this provision: "Providing, as it is hereby provided and declared, that no houses or buildings of any kind shall be erected on the said ground other than villas or dwelling-houses

room for two constructions. Reading the deed in a fair way, the Dean is bound to say that so far as its terms go all that has been provided is that no buildings other than those of a residential kind, or buildings for a nursery are to be allowed to be erected, and the Dean therefore finds that the buildings proposed are not in contravention of the title under which the petitioner holds his ground, and he has accordingly granted the lining.

"Upon the question decided by the Dean, the following authorities (given here chronologically) were referred to by the parties:—*Lumsden v. Lorimer*, (1843) 5 D. 501; *Frame v. Cameron*, (1864) 3 Macph. 290; *Fraser v. Downie*, (1877) 4 R. 942; *Moir's Trustees v. M'Ewan*, (1880) 7 R. 1141; *Cochran v. Paterson*, (1882) 9 R. 634; *Buchanan, &c. v. Marr*, (1883) 10 R. 936; *Colville v. Carrick*, (1883) 10 R. 1241; *Middleton v. Leslie*, (1894) 21 R. 781; *Assets Co. Ltd. v. Lamb & Gibson* (1896) 23 R. 569; *Assets Co. Ltd. v. Ogilvie*, (1896) 24 R. 400; *Richardson v. Borthwick*, (1896) 3 S. L. T. 303; *Millar v. Church of Scotland*, (1896) 23 R. 557; *Fleming v. Ure*, (1896) 3 S. L. T. 286, 4 S. L. T. 26; *Campbell v. Bremner*, (1897) 24 R. 1142; *Kimber v. Admans*, [1900] 1 Ch. 412; *Rodgers v. Hosegood*, [1900] 2 Ch. 388; *Graham v. Shiels*, (1901) 8 S. L. T. 368; *Minister of Prestonpans v. The Heritors*, (1905) 13 S. L. T. 463; *MacTaggart & Co. v. Harrower*, (1906) 8 F. 1101; *M'Arthur v. Magistrates of Edinburgh*, (1906) 8 F. 1123; and *Macguire v. Burgess*, 1909 S. C. 1283."

¹ *Assets Co., Limited, v. Ogilvie*, 24 R. 400, Lord Trayner, at p. 409.

² 8 F., at p. 1127.

³ *Kimber v. Admans*, [1900] 1 Ch. 412.

Nov. 9, 1911. with offices and such enclosing walls as my said disponent may think proper
Bainbridge v. to build." Then it goes on to express in words that I need not read, that
Campbell. "this shall not imply a prohibition against using the ground for nursery pur-
poses," and allows a certain class of greenhouse or conservatory to be put
Ld. President. up on the ground.

Now, the petitioner denies that there is any title in the objectors to insist upon the restrictions of his title, whatever they may be. The Dean of Guild has not found it necessary to decide that question, because he has held that the particular erection is not struck at by the prohibition, and as I agree with the Dean of Guild, I too do not think it necessary to form any opinion upon that question. I assume for the purposes of the argument that there is such mutuality of stipulation here as, in accordance with the well-settled rule, would give the objectors a title to object.

The whole matter turns upon the question whether the expressions in the prohibition of houses or buildings other than "villas or dwelling-houses with offices and such enclosing walls as my said disponent may think proper to build," do or do not strike at a tenement of dwelling-houses. I think they do not, and I have very little to add to the very clear and, I think, good judgment which the Dean of Guild has given; but as there is a difference of opinion among your Lordships, I shall say a few words more upon the subject.

In the first place, I think it is absolutely settled that the presumption is always for freedom; and it is a corollary of that that the person who has the title is entitled to read the language of the title in the way in which words are ordinarily read in any other contract. I say that because I think it is not permissible in this case to go to the other titles which have been granted by the same disponent in order, so to speak, to form a glossary of the disponent's words. There is no certainty that the petitioner in this case ever saw these other titles. He was not bound to go to the register of sasines to look for them. He was entitled to take the words which were proffered to him in his own title, and, if they suited him, to agree.

That being so, I ask myself whether the words "or dwelling-houses" can be considered as merely exegetical of "villas." I see no reason for supposing that they are, and the disjunctive "or" is certainly quite as appropriate to the view that they are not. I agree that, if there was never a case in which you could suppose that a tenement of houses should have offices attached, there would be something to be said for the idea that, inasmuch as these things which are allowed to be built are to have offices attached, or there is a possibility of their having offices attached, the conclusion would be that "dwelling-houses" was merely exegetical of "villas," if a villa was the only thing that could have offices attached. But it seems to me that a tenement is just as much in need of offices as a villa is. There was a necessity for putting the word in because, if nothing had been said, it might have been maintained that you could not build adjuncts, such as coal-houses, wash-houses, and so on, on the back ground.

It seems to me, therefore, that the prohibition is a prohibition against all things that do not fall within the class allied with villa or dwelling-house, that is to say, shop or manufactory, and so on. But a tenement of dwelling-houses is just a dwelling-house. It is a dwelling-house with more

or less accommodation in it. I cannot think that, in ordinary parlance, a set of flats could not be called a dwelling-house—they are dwelling-houses, and it is noticeable here that the plural is used and not the singular. Nov. 9, 1911.
Bainbridge v.
Campbell.

Accordingly, I come to the conclusion, and really without much difficulty, that upon this title the petitioner was entitled to take it as meaning that he might erect any kind of dwelling-house; and although, if one were allowed to speculate as to what the granter of the other titles had meant, it is quite likely that he meant to keep this ground for villa ground proper, still I think he did not say so in this title, and that is enough for the petitioner. On the whole matter I am of opinion that the Dean of Guild's judgment is right and should be affirmed. Ld. President.

LORD JOHNSTON.—The question here is one of interpretation of a particular restriction in a particular conveyance, and in interpreting that restriction I think that I am confined to a consideration of the conveyance in question, and am not entitled to look for assistance to other titles granted by the same author to the other portions of the ground of which that in question forms part. These can, I think, only be referred to, to determine whether the holders have any *jus quæsitum* to enforce restrictive provisions contained in the conveyance to be interpreted.

Turning, then, to the deed in question, I find restriction of some kind intended, and I find further, a distinction drawn between "houses or buildings" and "villas or dwelling-houses." I accept the conclusion of the Judges in *Kimber's* case,¹ that the term "house" standing alone without a context should be read as referring to the external structure, and not to the internal arrangements for occupation—to the whole regarded as an erection, and not to the parts as arranged for occupation. But when I contrast the term "houses or buildings" with the term "villas or dwelling-houses," and find that the former are prohibited, unless they conform to the description of the latter, I think I have such a context as the Judges in *Kimber's*¹ case desiderated, and obtain some assistance in the construction. Had the area disposed to the petitioner been a small portion of the whole area, as are the subjects belonging to the objectors, and had I found the prohibition to be against erecting any house or building other than a villa or dwelling-house, I should not have thought it doubtful that the petitioner was restricted to a villa, or dwelling-house such as commonly goes under that name. In fact, I should have regarded the words "or dwelling-house" as a redundant and stupid exegesis, and not as a proper alternative, wholly destructive of the sense of the restriction, and capable of being expanded into cottage, self-contained house, tenement, hotel, nay even common lodging-house, workhouse, infirmary, or any other erection adapted to human habitation, as the alternative for "villa." For I cannot understand the sense of introducing the primary word "villa" at all, if dwelling-house, in such expansive sense, is a true alternative, and covers anything which can be achieved by the building trade for human habitation, provided it can be regarded as one erection. The further context "with offices and such enclosing walls as my said disponee may think

¹ [1900] 1 Ch. 412.

Nov. 9, 1911. proper," is, at any rate, more appropriate to the idea of villa or dwelling-house for separate occupation, than to a block of tenement houses. I
Bainbridge v. should therefore have construed villa or dwelling-house in the singular to
Campbell. mean a villa or separated dwelling-house for separate occupation. That
Ld. Johnston. the exegesis would have been redundant and stupid, would not, I think, have justified its being rejected as an exegesis, and turned into a true alternative, destructive of the sense of the restriction.

What the petitioner acquired, however, was not one stance, but the whole balance of the original plot after several parcels had been disposed of, the original plot being building ground, already laid off with surrounding streets and a dividing avenue, and provided with a drainage system. But if my construction would have been a fair reading of the clause, had it been confined to one stance and the restriction confined to one erection, I think that it is equally applicable, in these circumstances, to a congeries of stances, and to a relative and comprehensive restriction.

LORD CULLEN.—I concur in the views expressed by your Lordship in the chair.

It is clear that in the absence of a restrictive context the term "dwelling-houses" includes tenements of flatted dwelling-houses. The objectors accordingly seek to find a restrictive context in the use of the word "villas." It is illogical, they say, first to authorise villas and then to go on to authorise dwelling-houses generally, including villas. And therefore they argue "dwelling-houses" must be taken to mean such dwelling-houses as are akin to villas. Now I do not think that this goes further than to raise a surmise as to whether the words used in the deed express what may have been in the minds of the parties. The fact remains that the deed, logically or illogically, authorises not only villas but "dwelling houses," without any expressed qualification such as might have been conveyed by, say, the adjective "self-contained." If the disponent intended any such qualification, he could readily have expressed it, and ought to have done so. The well-settled presumption is all in favour of freedom of ownership on the part of the disponee. One must go not on mere surmise, although plausible, but on the words actually used, preferring, *in dubio*, a construction which makes for freedom rather than for restriction.

The permitted structures include offices and enclosing walls. If these are pointed to as indicating the character of the dwelling-houses authorised by the deed, it is sufficient to say that flatted tenements may, and commonly do, have offices connected with them, and that they may equally well have walls enclosing the ground on which they have been erected.

THE COURT dismissed the appeal, and remitted the cause to the Dean of Guild to proceed.

HUTTON & JACK, Solicitors—ERSKINE DODS & RHIND, S.S.C.—Agents.

JEMIMA SUTHERLAND OR HALVORSEN AND NEIL THEODORE HALVORSEN, No. 16.
Pursuers (Respondents).—*M'Lennan, K.C.—Wm. Mitchell.*

JOHAN THOMAS SALVESEN AND OTHERS (Owners of the s.s. "Ramleh"), Nov. 11, 1911.
Defenders (Appellants).—*Murray, K.C.—J. G. Jameson.*

Halvorsen v.
Salvesen.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), sec. 1 (1)—
Accident arising out of and in the course of the employment—Seaman
attempting to reach ship in a boat without oars.

A ship's engineer who had been ashore in the course of his employment attempted to reach his vessel, which was moored 100 yards from the shore, alone and without oars in a 27-foot lifeboat which should have been manned by a crew of six rowers, trusting that the boat would be carried in the direction of the vessel by the force of wind and tide, his only means of directing its course being by paddling with the rudder. He was blown out to sea and was drowned.

Held that the accident did not arise out of the employment.

IN an arbitration under the Workmen's Compensation Act, 1906, in 1st Division.
which the representatives of Theodore Halvorsen claimed compensa- Sheriff of the
tion in respect of his death from the owners of the s.s. "Ramleh," the Lothians and
Sheriff-substitute at Leith (Guy) awarded compensation, and, at the Peebles.
request of the employers, stated a case for appeal.

The case set forth that the following facts were admitted or proved:—

"On 11th July 1910 the said Theodore Halvorsen was in the employment of the appellants as second engineer on board their steamship 'Ramleh,' which was then at anchor at Leith Harbour, South Georgia, an island situated in the South Atlantic Ocean. The steamship 'Ramleh' is a 'ship,' and the said Theodore Halvorsen was a 'seaman,' within the meaning of the Merchant Shipping Acts, 1894 and 1906. The said vessel arrived in said harbour early in May 1910, and shortly thereafter, while the said steamship 'Ramleh' was lying in said harbour, the said Theodore Halvorsen received an injury to his thumb by accident arising out of and in the course of his employment, by its being crushed in the machinery of the ship. The injury necessitated the services of a medical man, and the appellants, in implement of their duty under section 34 of the Merchant Shipping Act, 1906, allowed all the seamen on board their vessels to have the services free, when their ships were at Leith Harbour, South Georgia, of a medical man, Dr Cruickshanks, resident on shore there. On the afternoon of the day when the said Theodore Halvorsen met with said accident he went ashore, and was attended to by Dr Cruickshanks, whose services, as a medical man, were sometimes given on board ship and sometimes given at his house on shore.

"Shortly after the said Theodore Halvorsen's thumb had been attended to by the said Dr Cruickshanks, he was absent from the said harbour on another of the appellants' steamers, engaged in the capacity of chief engineer on an emergency voyage in search of a missing whaler, on which voyage he was absent for about three weeks.

"On his return his thumb was still requiring medical treatment, and on 11th July 1910 he went on shore for the purpose of seeing the doctor in connection therewith and having his thumb dressed. The said Theodore Halvorsen and Robert Hood, the third engineer, had been on shore on 10th July 1910 on their own private business or pleasure, namely, shooting, and had then seen Dr Cruickshanks,

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who asked Halvorsen when he was again coming to see him, and it was then arranged that Halvorsen should see him soon. Leith Harbour, South Georgia, has no built quay, but is only a natural harbour, which might be described as a narrow bay or creek in which ships anchor. Ships are discharged and loaded by means of small boats, which go and come between them and a jetty on shore. The 'Ramleh' was anchored about one hundred yards from the jetty. The said Theodore Halvorsen, along with Hood the third engineer, went on shore from the 'Ramleh' on the occasion in question in a small boat belonging to the ship, tied it to the jetty, and went to the doctor's house. The time when they went on shore was early evening, after their ordinary hours of work on board the ship were over for the day. On their arrival there the said Theodore Halvorsen called for the doctor, but was informed that he was not within the house. They—Theodore Halvorsen and his companion, the third engineer—then waited for some time, hoping that Halvorsen would be able to see the doctor. While they were thus waiting, the wind became very strong and very squally, and the two returned to the jetty with the object of returning to the ship. On reaching the jetty they found that the ship's boat, which they had tied to it, had been taken away to the other side of the harbour, and that the only boat which was then lying at the jetty was a lifeboat belonging to the South Georgia Whaling Company, Limited, the proprietors of the whaling station and jetty. The said lifeboat was some 27 feet in length, having in it its rudder but no oars. This boat was one which, in ordinary circumstances, should have been manned by six men, each with an oar.

"Halvorsen proposed to his companion that they should go without oars, and that the rudder should be used to steer the boat by paddling. The wind and tide would have carried the boat down the harbour more or less in the direction of the 'Ramleh,' although the wind was rather on the beam of the boat. The third engineer refused to take the risk, and Halvorsen then proceeded to attempt it himself, and pushed the lifeboat out from the jetty and began to paddle with the rudder, which he used on the side of the boat, trying to keep her on to the wind. Halvorsen failed to reach the ship, and was blown out to sea and was drowned, and neither the boat nor he was seen or heard of again."

In these circumstances the Sheriff-substitute held that the workman had met his death by accident arising out of and in course of his employment, and awarded compensation.

The questions of law for the opinion of the Court were:—"1. Whether the said Theodore Halvorsen's death arose out of and in the course of his employment with the appellants within the meaning of the Workmen's Compensation Act, 1906? 2. Whether the said Theodore Halvorsen's death was the result of 'accident' within the meaning of said Act?"

The case was heard before the First Division on 11th November 1911.

Argued for the appellants;—It was admitted that the occurrence was an accident in the sense of the statute, but the accident did not arise out of and in course of the employment. Granted that Halvorsen was on shore in the course of his employment, the accident did not arise out of that employment, as he exposed himself to a risk which was not contemplated in his employment.

Argued for the respondents ;—On the assumption that the accident Nov. 11, 1911. arose in the course of the employment, the question to be decided was whether the deceased was entitled to attempt to return to his ship in the manner stated. This question should be answered in the affirmative. The risk of going to his ship in a boat was one specially connected with his employment,¹ and so the question came to be whether the circumstances of the occasion justified the particular means of transit which he attempted. It was shown that the wind was rising and that both the second and third engineers were on shore. In these circumstances the ship's position might have to be altered, and it was this man's duty to return to the ship with all possible speed in order to be ready for such a contingency. Although it was not stated in the case that this was the motive which actuated the man's conduct, still it was an inference which might legitimately be drawn from the stated facts.² In this view of the case, the risk which he undertook was one to which he subjected himself in the interests of his employers, and therefore arose out of his employment. The emergency in which he was situated justified the unusual means of transit which he adopted, and it was a means which, on the facts found proved, had a reasonable prospect of success. His only fault was, in the circumstances, an error in judgment.

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LORD PRESIDENT.—It would be quite useless to repeat what has been said in so many cases by the House of Lords, and especially in the very recent case of *Fletcher v. The Owners of the "Duchess,"*¹ which is later in date than the cases of *Moore v. The Manchester Liners,*³ and *Kitchenham.*⁴ I cannot say that I have any real difficulty in disposing of this case. I shall assume that the employment was not interrupted, and therefore that the man who was drowned was at the time acting in the course of his employment; but I am bound to say that I cannot see how the Sheriff came to the conclusion that the accident arose out of the employment. To get back to his ship he had to get back in one of the ordinary ways, and if, as in the case of *Leach,*⁵ which was decided on the same day as *Kitchenham's* case,⁴ the accident had happened by his tumbling off a gangway, then he would have been returning to his ship in an ordinary way and as part of his employment, and that would have been an accident arising out of the workman's employment. But the question which underlies such a situation always is, Was the danger which caused the accident a danger to which in the workman's contract with his employers he was naturally subjected?—and if the danger is of that class then the accident will be considered to have arisen out of the employment. But here the workman was not returning to his ship in any ordinary way; he was returning in a most extraordinary way; he was taking, in other words, a means of transit which was no ordinary means of transit at all. I grant that a boat is a quite proper means of getting back to a ship where the ship is not moored to a quay. But a boat in that sense is such a boat as is referred to by the Lord Chancellor in the case of *Fletcher v. The Owners of the "Duchess,"*¹ namely, an

¹ *Fletcher v. Owners of s.s. "Duchess,"* [1911] A. C. 671.

² *Mackinnon v. Miller,* 1910 S. C. 373.

³ [1910] A. C. 489.

⁴ [1911] 1 K. B. 523, [1911] A. C. 417.

⁵ [1911] 1 K. B. 523.

Nov. 11, 1911. ordinary boat. It is certainly not making use of an ordinary boat to go into one which is meant to be propelled by oars but which has no oars, which is meant to be manned by six or seven men but has only one man in it, and whose course can only be influenced by paddling with the rudder, the propulsion being effected by the wind and tide. This seems to me a case where the boat used was really no boat at all, and that the poor man by going back to his ship in that way subjected himself to a risk which was no part of his employment, and a risk which his employers never could have thought that he should be subjected to in the ordinary course of his employment. I therefore have no hesitation in saying that the first question must be answered in the negative.

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Ld. President.

LORD KINNEAR.—I am of the same opinion. I think it clear that this man exposed himself to a risk which was not one of the risks of his employment at all. It was not one of the risks which his contract of employment as seaman required him to take. That he was entitled to return to his ship by means of a boat nobody disputes, but what is said is that, as the boat which was meant for the purpose was not at hand, he took a lifeboat which had no oars, and which in ordinary circumstances required to be manned by six men each with an oar, and, getting on board of her, he trusted that he would be carried more or less in the direction of the ship by the force of the wind and tide, his only means of directing the boat being that he took out the rudder and used it as a paddle for steering. I cannot see that this is a risk to which he was required by his employment to expose himself.

LORD JOHNSTON.—I agree that this accident did not arise out of the employment of the deceased.

THE COURT answered the first question of law in the negative, found it unnecessary to answer the second question, and sustained the appeal.

R. H. MILLER & Co., S.S.C.—BOYD, JAMESON, & YOUNG, W.S.—Agents.

No. 17.

ROBERT GRAHAM PENN, Applicant.—*J. S. Mackay.*
MRS ALICE SIMPSON OR PENN, Objector.—*J. G. Jameson.*

Nov. 14, 1911.

Penn v. Penn.

Poor's-Roll—Poverty—Circumstances warranting admission.

Held that a workman, who was earning 30s. a week and who was living apart from and was not supporting his family, was not entitled to be admitted to the poor's-roll for the purpose of defending an action of divorce.

2D DIVISION.

MRS ALICE SIMPSON OR PENN brought an action of divorce on the ground of desertion against her husband, Robert Graham Penn, who appeared at the diet of proof and obtained a sist of the case to enable him to apply for admission to the poor's-roll for the purpose of defending the action.

His application for admission was remitted to the reporters on *probabilis causa litigandi* to report whether the applicant had a *probabilis causa* and was otherwise entitled to the benefit of the poor's-roll.

The following statement of facts is taken from the note appended by Nov. 14, 1911.
the reporters to their report :—

“The applicant is the defender in an action of divorce on the ground of desertion, having appeared to defend at the diet of proof for the pursuer. He desires to lodge defences and to lead evidence in support thereof, and the action has been sisted to enable him to obtain the benefit of the poor’s-roll. There is one child of the marriage, who resides with the pursuer.

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“In his statement made before the minister and elders of the parish of Larbert the applicant stated that he ‘is a bricklayer to trade, in which his earnings amount to £1, 10s. per week when in employment.’ From a statement supplied by his employers, Messrs. J. & J. W. M’Lachlan, Larbert, we find that for the year from 29th October 1910 to 28th October 1911 his total wages were £70, 17s. 4d. This is an average of 27s. 3d. per week. During this year he was without work for three weeks. His average earnings for the remaining 49 weeks were therefore 28s. 11½d.”

On 9th November 1911 the reporters reported that in their opinion the applicant had a *probabilis causa litigandi*, and that he was otherwise entitled to the benefit of the poor’s-roll.*

On 14th November 1911 counsel for the applicant appeared before the Second Division (consisting of Lord Salvesen, Lord Guthrie, and Lord Cullen) and moved for his admission to the poor’s-roll.

Counsel for the applicant’s wife objected, and argued ;—In the case of *Robertson*¹ it was laid down as a general rule by Lord President Inglis that “under ordinary circumstances a man earning 23s. a week is not entitled to be admitted,” and this had become the established practice of the Court.² There were no circumstances in the present case to justify a departure from the rule, and the application should therefore be refused.

Argued for the applicant ;—The rule laid down in *Robertson*¹ was not absolute,³ and the standard applied by Lord President Inglis was no longer appropriate in view of the increased cost of living and the rise of wages since 1880. But in any event there were special circumstances which made this case exceptional. It was an action of divorce, where, on grounds of public policy, it was desirable that a proper defence should be stated. The applicant was a defender, not a pursuer,⁴ and it was also a consideration that so far he had conducted his own case.⁵

* “NOTE.—[After the statement of facts above quoted]—The question is whether the special circumstances of the case justify departure from the rule laid down by Lord President Inglis in *Robertson*, (1880) 7 R. 1092, that a man with 23s. a week is not in ordinary circumstances entitled to the benefit of the poor’s-roll. An example of such a departure is the case of *Paterson v. Linlithgow Police Commissioners*, (1888) 15 R. 826, where a pursuer having a wage of 27s. was admitted to the poor’s-roll. For other examples of circumstances justifying departure from the general rule reference is made to *Brown v. Brown*, (1906) 8 F. 687.

“In view of these precedents and of the special circumstances of this case we are humbly of opinion that it belongs to that class of cases in which an exception may be made to the general rule.”

¹ (1880) 7 R. 1092.

² *Macaskill v. M’Leod*, (1897) 24 R. 999.

³ *Paterson v. Linlithgow Police Commissioners*, (1888) 15 R. 826.

⁴ *Brown v. Brown*, (1906) 8 F. 687.

⁵ *Miller v. Gordon*, (1838) 16 S. 812.

Nov. 14, 1911. **LORD SALVESSEN.**—I am quite clear that we must refuse to admit this applicant to the benefit of the poor's-roll. The general rule was laid down by Lord President Inglis as far back as 1880 in *Robertson*,¹ that a man with 23s. a week is not in ordinary circumstances entitled to be admitted to the poor's-roll. The applicant stated in his declaration before the minister and elders of the parish of Larbert that he was earning 30s. a week. The fact that he was accidentally out of employment for three weeks during the past year cannot be taken into account, as was pointed out by the Lord President in *Robertson's*¹ case. It is not conclusive against an applicant that he is earning 30s. a week, if he is able to show any special circumstances which would entitle him to the benefit of the poor's-roll. There are no special circumstances here. The main fact relied upon by Mr Mackay was that the applicant is the defender in the action, which he desires to carry on with the assistance of counsel and agents for the poor, but I see no more reason for admitting a defender than a pursuer. It is true that a pursuer comes voluntarily into Court, whereas a defender is brought into Court, but in the ordinary case the expenses of a defender are not so heavy as those of a pursuer. Then it is said this is a consistorial action, and it is in the public interest that such causes should, if possible, be properly defended. That would make this case apply to all consistorial actions, which already form the largest class of cases carried on by pauper litigants. In point of fact, however, in consistorial actions the Judge is more or less charged with the interests of an absent defender, or of a defender who appears in person, and, when counsel do not appear for the defence, he must see that the grounds of divorce are very clearly established before granting decree. Here the applicant has no burdens. He has been living as a single man for four years, and he has no children dependent on him. I think that it would be a very unfortunate rule to establish that a man earning 30s. a week in regular employment is in such poor circumstances as to entitle him to the benefits of the poor's-roll.

LORD GUTHRIE.—I agree. In all the cases dealing with the question of admission to the poor's-roll a distinction has been drawn between the general rule and special circumstances which may justify a departure from the general rule. The general rule, as stated in the case of *Robertson*,¹ is that a man earning 23s. a week is not entitled to be admitted. In view of the changed conditions of life since the date of that case, it may be for consideration whether the figure of 23s. now requires modification. But even supposing it to be changed to 30s.—the applicant's wages in this case—the general rule would then be that a man earning 30s. a week is not entitled to the benefit of the poor's-roll except in special circumstances. These special circumstances may arise in various ways. A man may have burdens, such as the duty of supporting a large family, or the procedure in the case may be specially costly, as for instance if witnesses have to be brought from a distance. In either of these circumstances the Court may make an exception in order to do justice to the case. But no such circumstances arise in the present case. The applicant has no burdens, and his witnesses, if any, have

¹ 7 R. 1092.

only to be brought from Falkirk. I think it would be to depart from a sound general rule if on the facts stated in the present case we were to grant this application. Even if the rule is modified to the utmost in the applicant's favour, I think it still applies to his case, and no special circumstances have been shown to justify our treating his case as exceptional.

Nov. 14, 1911.
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Lord Guthrie.

LORD CULLEN.—I concur.

THE COURT refused the application.

D. LEWIS KIRK, S.S.C.—ARTHUR A. ROSS, S.S.C.—Agents.

MRS MARY DALZIEL SCOTT OR BRUCE AND OTHERS (Ralph Erskine Scott's Trustees), First Parties.— <i>Johnston, K.C.—Chree.</i>	No. 18.
MRS MARY DALZIEL SCOTT OR BRUCE, Second Party.— <i>Murray, K.C.—H. P. Macmillan.</i>	Nov. 16, 1911.
ROBERT RUSSELL SIMPSON AND OTHERS (Bruce's Marriage-Contract Trustees), Third Parties.— <i>Sandeman, K.C.—J. A. Inglis.</i>	Scott's Trustees v. Bruce.
ELINOR MARY ERSKINE SCOTT AND OTHERS (Ebenezer Erskine Scott's Trustees), Fourth Parties.— <i>Fleming, K.C.—Malcolm.</i>	
ELINOR MARY ERSKINE SCOTT (Christian Scott's Trustee), Fifth Party.— <i>Fleming, K.C.—Malcolm.</i>	
ELINOR MARY ERSKINE SCOTT AND OTHERS, Sixth Parties.— <i>Constable, K.C.—J. G. Jameson.</i>	
RALPH ERSKINE SCOTT AND OTHERS, Seventh Parties.— <i>Sandeman, K.C.—J. A. Inglis.</i>	

Succession—Testament—Construction—Implication—Supplying prefatory words by implication—Marriage-contract.

A testator directed his trustees to hold a share of his residue for his daughter upon the same terms as those contained in her marriage-contract. By the marriage-contract it was provided that the wife should have the liferent of a settled fund, and "*In the third place*, upon the death of the" wife, in the event of there being children and of the husband surviving, that the husband should have a liferent, and that the fee should be paid to the children; "*And lastly*, in the event of there being no child or children" and of the husband surviving, that he should have a liferent, "and upon the death of the" husband that the fund should revert and belong to the wife's father, whom failing to certain other beneficiaries. There were no children of the marriage, and no provision with regard to the fee was made for the event, which happened, of the wife being the survivor of the spouses.

Held that in order to give effect to the intention of the testator it was necessary to imply as introducing the last purpose of the marriage-contract the prefatory words of the third purpose "upon the death of the" wife; so that the direction for the distribution of the fee should read as if it were "upon the death of the wife and upon the death of the husband,"—that is to say, upon the death of the survivor of the spouses.

Process—Special Case—Competency—All parties interested not represented—Partial competency.

Circumstances in which *held* that a special case was competent in so far as it raised the question of a liferenter's right to immediate payment of the fee of the fund liferented, in respect that there were sufficient contradictors present; but incompetent in so far as it sought—in the

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event of the liferenter's claim being rejected—to determine the rights of parties in the fund on the termination of the liferent, in respect that the parties who might be interested could not be ascertained until that event happened, and so were not all necessarily represented in the case.

1st DIVISION. THIS special case was brought on 24th January 1911 for the determination of questions arising with regard to the fee of a sum settled upon Mrs Mary Dalziel Scott or Bruce, by her father Ralph Erskine Scott, C.A., Edinburgh, in her marriage-contract, and of a one-third share of the residue of his testamentary estate in which she was interested.

By contract of marriage dated 11th December 1871 between John Bruce, younger of Sumburgh, Shetland, and Mary Dalziel Scott, Miss Scott's father, Ralph Erskine Scott, bound himself and his heirs and assignees to make payment to the marriage-contract trustees of the sum of £10,000, the trust purposes being, *inter alia*, as follows:—"In the second place, the said trustees shall pay the annual interest and produce of the said capital sum to the said Mary Dalziel Scott during all the days of her life, on her own receipt, as an alimentary provision to her which shall not be affectable by the debts or deeds of the said spouses or either of them: In the third place, upon the death of the said Mary Dalziel Scott, in the event of the said John Bruce junior surviving her, and of there being issue of the said marriage, the said trustees shall pay the free annual interest and produce of the said capital sum to the said John Bruce junior for behoof of himself and the child or children of the said marriage during all the days of the lifetime of the said John Bruce junior, or until the said children attain majority, or in the case of daughters are married, whichever of these events shall first happen, when the capital shall be payable to the children in manner after mentioned . . . and it is hereby provided and declared that the said capital sum shall be divisible among the children of the said marriage if more than one or their issue in such proportions and under such restrictions and upon such terms and conditions as the said John Bruce junior and Mary Dalziel Scott, or the survivor of them, may appoint by any writing under their, his, or her hand: And failing such deed of division [then followed directions as to the method of distribution among the children in that event]: And lastly, in the event of there being no child or children of the said intended marriage, the said trustees shall pay to the said John Bruce junior, in the event of his surviving the said Mary Dalziel Scott, the free proceeds and interest of the said capital sum, but declaring that such payments shall be suspended during the subsistence of any second marriage entered into by the said John Bruce junior; and upon the death of the said John Bruce junior, the whole sums hereby settled by the said Ralph Erskine Scott as aforesaid, and any income that may be accumulated during the subsistence of said second marriage as aforesaid, shall revert and belong to the said Ralph Erskine Scott, whom failing, to the said Ebenezer Erskine Scott and Christian Scott, daughter of the said Ralph Erskine Scott, jointly, and the heirs of their bodies, whom all failing, to such person or persons as the said Mary Dalziel Scott by any writing under her hand may direct."

Ralph Erskine Scott died on 7th May 1887, leaving a holograph last will and settlement, by which he directed his trustees, *inter*

alia, to pay to Mr and Bruce's marriage-contract trustees the sum of £10,000 in implement of the obligation above mentioned, and further directed:—"In the third place, the net residue of my estate having been ascertained, the amount thereof shall be divisible equally among my three children then surviving, or if any have predeceased, the parent's share will fall to his or her family, but . . . from Mary's share will be deducted the Ten thousand pounds to be paid to the trustees under her marriage-contract. I direct that the surplus of Mary's share beyond the Ten thousand pounds shall be invested by my trustees in the stock of any of the foresaid banks, or on good heritable security in their names for her behoof, and the interest thereof paid to her half-yearly on her own receipt, and exclusive of the *jus mariti* or right of administration of any husband, present or future, the capital thereof to be settled in the same way and for the same purposes as are specified in the contract of marriage."

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There was no issue of the marriage between Mr and Mrs Bruce, and Mr Bruce died on 4th July 1907, survived by his widow.

Ralph Erskine Scott was survived by his daughter, Mrs Bruce, by a daughter, Miss Christian Scott, who died unmarried in 1896, and by a son, Ebenezer Erskine Scott, who died in 1897 survived by five daughters and a son. The *first parties* to the special case were Ralph Erskine Scott's trustees; the *second party* was Mrs Bruce; the *third parties* were Mr and Mrs Bruce's marriage-contract trustees; the *fourth parties* were Ebenezer Erskine Scott's testamentary trustees; the *fifth party* was Miss Christian Scott's testamentary trustee; the *sixth parties* were Ebenezer Erskine Scott's children, and the *seventh parties* were his grandchildren.

The case stated:—

"6. Questions have now arisen as regards the fee of said sum of £10,000, and of the said one-third share of the residue of the said Ralph Erskine Scott's estate. The parties of the first part maintain that, in the events which have occurred of there being no children of the marriage between Mr and Mrs Bruce, and of Mr Bruce having predeceased his wife, the marriage-contract of Mr and Mrs Bruce contains no trust purpose applicable to the fee of said sum of £10,000, and that said sum, subject to the burden of Mrs Bruce's liferent, forms part of the residue of the said Ralph Erskine Scott's estate.

"7. The party of the second part maintains that the marriage-contract trusts with regard to the fee of the said sum of £10,000 have failed, and that the said sum, subject to her own alimentary liferent, belongs to her as part of her one-third share of the residue of the said Ralph Erskine Scott's estate, the direction to deduct the same from her said one-third share of residue having become inoperative. She further contends that the fee of her said one-third share of the residue of the said Ralph Erskine Scott's estate, exclusive of the said sum of £10,000, belongs to her absolutely.

"8. The parties of the third and seventh parts maintain that in the events which have happened the said sum of £10,000 has been validly disposed of under the said marriage-contract between Mr and Mrs Bruce, and that upon the death of Mrs Bruce, the liferentrix, it will vest in the then surviving heirs of the body of the said Ebenezer Erskine Scott. Further, the parties of the seventh part maintain that the fee of Mrs Bruce's one-third share of the residue of Mr

Nov. 16, 1911 **Scott's Trustees v. Bruce.** Ralph Erskine Scott's trust-estate has been validly disposed of by his trust-disposition and settlement, and that upon the death of Mrs Bruce, the liferentrix, it will vest in the then surviving heirs of the body of the said Ebenezer Erskine Scott.

"9. The parties of the fourth and fifth parts maintain that in the events which have occurred of there being no children of the marriage between Mr and Mrs Bruce, and Mr Bruce having predeceased his wife, the marriage-contract of Mr and Mrs Bruce contains no trust purpose applicable to the fee of said sum of £10,000, and that said sum, subject to the burden of Mrs Bruce's liferent, has fallen into intestacy, or alternatively that it forms part of the residue of the said Ralph Erskine Scott's estate. They further maintain that the fee of Mrs Bruce's third share of the residue of Mr Ralph Erskine Scott's estate has not been disposed of by his trust-disposition and settlement, and has fallen into intestacy.

"10. The parties of the sixth part maintain that in the events that have happened the fee of the said sum of £10,000 has been validly disposed of under the terms of the said contract of marriage, and that it vested upon the death of Mr Bruce in the then surviving heirs of the body of Ebenezer Erskine Scott. They further maintain that the fee of the said one-third share of the residue of the said Ralph Erskine Scott's estate, liferented by Mrs Bruce, vested upon the death of Mr Bruce in the then surviving heirs of the body of Ebenezer Erskine Scott."

The questions of law for the opinion of the Court were:—

"1. In the events which have happened, does the said antenuptial contract of marriage between Mr and Mrs Bruce effectually dispose of the fee of the sum of £10,000 which the late Ralph Erskine Scott became bound to pay to the trustees under the said antenuptial contract of marriage? 2. In the event of the first question being answered in the affirmative, did the fee of the said sum of £10,000, subject to the second party's liferent, vest, on the death of the said John Bruce, in the heirs of the body of the said Ebenezer Erskine Scott, now represented by the sixth parties; or is vesting thereof postponed till the death of the second party? 3. In the event of the first question being answered in the negative, does the fee of the said sum of £10,000, subject to the second party's liferent (1) belong to the second party as part of the one-third share of the residue of the testator's estate bequeathed by him to her; or (2) fall into the residue of the testator's estate and become divisible among his residuary legatees, including the second party; or (3) form intestate succession of the testator? "4. (1) Does the fee of the one-third share of the residue of the testator's estate bequeathed by him to the second party (exclusive of the said sum of £10,000) belong to the second party absolutely; or (2) did the said fee vest, on the death of the said John Bruce, in the heirs of the body of the said Ebenezer Erskine Scott, now represented by the sixth parties; or (3) is vesting of the said fee postponed till the death of the second party; or (4) does the said fee form intestate succession of the testator?"

The case was heard before the First Division (consisting of the Lord President, Lord Johnston, and Lord Cullen) on 8th November 1911, when the undernoted authorities were referred to on the question of the competency of the case.¹

¹ Provan v. Provan, (1840) 2 D. 298; Harvey v. Harvey's Trustees,

At advising on 16th November 1911,—

Nov. 16, 1911.

LORD JOHNSTON.—I have considered the competency of this special case, with reference to the authorities, and I think that in part only is it competent. Scott's Trustees v. Bruce.

Mrs Bruce is entitled by action of declarator and payment to have determined her own rights in the funds settled on her by her father in her marriage-contract and in his will, for, if her contention is sound, it will result in present payment of such funds in whole or in part. To meet such action there are adequate contradictors even in the two sets of trustees, still more if to these are superadded all those in life who can put forward competing claims. These parties are all represented in the special case. So far, then, as Mrs Bruce's claims are concerned, the special case is competent. But I do not think that, if Mrs Bruce fails in her contention, the special case can proceed to determine interests that would arise in that contingency. For these are not interests resulting in present payment, nor can all possible claimants be at present ascertained. Some may not be in existence.

So far only, therefore, as query 1, query 3, and the first branch of query 4 go, is the special case competent. As regards the other queries it is incompetent.

The difficulty that has occurred in interpreting Mrs Bruce's marriage-contract and her father's will arises from the fact that the marriage-contract apparently omits to provide for a contingency which has happened, viz., the contingency of Mrs Bruce surviving her husband, John Bruce of Sumburgh, and of there being no issue of the marriage; and from the further fact that her father, Mr R. E. Scott, being a man of business, but not a conveyancer, wrote his own will.

I think, however, that though the draftsmanship of the marriage-contract is not all that could be desired, the omission is only apparent, and that Mr R. E. Scott's intention in his will can be ascertained with sufficient certainty.

Mr R. E. Scott settled £10,000 on his daughter Mrs Bruce by her marriage-contract for the following purposes: In the second place, the income was to be paid to her as an alimentary provision during her life. In the third place, "upon the death of the said Mary Dalziel Scott, in the event of the said John Bruce junior surviving her, and of there being issue of the said marriage," a limited life interest was given to Mr Bruce "for behoof of himself and the child or children of the said marriage." It was limited by the provision for payment out of the capital to the children. The children's shares in the capital were payable to them on majority or marriage, and did not vest until majority or marriage. In the last place, "in the event of there being no child or children of the said intended marriage," John Bruce junior, in the event of his surviving his wife, was to enjoy the liferent, and upon his death the settled fund was to revert and belong to Mr R. E. Scott, who provided it, whom failing to his other chil-

(1860) 22 D. 1310; Duthie's Trustees v. Forlong, (1889) 16 R. 1002; Cairns' Trustees v. Cairns, 1907 S. C. 117; Baillie's Trustees v. Whiting, 1910 S. C. 887; Smith v. M'Coll's Trustees, 1910 S. C. 1121; Court of Session Act, 1868 (31 and 32 Vict. cap. 100), sec. 63.

Nov. 16, 1911. dren jointly and the heirs of their bodies, whom failing to Mrs Bruce's appointees.

Scott's Trustees v. Bruce. At first sight it would appear that this last purpose only provided for the

Ld. Johnston. contingency of there being no issue of the marriage and of John Bruce junior being the survivor of the spouses, and that the resulting trust for the settlor, whom failing his other children, only came into operation on that particular contingency. Literally I admit that that is the result, but I cannot think that that was the intention. And the real intention is, in my opinion, sufficiently plain, notwithstanding the obscurity of the language.

In the first place, the provisions of the second purpose, giving Mrs Bruce a liferent, require that the last purpose should be impliedly prefaced by the same words as the third purpose. It would then run thus: "Upon the death of the said Mary Dalziel Scott, in the event of there being no child or children of the said intended marriage, the said trustees shall pay to the said John Bruce junior, in the event of his surviving the said Mary Dalziel Scott," the income of the settled fund. In this there is no difficulty of construction. And when the *last* purpose proceeds to say, "and upon the death of the said John Bruce junior the whole sums hereby settled by the said Ralph Erskine Scott as aforesaid" shall revert and belong, &c., I think that the clear meaning and intention, though badly expressed, is—again supplying by necessary implication the initial words of the purpose—this, "upon the death of the said Mary Dalziel Scott," and upon the death of the said John Bruce junior, that is, in effect on the death of the survivor, there being no issue of the marriage, the whole sums hereby settled shall revert and belong, &c.

If this be, as I think it is, the sound construction, Mrs Bruce's contention put forward in the special case fails, and the first query falls to be answered in the affirmative, and it becomes unnecessary to answer the third.

Turning now to Mr R. E. Scott's will, I think its interpretation is comparatively easy. Mr Scott would have more intelligibly expressed his intention had he put his third purpose first. For that is the way in which the thing presented itself to his mind. But the result of his first three purposes taken together, is that he divides his net residue among his three children, Ebenezer Erskine Scott, Christian Scott, and Mrs Bruce, equally, but directs £10,000 out of Mrs Bruce's share to be paid to her marriage-contract trustees in implement of his obligation under her marriage-contract. He does not, however, give Mrs Bruce absolutely the surplus of her share beyond the £10,000, but retains it in the hands of his trustees for her life interest, not in this case made alimentary, "the capital thereof to be settled in the same way and for the same purposes as are specified in the contract of marriage." What that settlement must be I have already dealt with. It is on children, if any, of the marriage, and failing them to revert and belong, &c. There follows a declaration limiting Mr Bruce's liferent in any event to the £10,000 settled by the marriage-contract, and providing that if there were no issue of the marriage, Mrs Bruce's whole share was to revert to the testator's other children. This declaration is expressed with the same confusion of language and want of grasp of the contingency with which it is dealing as is the relative clause in the marriage-contract. But it makes it

nevertheless abundantly clear that Mrs Bruce, whatever the reason or want of reason, was to take no share of capital in any event. Nov. 16, 1911.

The first branch of the fourth query will therefore fall to be answered in the negative. Scott's Trustees v. Bruce.

LORD PRESIDENT.—I agree in the result at which your Lordship has arrived. I think the rules as to competency were carefully considered in the case of *Baillie's Trustees v. Whiting*,¹ and I do not think we can go back upon what we there decided.

So far, therefore, as the £10,000 is concerned, it is clear that, inasmuch as the liferent of the £10,000 is an alimentary liferent, there cannot be any present payment of the fee of that £10,000 to the parties to whom it belongs; and as, even supposing the fee was in Mrs Bruce, she could not ask the trustees to denude, it is evident, so far as that sum is concerned, that she is not in a position to ask any present payment. And it is equally evident that, as she is not in that position, we have not got before us all the persons who may become possible competitors for that fee when the liferent has expired.

But so far as the sum left her by her father's will is concerned, that is not in the same position. The third provision of the will is that which deals with the residue, and it directs that the residue shall be divisible between the three children. Then it makes a provision as regards the deduction of the sum already paid to the son during his father's life, and then it goes on in the words, "and from Mary's share will be deducted the ten thousand pounds to be paid to the trustees under her marriage-contract."

Now I think that, although not very clearly expressed, the meaning there is perfectly clear, that is to say, that the £10,000 already paid is to be taken *in computo* in settling Mary's share, just as the £3850 the son had got during his father's lifetime is also to be taken *in computo* in fixing his share. But then the testator goes on and directs "that the surplus of Mary's share beyond the £10,000 shall be invested by my trustees . . . and the interest thereof paid to her half-yearly on her own receipt . . . the capital thereof to be settled in the same way and for the same purposes as are specified in the contract of marriage."

Now, here the liferent which she is given is not made an alimentary liferent; and therefore, if under the concluding words she got a fee, she would be entitled to say,—“I am now in possession of the liferent and fee of the same sum, and therefore I ask you to hand over the sum to me.” That has been settled again and again to be within her power.

Accordingly, I think the special case does become a competent special case so far as she is concerned, because she is in a position, if her contention is right, to ask for an immediate payment of that sum of money which represents what a third of the residue is under deduction of £10,000.

But then, in order to find out whether she has a fee of that sum, one has to go back to the marriage-contract, because the capital is “to be settled in the same way and for the same purposes as are specified in the contract of marriage.” When I come to the contract of marriage I go along with the

¹ 1910 S. C. 887

Nov. 16, 1911. reasons given by my brother Lord Johnston, and I do not find it necessary to repeat what he has said.

Scott's Trustees v. Bruce. Accordingly I find that, in my opinion, she has not the fee of this other sum. Well, then, who has it? The person who will have it will be the person who is entitled under the clause of the marriage-contract. Thus the proper contradictors are not here, because we cannot tell, at this present moment, who at the expiry of the liferent, which is the first period at which it can be paid, may be the heirs of the body of Ebenezer Erskine Scott and Christian Scott. Of course, they may not after all be the people who are entitled to get it, because it may be that the heirs are to be taken at a different time.

Ld. President.

Accordingly, I think that the special case cannot be further proceeded with, and that we ought simply to negative Mrs Bruce's claim to an immediate payment of any money at all.

LORD CULLEN concurred.

THE COURT answered the first question in the affirmative, and the first branch of the fourth question in the negative; found it unnecessary to answer the third question, and refused to answer the second question and the other branches of the fourth question.

MORTON, SMART, MACDONALD, & PROSSER, W.S.—MACKENZIE, INNES, & LOGAN, W.S.—R. R. SIMPSON & LAWSON, W.S.—R. SIMSON, W.S.—Agents.

No. 19.

JAMES D. CRANSTON, Pursuer (Appellant).—*J. A. Christie—Paton.*
L. MALLOW & LIEN, Defenders (Respondents).—*T. G. Robertson.*

Nov. 14, 1911.

Cranston v.
Mallow &
Lien.

Sale—Horse—Sale under warranty—Rejection.

A horse was sold with a warranty that it was a good worker and sound in wind, and the purchasers bargained that they should have a week's trial.

Held that the contract was one of sale under warranty and not one of sale on approbation, and accordingly that the purchasers were entitled to reject the horse within the week if it was disconform to the warranty, but not otherwise.

Process—Appeal—Summary cause—Printing—Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. cap. 51), sec. 8.

In an appeal in a summary cause to the Court of Session under sec. 8 of the Sheriff Courts (Scotland) Act, 1907, only those portions of the process should be printed to which the Court is entitled to refer.

Observations (per Lord Salvesen) as to the portions of the process to which the Court is entitled to refer in such an appeal, and *opinion* that, as the Sheriff's findings in fact are conclusive, the proof cannot be referred to.

2D DIVISION.
Sheriff of
Lanarkshire.

(SEE previous report, 1911 S. C. 1133.)

In October 1910 James D. Cranston, horsedealer and contractor, brought an action in the Sheriff Court at Glasgow against L. Mallow & Lien, provision merchants there, for payment of £28, being the price of a horse sold and delivered by the pursuer to the defenders.

On 22nd December 1910 the Sheriff-substitute (Craigie), after a

proof in which the evidence was recorded, gave decree in favour of Nov. 14, 1911. the pursuer as craved.

The defenders appealed to the Sheriff (Millar), who, on 22nd Feb-^{Cranston v. Mallow & Lien.} ruary 1911, pronounced this interlocutor:—"Recalls the interlocutor of 22nd December last: Finds in fact (1) that on 25th May 1910 the pursuer sold to the defenders a bay horse, at the price of £28, with a warranty that it was a good worker and sound in wind; (2) that the defenders bargained that they should have a week's trial with the horse; (3) that they returned the horse within the week, on the ground that it was suffering from stringhalt and was going lame: Finds in law that the contract was one of sale on approbation, and that the defenders having returned the horse within the period allowed for approval, there was no completed contract of sale: Therefore assoilzies the defenders from the conclusions of the action, and decerns: Finds the pursuer liable to the defenders in expenses, including the expenses of the appeal: Allows an account thereof to be given in, and remits," &c.

On 28th February 1911 the Sheriff, on the pursuer's motion, granted leave to appeal to the Court of Session, in terms of section 8 of the Sheriff Courts (Scotland) Act, 1907.*

The pursuer appealed to the Court of Session, and printed and boxed the whole documents in the process, including the initial writ, note of pleas in law, proof, and all the interlocutors, together with the notes appended to the final interlocutors of the Sheriff-substitute and the Sheriff respectively.

On the case being called in the Summar Roll on 25th May 1911 the defenders objected to the competency of the appeal, and on 8th July the Court repelled the objection.†

The appeal was heard on the merits before the Second Division (consisting of Lord Salvesen, Lord Guthrie, and Lord Cullen) on 14th November 1911, when the appellant argued;—On the facts found by the Sheriff it was clear that the contract was not one of sale on approbation, as he had held, but of sale with a warranty. The week's trial was given to the purchaser only for the purpose of ascertaining whether the horse was conform to the warranty, and the horse could only be returned on the ground that it was not so conform.¹ If the

* The Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. cap. 51), enacts:—Sec. 8. "*Summary cause procedure and appeal.*—In a summary cause the Sheriff shall order such procedure as he thinks requisite, and (without a record of the evidence, unless on the motion of either party the Sheriff shall order that the evidence be recorded) shall dispose of the cause without delay by interlocutor containing findings in fact and in law. Where the evidence has been recorded the judgment of the Sheriff-substitute upon fact and law may in ordinary form be brought under review of the Sheriff, but where the evidence has not been recorded, the findings in law only shall be subject to review. In a summary cause, if the Sheriff, on appeal, is of opinion that important questions of law are involved, he shall state the same in his interlocutor, and he may then or within seven days from the date of his interlocutor grant leave to appeal to a division of the Court of Session on such questions of law, but otherwise the judgment of the Sheriff shall be final."

† Reported 1911 S. C. 1133.

¹ Buchanan v. Parnshaw, (1788) 2 Term Reports, 745; Chapman v. Gwyther, (1866) L. R., 1 Q. B. 463; Head v. Tattersall, (1871) L. R., 7 Ex. 7; Hinchcliffe v. Barwick, (1880) 5 Ex. D. 177; Bell's Prin. sec. 129.

Nov. 14, 1911.

**Cranston v.
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Lien.**

purchaser were entitled to reject the horse within that period for any reason, or for no reason, the warranty would have no meaning. The findings of fact in the Sheriff's interlocutor were unambiguous, and it was not permissible to refer either to the evidence or to the Sheriff's note to explain or qualify them. The point now at issue was a question of law and not of fact.¹

Argued for the respondents;—Whether the contract was one of sale on approbation or not was a question of fact, depending on the evidence as to what passed between the parties. The Sheriff had found that it was a sale on approbation, and his finding could not be overturned. Further, his decision on this point was consistent with his other findings in fact. If there was any ambiguity in his findings, it was cleared up by reference to his note, from which it appeared that in his opinion the purchasers were to have a week's trial before deciding whether or not to take the horse. The warranty was in addition to the trial, and extended beyond the first week. Only by putting this construction on the contract could full effect be given to all the findings in fact.

LORD SALVESEN.—This is an appeal in a summary cause to which section 8 of the Sheriff Courts Act, 1907, applies, and as the procedure laid down in that section is novel, it behoves us to walk warily in dealing with the interpretation of it and the method in which it is to be applied in practice. The substance of section 8 is that in a summary cause the Sheriff-substitute may dispose of the cause without a record and without having the evidence taken down in shorthand or otherwise recorded, and that in such a case there shall be no appeal at all upon questions of fact, there being no materials preserved upon which such an appeal can be taken. It is open, however, for either party to move that the evidence shall be recorded, and if it has been recorded the Sheriff-substitute's judgment both on fact and law may in ordinary form be brought under the review of the Sheriff. The section proceeds: "In a summary cause, if the Sheriff on appeal is of opinion that important questions of law are involved he shall state the same in his interlocutor, and he may then or within seven days from the date of his interlocutor grant leave to appeal to a Division of the Court of Session on such questions of law, but otherwise the judgment of the Sheriff shall be final."

It is this last part of the section that confers upon us jurisdiction to entertain an appeal at all in a summary cause to which section 8 applies. We have already held that it is not a valid objection to the competency of the appeal that the Sheriff has not expressly stated in the interlocutor the particular question of law which he thought of sufficient importance to be submitted to the review of the Court of Session. It is enough if it plainly appears from his interlocutor that there is a question of law and that he has, within the seven days stipulated, granted leave to appeal, because it may be assumed that he would not grant leave to appeal unless he was of opinion that an important question of law was involved, and that it was right that the parties should have the benefit of having that question of law decided by a higher Court. It follows, however, from the section that we must take

¹ Cranston v. Mallow & Lien, 1911 S. C. 1133.

the findings in fact of the Sheriff as conclusive, and that we can only deal Nov. 14, 1911.
 with his interlocutor—either by way of affirming it or reversing it—if we ^{Cranston v.}
 are satisfied that upon these findings in fact he reached a correct or an ^{Mallow &}
 erroneous conclusion in law; and parties admitted that, that being so, we ^{Lien.}
 were not entitled to go to the proof printed in this case with the view of Lord Salvesen.
 considering whether the Sheriff was justified in reaching the conclusions in
 fact which he expressed in his interlocutor.

Now, so dealing with the case, we have three findings in fact here—(1) that on 25th May 1910 the pursuer sold to the defenders a bay horse at the price of £28, with a warranty that it was a good worker and sound in wind; (2) that the defenders bargained that they should have a week's trial with the horse; (3) that they returned the horse within the week, on the ground that it was suffering from stringhalt, and was going lame. It is plain that the third finding in fact does not affirm that there was any breach of warranty. It is not even found that the horse was in point of fact suffering from stringhalt, and was going lame; it is only found that that was the ground upon which it was returned. Even if it were suffering from stringhalt and was going lame, that would admittedly not be a breach of the warranty as expressed in the first finding. The case, therefore, turns really upon the two first findings, and I think we may take it exactly as if these findings had been expressed in a written contract by the parties, with the addendum appearing on the contract that the stipulation embodied in the second finding had been inserted at the instance of the defenders.

That being so, was the contract one of sale on approbation, as the Sheriff has found in law, or was it a sale with a warranty and a right on the part of the defenders to reject the horse within a week if within that time they found it was disconform to warranty? That is really a question of the construction of a contract, and is therefore properly a question of law. I think that the Sheriff was entirely justified in the view which he took that it was a question of law of such a nature as might entitle the party who was unsuccessful to obtain the benefit of the review of this Court.

I cannot say that I have any doubt that the findings in fact of the Sheriff did not warrant the conclusion in law at which he arrived. In my opinion this was not, upon his findings, a contract of sale on approbation. Had that been the true meaning of the bargain, I cannot understand why there should have been a warranty given at all, for within the week the buyer might reject the horse without assigning any ground whatever, except that he did not like it. The Sheriff's view involves that there was to be a free trial for a week of the horse with an absolute right of rejection upon any ground, and that the sale under the warranty was then to take effect if the horse was not rejected, which would give the purchasers a further right of rejection if they thereafter discovered a breach of the warranty and intimated timeously their desire to rescind the contract.

I reach this conclusion upon the facts as they have been found, and I should have reached the same conclusion if I were entitled to refer to the Sheriff's opinion. Such a reference may be competent for the purpose of construing any ambiguous finding in fact, although I greatly doubt whether it can be made for any other purposes. The findings here are not, I think, ambiguous, and are substantially the same as the conclusions expressed in

Nov. 14, 1911. the Sheriff's opinion. The error in law which I think he has committed is this, that he seems to have considered that the stipulation in the contract of sale, inserted at the instance of the purchasers—that they should have a week's trial of the horse sold—was a stipulation which raised a legal presumption that there was no completed contract of sale until the week had expired. I think that is not the legal result, and that it cannot stand with the finding that the horse was sold with a specific warranty. It is not inconsistent with such a sale that a time should be specified within which the right of rejection for breach of warranty must be exercised, for in a case where the warranty is one that the horse is sound in wind and a good worker, the correctness of which can be ascertained after a day or two's trial, the stipulation is really one in favour of the buyer.

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Mallow &
Lien.

Lord Salvesen.

On these grounds I am for recalling the Sheriff's finding in law; and I propose to your Lordships that we should, in place thereof, find in law that the contract was one of sale with a warranty with regard to which the purchasers were entitled to have a week to ascertain whether the horse conformed to the warranty or not, and that there being no finding in fact that the warranty had been broken, the pursuer is entitled to have decree for the admitted price. That would be substantially reverting to the decision at which the Sheriff-substitute arrived.

The only other matter on which I think it is necessary to say something is in regard to the printing of the evidence, which both parties admit we are not entitled to look at. I can quite understand how that proof came to be printed. Under the statutes and Acts of Sederunt which regulate appeals from the Sheriff Court, it is necessary for the appellant to box his prints within a fixed time; and no doubt the appellant here thought it was safer to deal with this appeal as if it were an ordinary one. But the reason why the proof requires to be printed in an ordinary appeal from the Sheriff Court is that the parties are entitled to ask the Court of Session to review both the findings in fact and the findings in law; and it is necessary, therefore, that the materials for reviewing the findings in fact should be before the Court. But that is not the case in an appeal under section 8, and I think it is impossible to defend, upon any principle, the printing of a proof which the Court is not entitled by the statute to refer to. In such summary appeals I hope parties will in future only print the matters which we can really consider. Probably they must have the record, such as it is, printed, and also the interlocutor of the Sheriff. I doubt whether they are entitled to print the previous interlocutors, or even the final interlocutor, of the Sheriff-substitute; because this section of the statute looks like an attempt to introduce something of the nature of a stated case, giving an appeal in law where the Legislature thought it undesirable that expenses should be accumulated by having matters of fact subjected to the judgment of three tribunals. If the appellant had any difficulty on the subject of what he should print he ought to have applied to the Court for directions, and I have no doubt that the Court would then have stated the opinion which, as I understand, with the approval of your Lordships, we now do.

LORD GUTHRIE.—I concur. I think it would have been unfortunate in the interest of justice if the interlocutor had been so expressed as to prevent

us from dealing with the question of law. If the Sheriff had simply found Nov. 14, 1911. that on a certain date the pursuer sold the horse at a certain price under the condition that the defenders should have a week's trial, and that they returned the horse within the week, that would have been quite unambiguous and would have raised no question of law on the face of it, and we would not have been entitled in that case to look at the note in order to discover if a question of law was involved. But I agree with your Lordship in thinking that here the interlocutor itself raises a clear question of law.

Cranston v.
Mallow &
Lien.

Lord Guthrie.

With regard to that question I have no difficulty in agreeing with your Lordship that, where a horse is sold with a warranty and a period is defined in connection with the sale, there is no presumption that that introduces a new condition, but that the presumption rather is that the parties intended to agree that if the horse was to be rejected under the warranty intimation must be given within the period fixed. That being so I agree in law with the decision your Lordship has come to.

I also think that we do not require to decide whether, in a case where on the face of the interlocutor it is doubtful whether or not a question of law is raised, it might not be competent to look at the Sheriff's note. In this case I think it is quite unnecessary to consider that question.

LORD CULLEN.—The Sheriff found in fact (1) that on 25th May 1910 the pursuer sold to the defenders for £28 a bay horse, with a warranty that it was a good worker and sound in wind, and (2) that the defenders bargained that they should have a week's trial with the horse. Such being in fact the terms of the bargain between the parties as found by the Sheriff, the only question in law is whether on a true construction of it the defenders were thereby given a right to return the horse within a week on any ground whatever without reference to the particular terms of the warranty. I am unable to construe the contract in that way, in view of the fact that the seller gave a warranty to run from 25th May. It seems to me that the fair reading of the stipulation for a week's trial is that it was intended that the defenders should have that period for testing whether the horse conformed to the warranty or not.

THE COURT pronounced this interlocutor:—"Sustain the appeal, and recall the . . . interlocutor appealed against except in so far as the findings in fact therein are concerned: Find in law that under the warranty contained in the contract of sale as found by the Sheriff the defenders were entitled to reject the horse within one week if disconform to warranty, but not otherwise, and in respect the Sheriff has not held that the horse was disconform to warranty, decern against the defenders for the sum of £28, with interest, as concluded for; Find the defenders liable in expenses in this and in the Inferior Court (with the exception of the expense of printing the Notes of Evidence), and remit, &c.

Sr CLAIR SWANSON & MANSON, W.S.—**LAING & MOTHERWELL, W.S.**—Agents.

- No. 20. ELIZABETH GOW FAIRGRIEVE, Pursuer (Reclaimer).—*Crabb Watt, K.C.*
 —*Kemp.*
 Nov. 17, 1911. DAVID ROBERTSON CHALMERS, Defender (Respondent).—*Wilson, K.C.*
 —*Wilton.*
Fairgrieve v.
Chalmers.

Process—Reclaiming—Double reclaiming notes—Competency—Court of Session Act, 1868 (31 and 32 Vict. cap. 100), sec. 52.

A party can competently present a reclaiming note after his opponent has already reclaimed. But it is a question for the Auditor to decide whether there was any proper reason for presenting a second reclaiming note and, if there was not, it will be his duty to disallow the expenses of that note.

Observations on the circumstances in which a second reclaiming note may properly be presented.

1ST DIVISION. ON 25th February 1911 Elizabeth Gow Fairgrieve brought an action of damages for slander against David Robertson Chalmers.
 Lord Dewar.

On 9th November 1911 an interlocutor was pronounced by the Lord Ordinary (Dewar) approving of an issue for the pursuer and of a counter issue for the defender.

On 11th November the defender's agent informed the pursuer's agents by telephone message that the defender intended to reclaim.

On 13th November the pursuer's agents wrote advising the defender's agent that they had prepared a reclaiming note and a notice of motion to vary the counter issue for the defender, and had instructed the printer to proceed with printing the reclaiming note.

On the same day the defender's agent acknowledged receipt of the letter from the pursuer's agents, and repeated the intimation of the defender's intention to reclaim.

The defender's reclaiming note was boxed on 14th November, and was called in the Single Bills of the First Division on 15th November, when it was sent to the Summar Roll.

On the same day (viz., 15th November) the pursuer's reclaiming note and notice of motion were boxed and, when they were called in the Single Bills of the First Division (consisting of the Lord President, Lord Johnston, and Lord Skerrington) on 16th November, counsel for the defender objected to the competency of the second reclaiming note, and argued ;—By section 52 of the Court of Session Act, 1868,* every reclaiming note had the effect of submitting to the Court the whole proceedings in the cause, and here any legitimate purpose of the pur-

* The Court of Session Act, 1868 (31 and 32 Vict. cap. 100), enacts, sec. 52 :—"Every reclaiming note, whether presented before or after the whole cause has been decided in the Outer House, shall have the effect of submitting to the review of the Inner House the whole of the prior interlocutors of the Lord Ordinary of whatever date, not only at the instance of the party reclaiming, but also at the instance of all or any of the other parties who have appeared in the cause, to the effect of enabling the Court to do complete justice, without hindrance from the terms of any interlocutor which may have been pronounced by the Lord Ordinary, and without the necessity of any counter reclaiming note ; and after a reclaiming note has been presented, the reclaimer shall not be at liberty to withdraw it without the consent of the other parties as aforesaid ; and if he shall not insist therein, any other party in the cause may do so, in the same way as if it had been presented at his own instance."

suer in reclaiming was served as soon as the defender's reclaiming Nov. 17, 1911.
note was boxed.

Counsel for the pursuer were not called upon.

Fairgrieve v.
Chalmers.

At advising on 17th November 1911,—

LORD PRESIDENT.—The question here raised is as to whether we should send this reclaiming note to the roll. The circumstances are these: There was a judgment, and one of the parties—the defender—intimated to the pursuer that he intended to reclaim. He carried out his intention by printing and boxing in the ordinary way, and his reclaiming note appeared in the Single Bills and was sent to the roll.

This is a reclaiming note by the pursuer, and it appeared in the Single Bills one day after the reclaiming note for the defender had been sent to the roll, and the defender now argues that this reclaiming note should not be sent to the roll, because, under the provisions of section 52 of the Court of Session Act, the pursuer had really got all he wanted, viz., the possibility of attacking the interlocutor which had been pronounced by the Lord Ordinary, by the fact that the case had already been sent to the roll upon the defender's reclaiming note.

I do not think that this matter amounts to incompetency. Section 52 of the Court of Session Act does not say so. It simply says that the effect of a reclaiming note is, first of all, to submit to review all prior interlocutors—unlike the older practice in which you had to reclaim against each separate interlocutor which you disliked; and, secondly, it gives the other side the opportunity of calling in question each and every interlocutor; but it does not say that it makes a reclaiming note at the instance of the other side incompetent. Accordingly, I think that this reclaiming note ought to go to the roll.

I am, however, very far from saying that I think it is good practice that there should be a second reclaiming note for the purpose of doing no more than could be done on a reclaiming note taken by the other side, and it really comes to be an Auditor's question and nothing else. It is quite evident that there are cases in which different results might be reached. For instance, if a party gets notice from the other side that he intends to lodge a reclaiming note and he himself at the same time wishes to reclaim, it is quite evident that he would not be in safety to trust to a simple intimation. He would be quite right to go on with his preparations so as to be quite sure that the reclaiming days did not run out, because the other party might write to him and say, "Now we have changed our minds," and he might find that the reclaiming days had gone.

On the other hand, if a reclaiming note has not only been intimated but also printed and boxed and the case sent to the roll early in the reclaiming days, I think it would be quite out of the question that the other party should then and there sit down and pen another reclaiming note with the view of getting the expense of it in the event of success being with him. I think the matter can be fairly left to the Auditor, who, in a case where there are double reclaiming notes, will fairly judge whether there was any proper reason for lodging the second reclaiming note, and if there was not,

Nov. 17, 1911. will certainly disallow the expense of it, even although that party may be successful.
 Fairgrieve v. Chalmers.

LORD JOHNSTON.—I quite agree with what your Lordship has said. The only point which I wish safeguarded is this, viz., I do not think that the mere written notice of one party that he is going to reclaim is a thing upon which the other party is bound to rely; because the party giving that notice may perfectly well change his mind, and if he does so just on the eve of the reclaiming days running out, then his opponent may find himself in the position of having an interlocutor against him against which it is too late for him to reclaim.

LORD SKERRINGTON concurred.

THE COURT appointed the cause to be put to the Summar Roll, on the reclaiming note for the pursuer and the notice of motion for her to vary the issue for the defender.

WYLIE, ROBERTSON, & SCOTT, Solicitors—J. OGILVIE GREY, S.S.C.—Agents.

No. 21. THOMAS W. ARMOUR, Pursuer (Appellant).—*Constable, K.C.—Lippe.*
 Nov. 17, 1911. T. L. DUFF & COMPANY, Defenders (Respondents).—*Horne, K.C.—Aitchison.*

Armour v. Duff & Co. *Agent and Principal—Disclosed principal—Ship—Owner—Order from brokers for ship's stores—Liability for price.*

A ship chandler received an order from a firm of "steamship owners and brokers" in these terms:—"Please supply the s.s. 'Silvia' with the following stores." He delivered the goods under the erroneous belief that the firm were the owners of the vessel, and sought to hold them liable for the price.

Held that the firm were not liable, in respect that they were acting as agents for the owners, and—since the latter could be discovered by reference to the Register of Shipping—as agents for a disclosed principal.

Expenses—Awarding—Misleading statements on record.

Circumstances in which successful defenders were refused full expenses on account of misleading statements in their defences, calculated to induce the pursuer to proceed with the action, which he might otherwise have abandoned.

2D DIVISION. IN May 1910 Thomas W. Armour, ship store merchant, brought an
 Sheriff of action in the Sheriff Court at Glasgow against T. L. Duff & Company,
 Lanarkshire. steamship owners and brokers. The claim of the pursuer was for payment of £228, 13s. 7d., being the amount of an account for goods sold and delivered.

The circumstances of the case, as ascertained by a proof, were as follows:—

The pursuer was a ship store merchant and ship chandler, and the defenders carried on business as "steamship owners and brokers" in Glasgow. The pursuer deponed that a Mr Dunlop told him to call on the defenders with reference to an order for stores for the s.s. "Silvia," which was then at Port-Glasgow, and mentioned that Mr

T. L. Duff, or his firm, were the owners of the vessel. The pursuer accordingly went to the defenders' office and, after an interview between him and Mr Duff, an order was sent to the pursuer on 22nd December 1909 (No. 9/2 of process) in these terms:—"Please supply the s.s. 'Silvia' with the following stores to be put on board at Port-Glasgow on Monday forenoon, 27th inst. . . .

Nov. 17, 1911.
Armour v.
Duff & Co.

(Signed) T. L. DUFF & Co."

The goods were delivered and an account rendered to the defenders, headed "Captain and owner of s.s. 'Silvia,' Dr. to Thomas W. Armour." The defenders refused to pay the account, and this action was then brought.

From the Register of Shipping at Glasgow it appeared that on 22nd December 1909 the "Silvia" was owned by the "Silvia" Steamship Company, Limited, but was subject to a mortgage in favour of persons named, that the mortgagees were in possession, and that T. L. Duff had been appointed manager. On 21st January 1910 the vessel was sold by the mortgagees in possession to the Grahamstown Shipping Company, Limited, incorporated on 18th January 1910.

The pursuer deponed that at the time the order was given he believed Mr Duff's firm to be the owners of the vessel, and that he only became aware who the real owners were in July 1910, when, in consequence of the statements in the defences, he went to the Custom House and examined the Register of Shipping.

The pursuer averred:—"The defenders . . . are owners of the s.s. 'Silvia,' or in any event, at the time of giving the order for the account now sued on, held themselves out as owners to pursuer." "Said order was given by defenders as apparent owners. The pursuer never heard of any other party being owners of s.s. 'Silvia' until defenders lodged their defences to this action."

The defenders, besides stating that the account was overcharged, averred:—"The defenders are not personally liable for the said account, which is against the owners of the said vessel. The owners are the Grahamstown Shipping Company, Limited, having their registered office at 24 George Square, Glasgow, and the pursuer knew this, and he knew that Messrs T. L. Duff & Company were merely acting as brokers, and were not personally responsible for the said account. The pursuer has in fact rendered his account against the captain and owners of said vessel. The defenders did not guarantee payment thereof."

The defenders pleaded;—(1) The defenders not having ordered the said goods from the pursuer, and same not having been supplied to the defenders, decree of absolvitor should be granted, with expenses. (2) The defenders being merely managers for principals known to the pursuer for whom the goods were ordered, decree of absolvitor should be pronounced, with expenses.

On 14th October 1910 the Sheriff-substitute (Fyfe), after a proof, pronounced this interlocutor:—"Finds (1) that the order for the goods, the price of which is sued for, given by the letter dated 22nd December 1909, No. 9/2 of process, was an order by known ship-brokers to a ship store merchant, to supply goods to the disclosed steamship 'Silvia'; (2) that the defenders are not and never were the owners of the s.s. 'Silvia': Finds that the defenders, having acted as agents for a disclosed principal, are not liable for the sum sued for; therefore assoilzies the defenders, and finds them entitled to expenses."

Nov. 17, 1911. The pursuer appealed to the Sheriff (Millar), who, on 19th January 1911, adhered to the judgment appealed against.*

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The pursuer appealed to the Court of Session, and the case was heard before the Second Division (consisting of the Lord Justice-Clerk, Lord Salvesen, and Lord Guthrie) on 17th November 1911.

Argued for the appellant;—The liability to pay for the stores depended, not on who was the owner of the ship, but on who made the contract.¹ On the evidence it was clear that the contract was made with the defenders, and that it was to them that credit was given.² This was not a contract for a disclosed principal, and the order was not signed as agent for the owners, and further was given by a firm who described themselves as shipowners. The suggestion that the defenders were not the responsible persons was never made in the correspondence which preceded the raising of the action, and this position was taken up for the first time in the defences. The statement in the defences that the Grahamstown Company were the owners of the vessel was so inaccurate and misleading, that, even if the defenders were successful on the merits, they should not be allowed expenses.

Argued for the respondents;—According to the ordinary rule the shipowner was the person responsible for payment for stores, and the pursuer had not shown anything in the nature of this contract to take it out of the ordinary rule. The order was in the usual form, and it was immaterial that the defenders did not sign expressly as agents.³ There was no evidence to show that the defenders had interposed their personal credit. They were not the owners, they had never been the owners, and had never pretended to be the owners. They had acted merely as agents for a disclosed principal. To order stores for a named ship was as good as disclosing the owner's name, since that could be immediately ascertained from the Register of Shipping. It was literally correct that the Grahamstown Company were the owners of the vessel when the defences were lodged, and in any case the pursuer was not misled in any way, since he knew from the examination of the register the whole history of the vessel. The defenders'

* "NOTE.—There is no question in this case that the defenders are not the owners of the 'Silvia,' but that they have the authority of the owners to purchase stores for the ship. The goods were supplied by the pursuer in terms of the written order No. 9/2 of process, and the question is whether the defenders are personally responsible in payment of the price. The question is entirely one of contract. The defenders are shipbrokers, and are said to be in a large way of business, although they are also said to be steamship owners. The order is in these terms:—'Please supply the s.s. "Silvia" with the following stores.' If a firm of brokers gives an order in these terms, it seems to me that they are acting on behalf of the owners of the ship, and, as these can be discovered, the principals of the broker are disclosed. Unless, therefore, the defenders put themselves forward as being the owners, I do not think they are liable as principals. There is no evidence of their having done so in the present case, although the pursuer says he believed them to be the owners at the time when the order was given. I think, therefore, the interlocutor of the learned Sheriff-substitute should be affirmed."

¹ Mitcheson v. Oliver, (1855) 5 E. & B. 419, *per* Parke B., at p. 443.

² Bell's Prin. sec. 224a.

³ The Royal Albert Hall Corporation v. Winchelsea, (1891) 7 T. L. R. 362.

misstatement—assuming it to be one—was not the consideration which induced the pursuer to proceed with the action, and should not therefore affect the question of expenses.

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LORD GUTHRIE.—The question which was opened by the pursuer and appellant before us related to the merits of the judgments of the Sheriff-substitute and the Sheriff. A question subsequently arose on the suggestion of the Court as to what should be done in any case with the expenses of the action ; but that was not opened upon by the appellant and does not seem to have been separately argued before the Sheriff-substitute or the Sheriff. With regard to the merits of the case I am of opinion that the Sheriff-substitute and the Sheriff have come to a right conclusion. The case may be looked at in two ways : either on the documents alone or on the documents taken along with the evidence which has been led.

If one takes the documents alone, one has to consider the original order given by Duff & Company along with the account which was subsequently rendered to them, and also along with the title by which the defenders are known, that is to say, "steamship owners and brokers." It is said by the pursuer that he was entitled when he went to Duff & Company—and it must be observed that they did not go to him, but that he went to them—to assume that they were owners of the steamship "Silvia." In defence of that view he does not found on any surrounding circumstances and he has to fall back on what he says is a general rule. It appears to me that we must consider what was the position of parties when the order was given. The position of parties was that Duff & Company held themselves out in two capacities—as steamship owners no doubt, but also as brokers. It is quite certain that brokers are in the habit of acting as managers for steamships belonging to others. That being so, I am of opinion that the pursuer was not entitled, simply because he found that T. L. Duff & Company were willing to give him an order, to assume that they were owners of the ship. Indeed when one looks at the proof it is fair to say that the pursuer does not take up any such position. That has been put forward by his counsel as his position now, but his true position is quite clear—namely that he proceeded on certain information which he had got from a friend, Mr Dunlop. Mr Dunlop had told him, as he says, that Duff & Company were the owners of the "Silvia." I think the effect of Mr Duff not being examined is, not to throw discredit on Mr Armour's credibility, but to lead to the inference that he must have mistaken what Mr Dunlop said—honestly mistaken it no doubt. But that being his position he says quite frankly : "Supposing I had had no previous communication with Mr Dunlop at all, and had never heard of the 'Silvia,' I would have called upon Mr Duff and I would have asked who was responsible for this . . . I took it from Mr Dunlop that T. L. Duff & Company were the owners of the ship, and for that reason I hold them responsible."

There is no moral blame upon Mr Armour in the matter : but it is clear that had he not had, what he supposed was, this information from Mr Dunlop he would have asked Mr Duff, and there is no reason to doubt that Mr Duff would have told him how the matter of the ownership stood, or he

Nov. 17, 1911. would have gone to the register to ascertain that for himself. It seems to me that that was his duty in any case. I do not say what might have happened if the matter had been reversed and if Duff & Company had gone to him and without telling him anything had simply given him an order. But in the circumstances of his going to Duff & Company it seems to me that it was his clear duty either to ask them how the matter stood or to ascertain for himself from the register what the position of matters was.

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Now, it so happens that there would have been no difficulty in ascertaining from the register how things stood, because the excerpt which has been lodged shows that not only does the register contain full information as to the owners of the ship, but it shows that the ship was subject to a mortgage, it tells who the mortgagees were, and it shows that these mortgagees were in possession. In these circumstances I think the Sheriffs were right in holding, without in the least impugning Mr Armour's *bona fides* in the matter, that he had no right to raise this action against Duff & Company, either on the footing, which is now abandoned, that they were the true owners, or on the footing, which is still maintained, that although not the true owners they held themselves out as the true owners. I do not agree with the Sheriff-substitute in the statement he has made in his note, which was quite unnecessary for the decision of the case, when he says:—"I think the evidence is sufficient to show that the pursuer quite well knew that he was transacting with agents."

If that be the sound view, the question still remains as to the conduct of the defenders in the defences which they put forward. As I read the evidence it seems quite clear that they have made several statements which are not only inaccurate in themselves, but which might quite well have misled, and probably did mislead, the pursuer. It may be that some of these statements, if the sentences are read by themselves, are on the face of them literally accurate; but the result certainly is so misleading as this, that—ordinarily read and taking the context along with the individual sentences—the statement is distinctly made that, while the defenders are not liable for the account, the people who are liable, and the owners of this vessel, are the Grahamstown Shipping Company, Limited; and further, that the pursuer knew that that was the fact.

It is common ground that that is a totally inaccurate statement, because the interest, as owners, of the Grahamstown Company, Limited, did not arise until after the contract had been entered into. It is quite true, as appears from the proof, and from the evidence of Mr Armour himself, that he came to be aware of how the register stood, and what information it contained, at a very early date, because he says that when the defences were lodged he then got the information by going to the Custom House and getting a copy of the register. And therefore I do not think that this is a case where one can say either that the pursuer would be entitled to his expenses, or that the defenders should have their expenses entirely disallowed. In such cases you cannot say absolutely whether, if the pursuer had not been misled by the defenders, he would have gone on with his action or not; but you can certainly say that under the advice of his legal advisers he might not have gone on with his action.

I should suggest for your Lordships' consideration that a just result

would be to hold that down to the date of the Sheriff-substitute's inter-locutor no expenses should be allowed to either party, and the defenders should get their expenses subsequent to that date. I think that result would mark the sense of the Court that when defenders are brought into Court it is their duty to make a full disclosure of their position, and that in any event it is their duty not to do as the defenders here did—to make a statement which, if they had chosen to consider the information within their own knowledge, they would have seen to be entirely misleading, and not only misleading, but calculated to induce the pursuer to go on with an action with which he might otherwise not have proceeded.

Nov. 17, 1911.
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Lord Guthrie.

LORD SALVESEN.—I am entirely of the same opinion. I think this is a very unfortunate action, because if the pursuer had acted with a little less precipitation, and the defenders had treated the case with more candour, it would have been obvious to the parties at a very early stage that there was nothing to fight about. The account was substantially admitted, and each of the three parties who might be suggested as being liable for it was perfectly solvent and able to meet it. Yet we have had a dispute going into three Courts as to whether the particular party who is sued was the person who ought to have been sued in the first instance.

On the merits of this case, such as they are, I think the Sheriffs have reached a sound conclusion. The Sheriff expresses his view in a single sentence. He says,—“The order is in these terms:—‘Please supply the s.s. “Silvia” with the following stores.’ If a firm of brokers gives an order in these terms it seems to me that they are acting on behalf of the owners of the ship, and, as these can be discovered, the principals of the broker are disclosed.” I think that is a substantially accurate statement of the law applicable to a contract of this kind, with this qualification that the owners of the ship are not bound unless the firm of brokers who gave the order had their authority to place it. In this case it is perfectly evident that the defenders had a mandate from the legal owners of the ship for the time being—that is, the mortgagees in possession. This was disclosed upon the face of the register, and it was on the owners’ behalf that they gave the order.

It is therefore very surprising that the defenders when they came to state defences did not take up the true position, but said that they ordered the goods as agents for the owners, and that the owners were the Grahams-town Shipping Company, who were in fact the owners at the date of the proof, but were not the owners of the ship at the time when the order was placed. That was a very misleading statement, and was calculated, as Lord Guthrie has indicated, to induce the pursuer to go on with his action, because he felt that he was able to refute the only defence that had been put forward. I think we ought to penalise the conduct of the defenders in the way that Lord Guthrie has suggested, by refusing them their expenses before the Sheriff-substitute. I think it would be going too far if we carried that refusal beyond the Sheriff-substitute’s Court, especially as the pursuer never seems really to have ascertained what his true legal position was, and came before the Sheriff and before us maintaining that upon the proof and documents he had established personal liability against the defenders.

Nov. 17, 1911. **LORD JUSTICE-CLERK.**—I agree with what your Lordships propose. I will say for myself that if I had been deciding this case alone I should have been a little more drastic in dealing with the defenders' expenses. I think this case is—shall I call it—a model of what ought not to be. I never have seen such a defence as that stated here. It is absolutely misleading. Your Lordships have dealt with it by proposing that expenses should not be allowed up to the date of the Sheriff-substitute's interlocutor. While I concur in that, I repeat what I said at the beginning, that I would have taken a more drastic course had I been left to myself.

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THE COURT pronounced this interlocutor:—"Dismiss the appeal, and affirm the interlocutors appealed against, except in so far as the finding for expenses in the said interlocutors is concerned, which is hereby recalled: Find in fact and in law in terms of the findings in fact and in law in the interlocutor of 14th October 1910: Therefore of new assoilzie the defenders from the conclusions of the action, and decern: Find the defenders entitled to expenses in this and in the inferior Court from 14th October 1910, and remit the same to the Auditor to tax and report."

BALFOUR & MANSON, S.S.C.—WHIGHAM & MACLEOD, S.S.C.—Agents.

No. 22. **THE NEW MINING AND EXPLORING SYNDICATE LIMITED, Pursuers**
(Reclaimers).—*Constable, K.C.—D. Anderson.*

Nov. 18, 1911.

CHALMERS & HUNTER AND OTHERS, Defenders (Respondents).—*D.-F. Dickson—Wilton.*

New Mining
and Exploring
Syndicate,
Limited, v.
Chalmers &
Hunter.

Partnership—Liabilities of partners—Partner of firm of law-agents acting as secretary of Company—Misapplication of Company's funds—Liability of firm—Money received "in the course of its business"—Partnership Act, 1890 (53 and 54 Vict. cap. 39), sec. 11 (b).

The Partnership Act, 1890, enacts, sec. 11 (b), "Where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm; the firm is liable to make good the loss."

C., a law-agent, was appointed salaried secretary to a mining and exploring company in May 1907. On 1st August 1907 he and H., another law-agent, entered into an agreement "to become partners as law-agents and conveyancers" on certain conditions, including, *inter alia*, that the partners should devote their whole time to the business, and that "all fees, including directors' fees, salaries, and other emoluments payable to either party individually" should be credited to the firm. C. remained secretary of the Company until 17th December of that year, when his firm of C. & H. were appointed secretaries in his place. In February 1908 C. absconded, and it was discovered that during the whole period of his connection with the Company he had been embezzling their funds. H., who was completely ignorant of C.'s dishonesty, admitted that the firm and he were liable for the sums embezzled after 17th December.

In an action at the instance of the Company against the firm and H. for repayment, *inter alia*, of sums embezzled between 1st August and 17th December it was proved that during this period the clerical work connected with the Company's business was done by the firm's staff; that entries connected with the Company's business were made in

the firm's books ; and that C. paid into the current bank account of the firm sums which he received from the public in payment for shares in the Company amounting to £925, of which only £175 was ever applied for behoof of the Company. It was also proved that at the date of the first of these payments by C., the firm's current bank account was overdrawn by £2601 ; that during the remainder of the period the overdraft always exceeded that amount ; and that during this period C. was indebted to the firm for upwards of £1000, and drew £1840 from the firm's bank account for his own purposes.

The Court *assolized* the defenders, *holding* (1) that they were not liable under the Partnership Act, 1890, sec. 11 (b), in respect that the monies had not been received by the firm "in the course of its business" ; and (2) that they were not liable at common law in respect that they had discharged the *onus* which lay on them of proving that the firm had not been gratuitously benefited by the payments into its bank account.

(REPORTED *ante*, on a question of caution, 1909 S. C. 1390.)

EXTRA
DIVISION.
Lord
Skerrington.

The New Mining and Exploring Syndicate, Limited, brought an action against the dissolved firm of Chalmers & Hunter, Writers to the Signet, Edinburgh, and against Hugh B. Hunter, W.S., Edinburgh, as a partner of the firm and as an individual, and R. M. MacLay, C.A., Glasgow, trustee on the sequestrated estate of R. S. Chalmers, the only other partner of the firm. The conclusions of the action were for payment of a sum representing the amount of monies belonging to the pursuers, which they alleged had been embezzled by Chalmers while he, and his firm in succession to him, were acting as secretaries of the pursuers' Company. It was admitted that the sums had been embezzled without the knowledge of the defender Hunter, who was entirely ignorant of his partner's dishonesty.

The action was defended by Hunter as an individual and on behalf of the dissolved firm, but no defences were lodged by Chalmers' trustee.

A proof was led before the Lord Ordinary (Skerrington) on 13th December 1910, when the following facts (which will be found more fully set forth in the opinions of the Lord Ordinary and Lord Mackenzie) were established :—

The pursuers were a mining Company registered in Scotland, the board of directors including in their number Robert Scott Chalmers, S.S.C., Edinburgh. At the first meeting of directors, held on 21st May 1907, Chalmers was appointed secretary of the Company, and also law-agent.

On 1st August 1907 Chalmers entered into a partnership with the defender Hunter, a Writer to the Signet, the agreement of co-partnership providing, *inter alia*, "the parties agree to become partners as law-agents and conveyancers, and to carry on the business at present carried on by the said Robert Scott Chalmers as law-agent and conveyancer, on the following terms and conditions, namely . . . (7) Both partners shall devote their whole time and attention to the business. . . . (10) Neither partner shall be entitled to sign the firm name to any cheque, bill, or other negotiable instrument for other than copartnership purposes. (11) All fees, including directors' fees, salaries, and other emoluments payable to either partner individually shall be credited to the firm unless by special agreement between the partners to the contrary. . . ."

On 17th December 1907 Chalmers resigned the secretaryship, and the firm of Chalmers & Hunter were formally appointed secretaries in his place. In February 1908 Chalmers, having become involved in financial difficulties, left the country, and it was discovered that,

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between May 1907, when he was appointed secretary, and the date of his leaving the country, he had embezzled large sums of money belonging to the Company. As secretary of the Company he was in the habit of receiving from applicants for shares the price of shares allotted to them, and the monies so received he appropriated to his private purposes.

The pursuers did not ultimately contend that the compearing defenders were liable for sums embezzled by Chalmers prior to 1st August 1907, the date of the partnership, and, on the other hand, the defenders admitted liability for the sums embezzled by Chalmers after 17th December 1907, the date when the firm were appointed secretaries. Therefore the only question that remained in the case was the defenders' liability for sums embezzled between 1st August and 17th December.

During that period Chalmers paid into the current bank account of the firm sums which he had received on behalf of the pursuers amounting in all to £925, and of that amount only £175 was ever paid out for behoof of the pursuers.

At the date when the first of these payments was made into the current account the account was overdrawn to the extent of some £2601. During the remainder of the period in question the overdraft was always in excess of that amount.* During the whole

* The following is an excerpt from the bank account, the entries printed in italics being those which contain the payments into the firm's account of sums received by Chalmers on account of the pursuers :—

Brought forward, £506 19 0				Brought forward, £3086 18 4				<i>Overdraft.</i> £2579 19 3			
1907.				1907.							
Nov. 2.	To lodged,	45	0	1	Nov. 2.	By cheque	27	2	8		
						do.	6	4	8		
					4.	do.	2	9	4		
						do.	4	3	4		
					5.	do.	16	13	4		
						do.	10	0	0	2601	12 7
7.	do.	300	0	0	7.	do.	502	6	0		
						do.	4	4	0		
						do.	3	3	0		
						do.	9	19	6		
						do.	33	9	9		
						do.	80	0	0	2934	14 10
8.	do.	350	0	0	8	do.	60	0	0		
9.	do.	150	0	0		do.	25	0	0		
11.	do.	1	4	8		do.	7	10	0		
						do.	7	10	0		
						do.	43	10	5		
						do.	5	16	8	2734	1 11
13.	do.	175	0	0	13.	do.	150	0	0		
						do.	80	0	0		
15.	do.	16	11	3		do.	8	10	0	2646	7 3
16.	do.	7	3	6	16.	do.	30	15	0		
						do.	80	0	0		
					20.	do.	5	0	0		
					22.	do.	80	0	0		
					27.	do.	12	10	0		
					28.	do.	4	4	0		
					30.	do.	10	0	0		
Dec. 4.	do.	30	0	0	Dec. 4.	do.	4	3	4		
						do.	17	10	0		
					6.	do.	2	2	0		
						do.	3	0	0		
					7.	do.	2	8	6	2831	15 4
9.	do.	250	0	0	9.	do.	30	0	0	2611	15 4

period in question Chalmers was indebted to the firm for upwards of Nov. 18, 1911. £1000, and drew out of the firm's bank account, for other than firm purposes, sums amounting to £1840.

The clerical work connected with Chalmers' individual appointments, including his secretaryship to the pursuers' Company, was done by the firm's staff, and in Chalmers' absence Hunter superintended the work. A letter, dated 27th August 1907, relating to the pursuers' business, was signed, in the handwriting of Hunter, "Chalmers & Hunter, Secretaries." The cash-book of the firm included payments and receipts on behalf of the pursuers, and the firm ledger included an account in the pursuers' name. There was evidence which tended to show that a considerable proportion of the firm's income was derived from emoluments payable to Chalmers in respect of appointments held by him as an individual.

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The pursuers pleaded, *inter alia*;—(2) The sum sued for having been embezzled or misapplied by the said Robert Scott Chalmers while a partner of the defenders Chalmers & Hunter, and in the course of the said firm's business, as condescended on, decree should be pronounced in terms of the conclusions of the summons. (4) The sums sued for received since 1st August 1907 having been received by the firm of Chalmers & Hunter in the course of its business, and having been misapplied by the partners, or one of them, while in the custody of the firm, the pursuers are entitled to decree as craved. (6) The defenders having in their custody or possession the sums belonging to the pursuers sued for, or at any rate a portion thereof, as condescended on, decree should be granted therefor as craved. (7) The firm of Chalmers & Hunter by their course of dealing having made the whole transactions had with the pursuers part of the ordinary business of the firm, the pursuers are entitled to decree as craved.

The compearing defenders pleaded, *inter alia*;—(2) The pursuers' averments are irrelevant and insufficient to support the conclusions of the summons so far as directed against these defenders, and the action as against them should be dismissed. (3) (a) These defenders not being responsible to the pursuers for any of the sums embezzled by R. S. Chalmers prior to 17th December 1907, as condescended on, and (b) these defenders having, prior to the raising of the action, admitted liability and offered to pay all sums embezzled by R. S. Chalmers during the firm's tenure of the secretaryship, these defenders are entitled to be assoilzied from the conclusions of the action.

On 23rd December 1910 the Lord Ordinary (Skerrington) pronounced an interlocutor in which he, *inter alia*, sustained the third plea in law for the defenders, and assoilzied them from the conclusions of the action.*

* "OPINION.—The pursuers are a mining company which was registered in Scotland on 17th May 1907. Three of the directors lived in Manchester, and the remaining director was a Scottish solicitor called Chalmers, who was also the solicitor and secretary of the Company. He absconded about the end of February 1908, having embezzled a considerable amount of the pursuers' money. The object of the action is to make Mr Hunter, a Writer to the Signet in Edinburgh, liable for Chalmers' defalcations. Mr Hunter had the misfortune to enter into partnership with Chalmers as from 1st August 1907 while the defalcations were going on. It is common ground that Mr Hunter is a man of honour, and that he neither knew nor suspected that his partner was dishonest. The action is defended by Mr Hunter in his own name and in that of his dissolved firm of Chalmers & Hunter.

Nov. 18, 1911. The pursuers reclaimed, and the case was heard before the Extra Division (consisting of Lord Kinnear, Lord Dundas, and Lord Mac-

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kenzie) on 9th and 10th November 1911.

Argued for the reclaimers;—The defenders were bound to repay to the pursuers the money embezzled by Chalmers either in respect of sec. 11 (b) of the Partnership Act, 1890,¹ or in virtue of the common law doctrine "*Nemo debet ex alieno damno lucrari.*"² (1) *Partnership Act*.—The money had admittedly been "misapplied" by Chalmers, one of the partners, and the only question, therefore, was whether it had been received by the "firm in the course of its business." In the circumstances it clearly had been so received. What constituted the course of a firm's business was in every case a matter for proof. The mere fact that a firm styled itself a firm of law-agents did not free the firm from liability for the actions of one of its partners in another sphere, if that other sphere was in fact included in the ordinary scope

The trustee on Chalmers' sequestrated estates is also cited, but does not appear as a defender.

"The moneys embezzled by Chalmers did not come into his possession in his capacity as the Company's solicitor. They consisted of sums paid for shares by members of the public to whom Chalmers gave in return a receipt as secretary of the Company. A secretary as such has no authority to receive money on behalf of his employer. His office has been described as a humble one—*George Whitechurch, Limited, v. Cavanagh*, [1902] A. C. 117, at p. 124; *Tendring Hundred Waterworks Company v. Jones*, [1903] 2 Ch. 615, at p. 621. But the pursuers allowed Chalmers to handle their cash, believing no doubt, as did also Mr Hunter, that he was an honest man. The embezzlements began before the Company was registered, and they amounted to more than £500 at 1st August 1907 when the partnership of Chalmers & Hunter came into existence. About £1200 more was embezzled between that date and 17th December when, as the pursuers allege in condescendence 4, 'Messrs Chalmers & Hunter were formally appointed secretaries of the pursuers in place of the said Robert Scott Chalmers.' The minute of appointment in favour of the firm bore that it was made 'at the request of the secretary' (Chalmers). In asking for and accepting this appointment on behalf of his firm I hold that Chalmers exceeded his powers under the partnership agreement, which stated that the parties were to carry on business as law-agents and conveyancers. It is no part of a solicitor's business to act as secretary or treasurer to a company. Although Chalmers acted without the authority of Mr Hunter, the latter, when he came in January 1908 to know of the appointment, ratified it, and so made it binding upon the firm and himself as from its date, but no earlier. It was not proved that Mr Hunter knew that the appointment was virtually as secretary and treasurer; but he has raised no question on this head, and has admitted liability for the sum of £200 which was embezzled by Chalmers in the two months during which the firm held the appointment. The only dispute is as to his liability for the money embezzled by Chalmers between 1st August and 17th December 1907.

"I hold it proved that between 21st May 1907, when Chalmers was appointed secretary, and 17th December, when the firm was appointed to that office, no agreement of any kind, either express or implied, was made between the pursuers or their directors on the one part and either Chalmers or Mr Hunter on the other part in regard to the secretaryship. It follows that the original appointment, which was by minute of the directors and for no defined period, remained in force until 17th December 1907, and that until that date there was no contract between the pursuers and the firm

¹ 53 and 54 Vict. cap. 39—Quoted in rubric.

² Stair, i. 6, 33.

of the firm's activities.¹ In the present case it was clear from the deed of copartnership that company work was expected to be an important part of the business of the future firm,² and in actual practice it had been proved that company work, i.e. the secretaryships of companies, had been the firm's most important source of revenue. In particular the duties in connection with the pursuers' Company had been treated as firm business; the clerical work had been done by the office staff; the defender had given his assistance and had, within the period in question, signed at least one letter "Chalmers & Hunter, Secretaries," and the firm's ordinary books contained numerous entries in connection with the pursuers' Company. Even, however, if the business in question had been outwith the strict line of the partnership, and had been transacted without the sanction of Hunter, still the defenders were liable in respect that the transactions in question had gone through the firm's books and ought therefore to have been known

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except as regards any legal business which the former employed the firm to execute. In point of fact, however, the firm did not perform any legal business for the pursuers prior to January 1908. The pursuers' counsel pointed out that partners are agents for each other and for the firm (53 and 54 Vict. cap. 39, sec. 5), and he referred to the law as to undisclosed principals and ratification with the object of showing that the pursuers were now entitled to treat the firm as if it had made a contract with them (the pursuers) through the agency of Chalmers. But these rules of law presuppose the existence of a contract upon which they can operate. The unauthorised contract of 17th December 1907, which Chalmers purported to make on behalf of his firm, and Mr Hunter's subsequent ratification, illustrate the law as to ratification which was fully considered and explained by the House of Lords in *Keighley, Maxsted, & Company v. Durant*, [1901] A. C. 240. If the pursuers could have proved a similar contract of an earlier date professing to bind the firm, and duly ratified subsequently, they would have made some advance towards gaining their case. Again, if on or after 1st August 1907, Chalmers had made a new contract with the pursuers for his appointment as secretary without mentioning the firm, it would have been possible to argue that such contract had been entered into by him as the authorised agent of the firm who were his undisclosed principals. Such an argument, though possible, would have been obviously bad, because a contract for the personal services of one man cannot be converted by any legal subtlety into a contract for the personal services of two men—See *Mabon v. Christie*, 6 D. 619.

"The pursuers' counsel founded specially on two clauses in the partnership agreement, viz.—(Seven) 'Both partners shall devote their whole time and attention to the business.' . . . (Eleven) 'All fees, including directors' fees, salaries, and other emoluments payable to either partner individually shall be credited to the firm unless by special agreement between the partners to the contrary.' These clauses show that in a certain sense it was part of the business of the firm of Chalmers & Hunter that its partners should hold individual appointments and so earn profits for the firm, and that a partner attended to the firm's business when he did his duty as a director or secretary under an appointment in favour of himself as an individual. In no proper sense, however, can it be said that a firm's business includes matters as to which the firm has no right and no duty to concern itself.

"The proof did not, in my opinion, add anything material so far as

¹ *Willet v. Chambers*, (1778) 2 Cowper, 814, per Lord Mansfield, at p. 816; *Rhodes v. Moules*, [1895] 1 Ch. 236; *Cleather v. Twisden*, (1884) 28 Ch. D. 340, per Bowen, L.-J., at p. 349; *Barwick v. English Joint Stock Bank*, (1867) L. R., 2 Ex. 259.

² Clauses 7 and 11 of the deed of copartnership.

Nov. 18, 1911. to Hunter.¹ It was further perfectly clear that the directors of the Company had from the beginning of the partnership regarded and treated the firm as secretaries, and Hunter had never protested against their attitude; the truth being that the express appointment of the firm as secretaries was just the formal recognition of an already existing arrangement known to and acted upon by all parties concerned. The cases of *Keighley, Maxsted, & Company v. Durant*,² and *Mabon v. Christie*,³ were distinguishable. The former was the case of an isolated transaction, the latter a case in which it was very properly held that the proprietors of an estate who had appointed a factor were not bound to recognise his partner as their factor. (2) *Common Law*.—It was well established that no one was entitled to derive a gratuitous benefit out of another person's loss.⁴ The paying in to the firm's account of the sums embezzled was *per se* a gratuitous benefit, and it was not necessary for the pursuers to trace these sums further,

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regards the question of Mr Hunter's liability. It was proved that the clerical work connected with Chalmers' individual appointments was done by the firm's staff, and that in his partner's absence Mr Hunter lent a hand to do what was necessary. It was also suggested, though not clearly proved, that a considerable proportion of the firm's income was derived from emoluments payable to Chalmers as an individual. The volume of this kind of business and the way in which the necessary clerical assistance was provided are matters which do not affect the argument. One might figure an extreme case where two pluralists who had no professional practice agreed to divide as partners the emoluments of their several individual offices and to provide at joint expense suitable house-room and clerks to the satisfaction of the various employers. Seeing that such a firm could not sue any of the employers for salary, it is difficult to understand why it should be supposed to owe these employers any duty except the ordinary duty of honesty which it owed to the whole world. Another point much insisted on was the firm's mode of book-keeping. Their cash-book included payments and receipts on behalf of the pursuers, and their ledger included an account in name of the pursuers. Even if Mr Hunter had known and approved of this mode of book-keeping, the fact would not have affected the legal relation of the firm to the pursuers except if and in so far as Mr Hunter had notice from the entries in the firm's books of his partner's breach of trust. Technically it was incorrect that any of the pursuers' transactions should be recorded in the firm's books, but it was natural that Chalmers should borrow from his firm what he needed for petty cash advances on behalf of the pursuers. Of course it was inexcusable on his part to pay the pursuers' money into the firm's overdrawn bank account, and one wonders why he took the trouble to record such transactions. But it was not suggested that Mr Hunter saw these entries and so had notice of the breach of trust. It was said that he was negligent in not supervising his partner's book-keeping. I do not agree. He was entitled to rely on Chalmers so long as he believed him to be honest and competent. In any case Mr Hunter and his firm owed no duty to the pursuers as to how they kept their books.

"For the foregoing reason I hold that the firm and Mr Hunter incurred no liability to the pursuers under any section of the Partnership Act. Chalmers' wrongful acts were not committed while he was 'acting in the ordinary course of the business of the firm or with the authority of his copartners'

¹ Bell's Com., M'Laren's ed., vol. ii., p. 506; Sandilands v. Marsh, (1819)

² Barn. & Ald. 673; Lindley on Partnership, 7th ed., p. 185.

³ [1901] A. C. 240.

⁴ (1844) 6 D. 619.

⁴ Clydesdale Bank v. Paul, (1877) 4 R. 626; Stair, i. 6, 33.

the automatic reduction of the firm's overdraft being in itself a benefit to the firm.¹ When these sums were paid into the firm's account they became the property of the firm; and it was quite irrelevant, in a question with the pursuers, for the defenders to say that, by a further fraud of Chalmers, the monies had in fact been appropriated to his benefit and not to that of the firm.

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Argued for the respondents;—The pursuers' argument failed on both branches. (1) *Partnership Act*.—The payments made to Chalmers as secretary of the Company were not received by the "firm in the course of its business" within the meaning of sec. 11 (b) of the Partnership Act. The partnership according to the agreement was "as law-agents and conveyancers," and accordingly Chalmers' secretaryship did not fall within the scope of the partnership business. It was moreover purely as secretary that the monies came into Chalmers' hands—it being in no way the business of the firm to receive them—

(section 10). Nor was the pursuers' money received by Chalmers when 'acting within the scope of his apparent authority' (section 11 (a)). Nor did the firm itself receive the money 'in the course of its business' (section 11 (b)). Lastly, Mr Hunter had no notice of the breach of trust (section 13 (1)), and the money cannot now be followed and recovered as it is not in the possession and control of the firm (section 13 (2)). Subject to the provisos (1) and (2), section 13 is clear to the effect that the employment by one partner of trust property in the business of the firm does not create any liability against the other partners. 'If a partner, being a trustee, improperly employs trust property in the business or on the account of the partnership, no other partner is liable for the trust property to the persons beneficially interested therein.' In the 7th edition of his book on Partnership (p. 192), Lord Lindley states that this section has not introduced any change in the previous law, and he quotes two cases where trust money having been applied in paying partnership debts, or to other partnership purposes, the amount so applied was held to be not provable against the 'joint estate.' Though a firm in Scotland is a separate *persona* I do not suppose that our law was different. I do not, however, interpret the statute as excluding liability on the part of the firm and its innocent partners in a case where it could be proved that the firm and partners had been actually enriched by the dishonesty of a partner who had misapplied trust money in paying off the firm's liabilities. Such a case is unlikely to occur in real life. The first victims of a dishonest partner are his firm and copartners, and Mr Hunter is no exception to the general rule. If, however, such an exceptional case should occur, a remedy would be found in what Stair (i. 6, 33) calls 'that common ground of equity, "*Nemo debet ex alieno damno lucrari*."' The same rule of equity was stated in other words by Lord Chancellor Campbell in an English case cited by Lord Shand in his opinion in *Clydesdale Bank v. Paul*, (1877) 4 R. 626, 628,—'I consider it to be an established principle that a person cannot avail himself of what has been obtained by the fraud of another unless he is not only innocent of the fraud, but has given some valuable consideration.' This equitable rule has no application to the facts of the present case. Although about £925 of the pursuers' money—which was trust money in the hands of their agent Chalmers—was paid by him into the firm's bank account between 1st August and 17th December 1907, and was never repaid to the pursuers, the firm and Mr Hunter are not a whit the richer, but, on the contrary, are much the poorer for Chalmers' frauds. The pursuers' counsel

¹ *Clydesdale Bank v. Paul*, 4 R. 626; *Reid v. Rigby & Co.*, [1894] 2 Q. B. 40; *Jacobs v. Morris*, [1901] 1 Ch. 261; *Barwick v. English Joint Stock Bank*, L. R., 2 Ex. 259.

Nov. 18, 1911. and it was purely as secretary that he embezzled them.¹ The monies further had never been in any true sense "in the custody of the firm"; they ought to have been paid direct by Chalmers into the Company's own account. Indeed, strictly speaking, they ought never to have been received by Chalmers at all, for a secretary had, as such, no power to receive money on behalf of his employer.² The pursuers accordingly were endeavouring to bring within the scope of firm business an appointment which was not a firm appointment and a series of actions which, in any event, did not fall within the scope of that appointment. The clause in the contract of copartnership that fees and salaries were to be credited to the firm did not mean that the business in respect of which the fees and salaries were payable must necessarily be firm business. (2) *Common Law*.—If there was no case under the statute there was no case at common law, because the statute merely codified the common law. But assuming that there was the difference

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founded on the case of *Clydesdale Bank v. Paul*, already cited, and in particular on Lord Shand's opinion. The opinions of the Lord Ordinary (Rutherford Clark) and of Lord President Inglis (in which Lord Deas and Lord Mure concurred) were based on a rule of the law of agency to the effect that if an agent commits a fraud 'while doing his business of agent,' the principal is liable, at any rate to the extent to which he has benefited. In other words, assuming that the principal is entitled to repudiate the transaction (which may not always be the case) he must repudiate it as a whole, and he cannot at the same time refuse to return the consideration received by his agent from the third party. In the present case, Chalmers' fraudulent acts were not done by him in his capacity as agent for the firm, and accordingly the firm is not called upon to elect whether it shall repudiate or ratify his actings. The ground of judgment in *Clydesdale Bank v. Paul* is really covered in the case of a firm by sections 10 and 11 of the Act. A difficulty arises from Lord Shand's reference to the general rule of equity. With the greatest possible respect, I doubt whether the judgment can be supported on that ground. Further, it humbly appears to me that the rule of agency law founded on by the majority of the Judges is different, both in principle and in practical working, from the general rule of equity invoked by Lord Shand.

"I have already said that Chalmers' frauds did not arise out of his or the firm's employment as solicitors. I assume that the firm did execute various pieces of legal business for the pursuers, and that if the whole facts were examined the inference would be that the pursuers employed the firm and not Chalmers as an individual. In the course of the argument a good deal was said as to the effect of the agreement of copartnership upon Chalmers' former clients. For the sake of clearness I may state my views, though the question does not really arise. (1) As regards legal work which Chalmers was employed to do before the partnership began, and as to which there was no new contract express or implied either with the firm or any partner, I should have thought it clear that the firm could neither sue nor be sued, even though the work was in fact done by them. My only difficulty arises from the contrary opinion of Lord Kyllachy in *Tully v. Ingram*, (1891) 19 R. 65, 70. In the Inner-House the Lord President pointedly

¹ Lindley on Partnership, 7th ed., pp. 187 and 188; *Mabon v. Christie*, 6 D. 619; *Keighley, Maxsted, & Co. v. Durant*, [1901] A. C. 240; *Cleather v. Twisden*, 28 Ch. D. 340; *Lloyd v. Grace, Smith, & Co.*, [1911] 2 K. B. 489.

² *George Whitechurch, Limited, v. Cavanagh*, [1902] A. C. 117, at p. 124; *Tendring Hundred Waterworks Co. v. Jones*, [1903] 2 Ch. 615; *Cf. also Jacobs v. Morris*, [1901] 1 Ch. 261.

suggested by the pursuers between the case at common law and under Nov. 18, 1911. the statute, it was necessary for them, if they were to succeed at common law, to prove that the firm had received a gratuitous benefit. Here, however, the benefit, if there was any benefit, was not gratuitous. Chalmers was indebted to the firm, and the payments accordingly were not gifts but payments in consideration of debt. But, in point of fact, there was really no benefit; the mere fact that the money had been temporarily in the firm's account was not a benefit,¹ and the pursuers had entirely failed to discharge the onus which lay on them of proving that, apart from a mere question of bookkeeping, the defenders had received some tangible benefit from Chalmers' fraud. Further, it was to be noted that Hunter had no reason to imagine that the money embezzled had belonged to the Company, the cheques having all been payable to Chalmers as an individual.

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Hunter.

At advising on 18th November 1911,—

LORD MACKENZIE.—The purpose of this action is to make the defender liable for the defalcations of his late partner, Robert Scott Chalmers, S.S.C., who acted as secretary of the pursuers—the New Mining and Exploring Syndicate, Limited. It is common ground that the defender was entirely ignorant of his partner's dishonesty. The question to be decided in this case is which of two innocent parties is to suffer for Chalmers' fraud.

The pursuers seek to recover from the defender certain payments which are traced into the firm's bank account, and this they do upon two grounds, (1) under section 11 (b) of the Partnership Act, 1890, which provides, "Where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm; the firm is liable to make good the loss"; and (2) at common law, on the ground that no one can retain a gratuitous benefit which he has obtained through the fraud of another.

Three periods were dealt with in argument—the *first* being from 17th May to 1st August 1907. It was stated that during these months £525 of the Company's money was misappropriated by Chalmers whilst secretary of the Company. Mr Hunter did not, however, enter into partnership with Chalmers until the 1st of August 1907, and pursuers' counsel admitted

reserved his opinion on this question (pp. 73, 74). (2) As regards clients of Chalmers who knew that he had assumed a partner and who employed him without mention of the firm, it would be a jury question whether the contract was with him as an individual or as agent for the firm. Generally, I think, the inference would be that he acted for his firm, but if the circumstances pointed to an individual employment, say, as permanent solicitor to a corporation, the inference might be the other way. *The British Homes Assurance Corporation, Limited, v. Paterson*, [1902] 2 Ch. 404, is an example of a case where a client was held to have employed a solicitor individually, and not his firm. (3) As regards clients who employed Chalmers without knowing of the partnership, the firm might sue or be sued as Chalmers' undisclosed principal, if that exceptional rule of law is applicable to so personal a contract as the employment of a solicitor. I express no opinion as to this." [His Lordship then dealt with a point which is not reported.]

¹ *Sinclair, Moorhead, & Co. v. Wallace & Co.*, (1880) 7 R. 874.

Nov. 18, 1911. that no claim could be made against the defender prior to that date. The real question in the case relates to the *second* period, from 1st August to 17th December 1907. Hunter and Chalmers entered into partnership as law-agents and conveyancers on 1st August 1907. During the period from that date to 17th December 1907 Chalmers was secretary of the Company. It is alleged that £925 of the pursuers' money was during this period paid by Chalmers into the firm's bank account; that he paid out for behoof of the pursuers' Company only £175; and that he embezzled the balance of £750. The defender is sought to be made liable for this sum. The *third* period was from 17th December 1907 to the end of February 1908, when Chalmers absconded. During this time the firm acted as secretaries to the Company. The defender admits his liability for a sum of £200, but counter claims for sums which *in cumulo* amount to more than this. These counter claims have been given effect to by the Lord Ordinary. As regards £100 there is a question which will be referred to later on.

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Confining attention to the *second* period, from 1st August to 17th December, the claim by the pursuers under the Partnership Act, 1890, section 11 (b), depends upon whether the firm received the money—"in the course of its business." Now, during this period it was Mr Chalmers who was secretary of the Company—not the firm. The pursuers' counsel laid great stress upon the terms of the agreement of copartnership between the defender and Chalmers, particularly the provisions (7) "both parties shall devote their whole time and attention to the business, . . ." and (11) "all fees, including directors' fees, salaries, and other emoluments payable to either partner individually, shall be credited to the firm unless by special agreement between the partners to the contrary . . ." It was argued that a large part of the firm's business consisted of work in connection with companies; that the directors of the pursuers' Company were aware of the assumption of the defender as a partner by Chalmers; that the partners treated the pursuers' business as part of that conducted by the firm; that this was evidenced by the way the books were kept; and that consequently the Company could elect even after the event to hold the firm liable for what their secretary had done. I am unable to assent to this view. Hunter and Chalmers agreed to become partners "as law-agents and conveyancers" according to the terms of the copartnership agreement. The firm were not secretaries of the Company, nor indeed were they its law-agents. Chalmers was the secretary, giving his personal service. There is only one item of evidence put forward against this, and that is a letter, dated 27th August 1907, signed "Chalmers & Hunter, Secretaries." The signature of the firm is in the handwriting of the defender—Mr Hunter—but the letter is a typewritten one, and the signature "Chalmers & Hunter" might well have been appended *per incuriam*.

So far as the £925 is stated to have consisted of cheques, these were made payable to Chalmers as an individual. As the Lord Ordinary points out in his reference to the case of *Mabon v. Christie*,¹ it is impossible in the circumstances to hold that the contract by which Chalmers gave his personal service to the Company became a contract under which the firm

¹ 6 D. 619.

was bound. I am accordingly of opinion that the case sought to be made against the defender under the Partnership Act, 1890, fails. It was admitted in argument that if liability could not be established against the firm under section 11 (b) no case could be made under any of the other sections.

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The case against the defender at common law creates more difficulty. An argument was submitted by the Dean of Faculty on behalf of the defender that sections 10 and 11 of the Partnership Act, 1890, contained all the grounds upon which one partner could be made liable for the default of another. According to this contention the defaulter must have received the money in his capacity as agent. It was argued that the case of the *Clydesdale Bank v. Paul*¹ did not go further than this. It is no doubt quite true that, if it is sought to make a principal liable as such, agency must be established. The common law ground of liability, however, rests upon a much wider basis. The Lord Ordinary quotes the passage from *Stair*² in which it is described as "that common ground of equity, '*Nemo debet ex alieno damno lucrari.*'" This principle is independent of the question of agency. The Lord Ordinary refers to Lord Shand's dicta in *Paul's* case,¹ and expresses a doubt whether the judgment there could be supported on the general rule of equity. It is not necessary to discuss that question here. No doubt is expressed in the Lord Ordinary's opinion as to the existence of such a general rule of equity—his opinion being that the equitable rule has no application to the facts of the present case. It is here that, in my opinion, the difficulty of the case lies, although in the conclusion I arrive at the same result as the Lord Ordinary. The question is whether the firm took a gratuitous benefit. It was argued for the defender that consideration was given by the firm, because at the time the payments in were made by Chalmers he was the firm's debtor, and that accordingly it must be regarded that he was merely paying his debt. The answer to this, in my opinion, is that in point of fact he never did pay his debt. It is no doubt of importance (as will be adverted to later on) that he was debtor to the firm during the period in question, but I cannot see evidence in the case to entitle me to take the view that he paid his debt to the firm and obtained a discharge for the amount.

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The question, in my opinion, really depends on the view taken of the firm's bank account. I should say first of all that I think it sufficiently established that there are five credit entries in that account which represent money of the pursuers' Company. This is instructed by the evidence and minute of admissions which I need not go into in detail. The sums are £300 paid in in notes on 7th November 1907 in respect of the allotments of shares in the pursuers' Company to the brothers Reid; £200, part of a cheque of £350 in favour of Chalmers paid in on 8th November in respect of an allotment of shares to Dr Cramer; £150 by cheque to Chalmers paid in on 9th November in respect of an allotment of shares to Mr Barbour; £25, part of a cheque for £175 to Chalmers, paid in on 13th November in respect of shares allotted to Mr George Campbell, and £250 paid by cheque to Chalmers on 9th December 1907 in respect of shares allotted to Mr James Donaldson.

¹ 4 R. 626.

² I. 6, 33.

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From one point of view it may no doubt be represented that the firm took a gratuitous benefit from these payments to credit of its bank account. At the date of the first of the payments the account was overdrawn to the extent of £2601, 12s. 7d., and the argument is that the amount of the overdraft was extinguished *pro tanto* by the payment in of the £300. If, however, the debit side of the account is examined, it is found that at the close of the banking operations on the 7th of November, the day when the £300 was paid in, so far from the overdraft being diminished, it was increased to the figure of £2934, 14s. 10d. The pursuers, however, say, We have charged you, the firm, with receipt of £300 of the Company's money—you do not discharge yourselves of the receipt of that money by merely pointing to the fact that cheques were drawn the same day which *in cumulo* are much more than sufficient to draw out the amount paid in. This in the ordinary case would appear to me to be a formidable argument. I have come, however, to be of opinion that it is sufficiently met by the evidence led for the defender. It is conclusively proved that Chalmers drew out of the firm's bank account for other than firm purposes sums amounting to £1840. It is also proved that throughout the whole of the period in question he was in debt to the firm for upwards of £1000. There is a want of specification about both these items of evidence. When, however, it is said that Chalmers was throughout a debtor to the firm for the amount stated, I think it may fairly be held to mean that he had drawn out by upwards of £1000 more than he had put in, including in his payments to credit the amount of the pursuers' money. This being the case, it is impossible, in my opinion, to say that the firm took a gratuitous benefit to the extent of the £300. If the succeeding payments are scrutinised in the same way, the same considerations, I think, apply to them. As already stated the £300 was paid in on the 7th of November and the last of the payments—the sum of £250—on the 9th of December. The amounts of the overdraft, as noted on No. 23 of process, are during the whole of this time always in excess of the sum of £2601, 12s. 7d., with which the period commences. The amount of the overdraft on the 9th of December is £2611, 15s. 4d.

An onus is put on the defender by the pursuers when they prove that money belonging to them was paid into the bank account—the onus being to show that the firm was not enriched thereby. On an examination of the bank account, taken with the whole evidence in the case, I have come to be of opinion, though not without difficulty, that this onus has been discharged by the defender. The facts of the case make it like one in which a partner of a firm puts cash into the firm's safe for a limited period which he takes out again. The fact that the money has been deposited in the safe does not *per se* benefit the firm.

I should notice another way of putting the case against the defender, which is this. At the close of the day on 15th July 1908 he squared off the bank account by paying in the sum of £224, 5s. 7d. It was argued that, but for the five credit entries I have above referred to, the amount he would have had to pay would have been swelled by the sum of £925. I am not satisfied of this. It is not established that the bank would have allowed the overdraft to mount up, and it may fairly be said that the sums

which were allowed to be drawn out were to a certain extent in respect Nov. 18. 1911. of the sums which were paid in. The defender's answer was that the amount of the overdraft was limited by the value of the securities deposited. Here the proof is deficient, as I regret to say it is on other points in the case. It is not proved what the value of the securities deposited was, nor what limit the bank put upon the amount of the overdraft. For the reasons, however, previously stated, I think there is sufficient in the case to entitle the defender to escape liability. [His Lordship dealt with the question of the counter claims with which this report is not concerned.]

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I am of opinion that the interlocutor reclaimed against should be adhered to.

LORD KINNEAR and LORD DUNDAS concurred.

THE COURT adhered.

COWAN & STEWART, W.S.—DAVIDSON & SYME, W.S.—Agents.

THE BRITISH LINEN BANK, Pursuers (Reclaimers).—*Fleming, K.C.*— No. 23.
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THE LORD PROVOST, MAGISTRATES, AND COUNCIL OF THE CITY OF EDIN- Nov. 18, 1911.
BURGH, Defenders (Respondents).—*Cooper, K.C.*—*Constable, K.C.*—*Hon. Wm. Watson.* British Linen
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of Edinburgh.

Loan—Local Government—Burgh—Stock Exchange—Issue of redeemable stock by a municipality—"Redeemable"—Edinburgh Corporation Stock Act, 1894 (57 and 58 Vict. cap. lvi.), sec. 5—Edinburgh Improvement and Tramways Act, 1896 (59 and 60 Vict. cap. cccxiv.), sec. 83.

The Corporation of Edinburgh, under powers conferred by Acts of Parliament, issued Corporation stock, the certificates of which bore that the holders were the proprietors of a certain value "of Edinburgh Corporation two and a half per cent Redeemable Stock, subject to the Acts of Parliament relating thereto. . . . Redeemable at par after Whitsunday 1927."

Held, on a construction of the certificate, together with the Acts which authorised, and the resolution of the Corporation which effected, the creation of the stock, that the Corporation were bound on the application of the holders to redeem the stock at par at Whitsunday 1927, and had not merely an option of so doing.

ON 21st October 1910 the British Linen Bank brought an action EXTRA
against the Lord Provost, Magistrates, and Council of the City of DIVISION.
Edinburgh, for declarator "that on a sound construction of the Lord
statutes, resolution, and prospectus detailed in the condescendence, Skerrington.
under which the defenders in 1897 created and issued £750,000 two
and a half per cent Edinburgh Corporation Redeemable Stock, the
defenders are bound to redeem the said stock immediately on the
expiry of the 15th day of May 1927 on the application of the holders
thereof, and are not entitled to postpone the right of the holders of
the said stock to have the same redeemed by the defenders for any
further period after the said 15th day of May 1927."

The circumstances connected with the issuing of the stock were as

Nov. 18, 1911. follows:—On 7th April 1897 the Lord Provost, Magistrates, and Council of the City of Edinburgh passed the following resolutions:—
 British Linen Bank v. Magistrates of Edinburgh. “First. That under the authority and subject to the provisions of the Edinburgh Corporation Stock Act, 1894,* and the Edinburgh Improvement and Tramways Act, 1896,† the Corporation do hereby, in exercise of their several statutory powers, create stock to be called the Edinburgh Corporation 2½ per cent Redeemable Stock, and to be issued to an amount which shall be sufficient for the following purposes, but not exceeding £750,000 . . .

“Second. That such stock shall be issued at the price, and shall bear the dividends, and be transferable in the manner hereinafter specified: (that is to say) (a) The minimum price of issue to be £99 per cent, the first dividend to be payable on 11th November 1897, for the half-year ending on that date . . . (d) Dividends at £2, 10s. per cent per annum, to be payable half-yearly at the terms of Martinmas (11th November) and Whitsunday (15th May) . . .

“Third. That such stock shall be redeemable at par after the expiration of a period of thirty years from 15th May 1897.”

Thereafter they issued a prospectus‡ in the following terms:—

* The Edinburgh Corporation Stock Act, 1894 (57 and 58 Vict. cap. lvi.) enacts:—

“ . . . Whereas it is expedient that the Corporation should be authorised to exercise their statutory borrowing powers for the time being by means of the creation and issue of Corporation stock as in this Act provided . . .

“Sec. 5 (1) Where the Corporation have for the time being any statutory borrowing power then, subject and according to the provisions of this Act, the Corporation may from time to time by resolution exercise the power by creation of redeemable stock to be from time to time issued for such amount within the limit of the power at such price to bear such half-yearly or other dividend and to be so transferable . . . as the Corporation by the resolution for the first creation of Corporation stock direct: Provided that all Corporation stock at any time and from time to time so created shall be created on and subject to such terms and conditions as that the same shall form one and the same class of stock bearing one and the same rate of dividend, and shall become redeemable as hereinafter provided after the expiration of one and the same period from the first creation of Corporation stock.

“(3) The resolution for the first creation of Corporation stock shall provide that such stock shall be redeemable at the option of the Corporation at par after the expiration of a period to be fixed by the resolution not exceeding sixty years from the first creation of the stock. . . .

“(4) Each resolution for creation of stock shall specify that the stock thereby created is redeemable.”

† The Edinburgh Improvement and Tramways Act, 1896 (59 and 60 Vict. cap. ccxxiv.) enacts:—

Sec. 83. “The Corporation, in addition to the powers contained in the Edinburgh Corporation Stock Act, 1894, may and they are hereby authorised at any time to create and issue a new class of stock for all or any of the purposes for which the Corporation may create and issue stock to bear any rate of dividend which the Corporation may fix, and all stock of such class shall be redeemable at the option of the Corporation at one and the same period to be fixed by the Corporation, but not exceeding sixty years from the first issue of such stock.”

‡ The pursuers did not ultimately found on the prospectus.

"PROSPECTUS of Issue of £750,000 Edinburgh Corporation
2½ per cent Redeemable Stock.

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"EDINBURGH CORPORATION STOCK.

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"Authorised by the Edinburgh Corporation Stock Act,
1894, and the Edinburgh Improvement
and Tramways Act, 1896.

"ISSUE OF £750,000 2½ PER CENT STOCK.
Redeemable at par after 15th May 1927.

"The Corporation of Edinburgh give notice that they have resolved to issue, and are prepared to receive tenders for, £750,000 of stock, bearing interest at 2½ per centum per annum, payable half-yearly, at the terms of Martinmas (11th November) and Whitsunday (15th May).

"The stock will be redeemable at par after 15th May 1927. . . ."

The British Linen Bank received a copy of the prospectus, and tendered for, and were allotted, £254,000 of the stock.

The stock certificate was in the following terms :—

"CITY AND ROYAL BURGH OF EDINBURGH.

No.

Register Folio.

"Stock created and issued to date, £750,000. The amount of stock authorised is unlimited.

"Authorised by The Edinburgh Corporation Stock Act, 1894, and The Edinburgh Improvement and Tramways Act, 1896.

"This is to certify that
the Proprietor of Pounds of
Edinburgh Corporation Two and a half per cent Redeemable Stock,
subject to the Acts of Parliament relating thereto.

"NOTE.— . . . Redeemable at par after Whitsunday 1927. . . .
Interest payable half-yearly on 15th May and 11th November."

The pursuers pleaded;—On a sound construction of the statutes, resolution, and prospectus condescended on, the pursuers are entitled to decree of declarator as concluded for.

The defenders pleaded;—(1) The action is premature and incompetent and should be dismissed.* (2) The pursuers' averments are irrelevant and insufficient to support the conclusions of the summons, and the action should be dismissed. (3) In respect that the stockholders, under the terms of issue of said stock, have no right to demand repayment of their loans prior to 15th May 1957, the defenders are entitled to decree of absolvitor.

On 17th December 1911 the Lord Ordinary (Skerrington) dismissed the action.†

* The defenders did not insist upon their first plea.

† "OPINION.—The pursuers are the holders of a large block of municipal stock which was allotted to them by the defenders, the Corporation of the City of Edinburgh, in the year 1897. The Corporation's resolution to create this stock is dated 7th April 1897, and bears to be under the authority and subject to the provisions of two private Acts of Parliament dated in 1894 and 1896 respectively. It purports to 'create stock to be called the Edinburgh Corporation 2½ per cent Redeemable Stock, and to be issued to an amount which shall be sufficient for the following purposes, but not exceeding £750,000.' It also bears 'that such stock shall be redeemable at par

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The pursuers reclaimed, and the case was heard before the Extra Division (consisting of Lord Kinneir, Lord Dundas, and Lord Mackenzie), on 7th and 8th November 1911.

Argued for the reclaimers;—On a sound construction of the stock certificate read in the light of the resolution of 7th April 1897, which created the stock, and the Acts of 1894 and 1896, which authorised the creation, the respondents were under an absolute obligation to redeem the stock at par at Whitsunday 1927 on the application of the holders. It must be admitted that the language of the statutes and of the certificate was not free from ambiguity and difficulty, but the interpretation contended for by the reclaimers was the only one which gave the statutes a reasonable meaning. The respondents founded chiefly on the word “redeemable.” They argued that the suffix “able” connoted, not an obligation, but merely a faculty or power of redemption, and they appealed to the ordinary use of the word in

after the expiration of a period of thirty years from 15th May 1897.’ In the present action the pursuers ask for declarator that on a sound construction of the statutes and resolution above referred to, and also of a certain prospectus, the defenders are bound to redeem the said stock immediately on the expiry of the 15th day of May 1927. Though the conclusion is not so expressed, the pursuers mean that the defenders must redeem the stock at par. The prospectus referred to in the conclusion represented with perfect truth that the stock would ‘be redeemable at par after 15th May 1927,’ but that representation has no bearing upon the present dispute. The defenders have, in the exercise of their Parliamentary powers, created a peculiar species of property, and the only point in controversy is whether the property so created does or does not possess the quality which the pursuers attribute to it, viz., that it must be redeemed on 16th May 1927. It must be clearly understood that the present action relates exclusively to what is called the new or 2½ per cent Edinburgh stock which was created and issued under the combined powers of the Acts of 1894 and 1896. It has nothing to do with the original or 3 per cent stock which was issued under the powers of the 1894 Act alone. It will be necessary for me to express an opinion as to the meaning of the 1894 Act, but, of course, the rights of the 3 per cent stockholders depend not merely on that Act but on statutory resolutions, the terms of which are not before the Court in the present action. It will also conduce to clearness if I state that counsel on both sides thought it unnecessary to debate the question whether the holders of either class of stock have a legal interest in the ‘Loans Fund’ established by the Act of 1894 for the purpose of providing for the payment of dividends and the redemption and extinction of all Corporation stock. Even if this question were answered affirmatively, it would not entitle the pursuers to the declarator for which they ask.

“Prior to the year 1894 the City of Edinburgh had obtained from Parliament and had partially exercised borrowing powers of various kinds, but none of its private Acts had authorised the creation and issue of municipal stock. The defenders might probably have taken advantage of the powers conferred upon local authorities by the Local Authorities Loans (Scotland) Acts, 1891 and 1893 (54 and 55 Vict. cap. 34, and 56 and 57 Vict. cap. 8), and have issued redeemable stock in terms of these Acts. This course might, however, have involved disputes with the creditors under the then existing city debt, and the Corporation would further have been subject to the control of the Secretary for Scotland in the management of its finances. The defenders accordingly obtained a private Act, which is an adaptation of the public Act of 1891 to the special requirements of the City of Edinburgh, and which authorises the Corporation to exercise any unexhausted statutory borrowing powers by the creation and issue of redeemable stock. It is called

everyday language and to the case *In re Chicago and North-Western Granaries Company, Limited*.¹ That case, however, was a decision upon the meaning of the word "redeemable" in connection only with the particular documents which were there under consideration; and although undoubtedly in ordinary language the word had in general the meaning attributed to it by the respondents, it had undergone, when used in connection with stocks and shares, the same change of meaning as had occurred in the words "payable" and "repayable." These words, both in popular and legal and judicial language, when used in connection with sums borrowed or with interest, connoted, not an option to pay or repay, but an absolute obligation to do so.² A reference to any broker's share-list or any Stock Exchange Year Book would readily show that this was the case. Further, it was contrary to all rules of interpretation to give so much weight as the respondents sought to do to a single word. The

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the Edinburgh Corporation Stock Act, 1894 (57 and 58 Vict. cap. lvi.). The draftsman of the private Act had the public Act of 1891 before him. Section 5, which deals with the 'creation of stock,' is practically the same in the two statutes, except that in the Edinburgh Act the reference to the Secretary for Scotland and all words expressly imposing an obligation on the Corporation to redeem the stock have been omitted. Nothing can be more significant than the contrast between section 5 (1) and (4) of the public Act and the corresponding clauses of the Edinburgh Act. This observation is not, of course, conclusive as to the construction of the Edinburgh Act, because the statute read as a whole may, by necessary implication, impose such an obligation on the Corporation. After carefully reading the statute, however, I have come to the conclusion that it is impossible to hold that the Corporation was impliedly bound by the Act of 1894 to redeem all stock created under the powers of that statute; though it may be that it was entitled in the statutory resolution for the creation of such stock to fix a date at which the option of redemption would be exercised.

"Section 5 (1) of the Act of 1894 contains a proviso requiring that all Corporation stock from time to time created under the powers of that section 'shall form one and the same class of stock bearing one and the same rate of dividend, and shall become redeemable as hereinafter provided after the expiration of one and the same period from the first creation of Corporation stock.' Various issues of stock were made under the powers of this section, all of which bore the same rate of dividend, viz., 3 per cent, and were redeemable at the same date, viz., 16th May 1924. It seems to have occurred to the defenders that they could borrow money on more favourable terms, and accordingly a single section was introduced into the Edinburgh Improvement and Tramways Act, 1896 (59 and 60 Vict. cap. ccxxiv.), authorising the issue of a new class of stock, being that with which alone the present action is concerned. Section 83 of the Act of 1896 is as follows:— 'The Corporation in addition to the powers contained in the Edinburgh Corporation Stock Act, 1894, may, and they are hereby authorised, at any time to create and issue a new class of stock for all or any of the purposes for which the Corporation may create and issue stock, to bear any rate of dividend which the Corporation may fix, and all stock of such class shall be redeemable at the option of the Corporation at one and the same period to be fixed by the Corporation, but not exceeding sixty years from the first issue of such stock.' It is remarkable that the 1896 Act does not enact that the whole provisions of the 1894 Act with reference to the original stock shall apply *mutatis mutandis* to the new stock. Unless some such

¹ [1898] 1 Ch. 263.

² *In re Tewkesbury Gas Co.*, [1911] 2 Ch. 279.

Nov. 18, 1911. **British Linen Bank v. Magistrates of Edinburgh.** Act of 1896 had admittedly to be read in the light of the Act of 1894, without which the 1896 Act was more or less meaningless. Now, the preamble to the Act of 1894 showed that it was with "borrowing" powers that the Acts were dealing. But borrowing connoted repayment, and (apart from the respondents' argument from the word "redeemable") there was nothing in the Acts or documents to suggest that there was not to be repayment. There was no statement anywhere that the stock was to be perpetual. In public borrowing the policy of the Legislature was that, when the benefit arising from the loan had been exhausted, the money borrowed should be repaid; hence the introduction of the period of sixty years. There was not, as the Lord Ordinary seemed to think, any essential difference between the public Act of 1891¹ and the Edinburgh Acts; but, even if there were, it was immaterial, as the issue of this stock had taken place entirely under the Edinburgh Acts, which fell to be con-

enactment is implied section 83 of the later Act is unworkable. It appears from the resolution already quoted that the defenders assumed that the provisions of the 1894 Act applied to the new stock, and I think that they were right. I read section 83 of the 1896 Act as an addition to and an amendment of section 5 (1) of the 1894 Act. The result is that from 1896 onwards the defenders had power to create and issue two different kinds of stock, and that the provisions of the earlier Act apply equally to the original stock and to the new stock.

"Whether that is or is not the right way to get over the difficulty, I agree with the pursuers' counsel (the Dean of Faculty) in thinking that, so far as the present controversy is concerned, the rights of his clients fall to be determined primarily on a construction of the resolution quoted at the beginning of this opinion and of section 83 of the 1896 Act, the language of which is somewhat more favourable to his case than that of section 5 of the 1894 Act. As regards section 83 he argued that the new stock was stamped by Parliament as a redeemable stock and that it was absurd to suppose that the Corporation had an option to convert it into a perpetual stock by simply doing nothing. He argued that the words 'at the option of the Corporation' as used in the section did not qualify the antecedent 'redeemable' but referred to what came afterwards, and were intended to make it clear that the Corporation should be entitled to fix the date of redemption at any date which they chose to select within sixty years from the first issue of the stock. He also maintained that the word 'period' as used in the section meant a specific date to be fixed by the Corporation. It followed that according to the intention of Parliament the stock must be redeemed within sixty years at the outside, and in the present case at the expiry of thirty years, being the date fixed by the Corporation itself. It seems to me that the Dean of Faculty's reading of the section reduces the words 'at the option of the Corporation' to mere surplusage. Even, however, if his reading of section 83 is accepted, the section and the relative resolution come to no more than that the stock 'shall be redeemable' at a particular date. The word 'redeemable' is a familiar one in our law and it imports no more than that the creator of a right has a 'power or faculty' to re-acquire it on certain terms (Ersk. ii. 8, 2). So too it has been decided in England on the construction of a contract between a limited company and its debenture-holders that *prima facie* the word 'redeemable' means nothing more than that the debentures are 'liable to redemption.' Of course there is nothing to prevent a person who

¹ Local Authorities Loans (Scotland) Act, 1891 (54 and 55 Vict. cap. 34), sec. 5; See also Local Authorities Loans (Scotland) Act, 1891, Amendment Act, 1893 (56 and 57 Vict. cap. 8), sec. 2.

strued independently. "After" clearly meant "at," and the words "at the option of" referred merely to the period which the Corporation might fix for the obligatory redemption within the limit of sixty years. Nov. 18, 1911.
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Argued for the respondents;—On a sound construction of the statutes, resolution, and certificate, the Corporation were not bound to redeem the stock at May 1927 or at any other period. The reclaimers argued that it was *a priori* improbable that the stock should be irredeemable, it being, as they said, the policy of the Legislature to discourage anything in the nature of perpetual loans to corporations. That might have been its policy at one time in the case of loans for particular purposes, but the Local Authorities Loans Acts clearly showed that that policy was changed, at any rate in the case of the general consolidated stocks issued by so many corporations in which the holders were just in the position of the holders of stock in ordinary companies.¹ There was no reason, therefore, from the point of view of public policy, why the word "redeemable" should not be given its ordinary meaning, viz., open to or capable of redemption, a meaning given to it in closely analogous circumstances in *In re Chicago and North-Western Granaries Company, Limited*.² The word "repayable" was not analogous, as in ordinary everyday language that word had undergone a change and had come to connote obligation. It was exceedingly significant to contrast the clauses in the private Acts with the corresponding clauses in section 5 of the Act of 1891, and to note how the words implying obligation were omitted in the private Acts. The respondents' reading was, in short, the only one which made reasonable sense of the various sections of the Acts, and gave some meaning to the expression "at the option of the Corporation" in section 83 of the Act of 1896. It was not perhaps very easy to find a completely satisfactory reading of the sections. It might be contended that they meant that the option of the Corporation to redeem fell to be exercised within a certain period, and if not exercised within that period that the stock thereafter became permanently irredeemable; or it might be contended that the stock was irredeemable for a certain period and that after the expiry of that period it became redeemable at any time at the option

has reserved a power of redemption from contracting to exercise that power at a particular time and in a particular manner, and such bargains were resorted to at one time in the hope of evading the Usury Acts. Again the Local Authorities Loans Act, 1891, affords an excellent example of a statutory power to redeem 'coupled with a duty.' I use the phraseology of the interpretation clause of the 1891 Act, which is followed in the corresponding clause of the Edinburgh Act of 1894. Anyone who alleges that a redeemable stock must be redeemed is bound, in my opinion, to show the existence of the obligation upon which he founds, and this the pursuers have failed to do. Parliament might quite well have followed the same policy in the Edinburgh Acts as it adopted in the Local Authorities Loans Acts, and have made all stocks issued by the Corporation compulsorily redeemable within a certain period. But I see nothing absurd or improbable in the scheme which was actually adopted, viz., that the whole question should be left to the discretion of the Corporation. I accordingly sustain the defenders' second plea in law and dismiss the action."

¹ See Report of Select Committee on the application of Sinking Funds in exercise of borrowing powers, June 16, 1909 (No. 193 House of Commons Papers for 1909).

² [1898] 1 Ch. 263; See also Ersk. Inst., ii., 8, 2.

Nov. 18, 1911. of the Corporation; but this much at any rate was clear that no right was conferred on the stockholders to demand repayment at Whitsunday 1927 or indeed at any period.

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At advising on 18th November 1911,—

LORD KINNEAR.—This is an action by the British Linen Company against the Corporation of Edinburgh for a declarator that on a sound construction of certain statutes and a resolution, under which the defenders in 1897 created and issued £750,000 two and a half per cent redeemable stock, the defenders are bound to redeem the said stock immediately on the expiry of the 15th day of May 1927, on the application of the holders thereof. The defenders plead in answer, in the first place, that the action is premature and incompetent, and should be dismissed. That plea, which I suppose was founded upon the notion that we ought not to declare at present a right which will only emerge in 1927, is no longer insisted in; and counsel for both parties stated at the bar that it is in the interests of both that the question between them should now be decided. Accordingly, we must entertain the action as being properly brought.

The only other specific defence is that under the terms of the issue of the stock the stockholders have no right to demand repayment of the loans prior to 15th May 1957. Reading that plea as it stands, I should have thought it implied—I do not know whether it was meant to imply—that on the arrival of 15th May 1957 the stockholders would have a right to demand payment which it is denied they have at present; but the defenders' counsel and the Lord Ordinary have gone further, because, according to the argument maintained to us, and according to the judgment of the Lord Ordinary, the view of both is that the right of the Corporation is to redeem or not redeem according to their own judgment and discretion. The stockholders, who have advanced money upon the terms contained in the Acts of Parliament and the documents regulating the issue of the stock, are, according to that view, never to be entitled to demand repayment of the money which they have advanced.

The question depends upon the terms of the certificate which has been issued to the pursuers, read with reference to the statutes which authorised the creation of the stock. The certificate sets out that the person named is proprietor of so much of two and a half per cent redeemable stock, subject to the Acts of Parliament relating thereto, and there is a note that the stock is redeemable at par after Whitsunday 1927, and that interest is payable half yearly on the 15th May and 11th November. If one were to take this document by itself *prima facie* it would appear to me to mean that the stock, whatever "stock" may mean, is to be redeemed at par at or after Whitsunday 1927, and that until then it is to bear interest at two and a half per cent, payable half yearly on 15th May and 11th November. But then the argument is that that is not the true nature of the Corporation's undertaking.

The first argument which was maintained by the defenders' counsel, I must confess, does not much impress my mind. It was maintained that taking the word "redeemable" by itself, it means only that the Corporation has a power to redeem, but is under no obligation to exercise that power. I must say I think very little importance is to be attached in questions of this kind to etymological considerations. It is a most fallacious way of con-

struing an Act of Parliament, or any legal instrument, to take a single word by itself and pull it to pieces in order to get at what is supposed to be its original or primary meaning, because words in common use acquire secondary meanings and carry a variety of different implications according to the connection in which they are used. We must read the whole clause and interpret the language used with reference to the context and the subject-matter and the avowed object of the statute. I think that is very clearly brought out by the two authorities which were cited by the defenders' counsel in support of their contention as to the meaning of the word "redeemable." The opinion of Mr Justice North,¹ to which they referred, as to the meaning of the word in a particular prospectus which he was construing, is not founded upon the view that the word has one fixed and definite signification which is always to be attached to it wherever it occurs, but it is founded upon an exact consideration of the actual document with which he was dealing, and it was upon a reading of the whole document that he came to his conclusion in the particular case. The other authority is Erskine, ii. 8, 2, referred to by the Lord Ordinary in the passage of his opinion in which he says,—“The word ‘redeemable’ imports no more than that the creator of a right has ‘a power or faculty’ to re-acquire it on certain terms.” Mr Erskine in the passage referred to begins by stating that a redeemable right is defined by Mackenzie as “that which returns to the disposer or granter on payment of the sum for which it was granted.” But then he goes on to point out that there may be cases in which the granter has a right to redeem that which he has granted without payment, and he says that although that is not in accordance with the strict grammatical meaning of the word, since no price is to be paid for getting back the subject, still, according to the ordinary familiar reading it is for all purposes a redeemable right. He then continues (in the passage referred to by the Lord Ordinary):—“Under the appellation, therefore, of redeemable rights all those may be included in which a power or faculty is in a certain event, or within a certain period of time, or without any restriction in point of time, competent to the debtor or granter of the right.” Now, in his explanation of that doctrine Mr Erskine is, I think, proceeding according to ordinary usage and common sense. The redeemable right must always be one which the granter has power to redeem, but the power may or may not be coupled with the duty or obligation of repayment according to the nature of the right itself and the conditions under which it is created. Therefore it appears to me, without any further consideration of the etymological signification of the word, that we must go to the Acts of Parliament in order to see what the right is which the Corporation is authorised to create and what are the mutual rights and liabilities of the parties to the transaction.

There are two statutes, the Act of 1894 and the Act of 1896, and the particular stock with which we are now concerned was created and issued under the second of these Acts. The Act of 1896 by its 83rd section authorises the Corporation to issue a new class of stock; but then I think it is common ground, and the Lord Ordinary has so held, that this specific

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¹ [1898] 1 Ch. at p. 267.

Nov. 18, 1911. provision in the Act of 1896 cannot be taken by itself, and that in order to ascertain its true meaning and effect we must refer back to the Act of 1894, which first gave the Edinburgh Corporation the power of creating and issuing stock. I think that is quite obvious, because if we look at the 83rd section by itself it is practically unworkable. If we could not go back to see what was meant by "stock" in the Act of 1894, I do not think anybody would be able to make out what was meant by the 83rd section. The stock issued by the Corporation does not define itself. It is not a term that, in the connection in which it is used in these Acts, is very easily understood, and, indeed, I should not have been able to understand it had there not been the provision in the Act of 1894, and to a certain extent a provision in another Act—a general statute—which is not before us. The word is more familiarly used in connection with joint stock companies. What was intended was to create an interest in the funds of the Corporation which could be transferred from one name to another and could stand in any name; and so far there is an analogy between the stock of public joint stock companies and this interest which is to be created under the statutes. But in other respects there is no resemblance between the two rights. The stock in a public company means merely the capital of a commercial undertaking, and a stockholder is simply a shareholder—a person having a right to a share in the capital; whereas the Corporation, as a municipal corporation, is not a trading company and has no capital—and the persons who are called stockholders are in no sense shareholders in any undertaking whatever.

But then, I think, when we come to the Act of 1894 the whole scheme of the statute and the special provision which we have to construe bring out quite clearly what it was that the statute intended to authorise. I may say for the purpose of clearness that I think the question as to the construction of this statute between the two parties is one which is capable of being very simply stated. The pursuers say that the transaction between them was a loan of money by them and others to the Corporation, which was therefore repayable just because it was a loan; and that the legal interest in the fund is the security for repayment of the loan, with interest at $2\frac{1}{2}$ per cent charged upon the revenue of the Corporation. The defenders, on the other hand, say that the transaction was a sale of a special kind of property in the shape of a perpetual annuity for payment of a sum of money down, which therefore may never be called up and which they are never bound to repay. That is really the controversy between the parties on the construction of this Act.

Now, I must say I cannot have any doubt that the pursuers are right, and that the transaction between the parties is one of loan. I think that is made perfectly clear by the explicit provision of the Act of 1894. That Act begins by a preamble, which we are quite entitled to look at for the purpose of throwing light on the enacting clauses by ascertaining the avowed purpose for which they were passed. The preamble, so far as it refers to the creation of stock, proceeds: "Whereas it is expedient that the Corporation should be authorised to exercise their statutory borrowing powers for the time being by means of the creation and issue of Corporation stock"; and then the statute goes on to say what they are to do in order

to exercise the power of borrowing. In the fifth section of the statute, Nov. 18, 1911. which is the material one, it is enacted that where the Corporation have for the time being any statutory borrowing power, then the Corporation may from time to time by resolution exercise the power by creation of redeemable stock to be from time to time issued for such amount within the limit of the power, to bear such half-yearly or other dividends, and to be so transferable as the Corporation may direct. They are to issue what is called redeemable stock for the purpose of carrying into effect their power of borrowing. Then the section goes on to provide that this is to be done by resolution, and that the resolution for the first creation of Corporation stock shall provide that such stock shall be redeemable, at the option of the Corporation at par after the expiration of a period to be fixed by the resolution not exceeding sixty years from the first creation of the stock; and each resolution for creation of stock shall specify that the stock thereby created is redeemable. This condition is imperative. There is no power given to the Corporation to issue an irredeemable stock, or, in other words, to create a perpetual charge upon the town's revenues. Now, in accordance with that section, the Corporation did pass a resolution for creation of the stock now in question, in which they set forth, as it was their duty to do, that it was redeemable. Then there follow certain clauses which I do not think so material, but they all go to confirm the view which I take of the two sections I have read. In the first place, there is clause 6, which says that the borrowing power is to be exercisable for the actual sum raisable by the Corporation; and then clause 7 enacts (1) that the Corporation stock shall be charged indifferently on the whole revenues of the Corporation from time to time, arising from lands and heritages and from the city undertakings, and on all funds, rates, and assessments leviable under the City Acts and this Act; and (2) that the dividend for the time being payable on the stock shall rank equally with the interest on all other securities granted by the Corporation.

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Now the plain meaning of this appears to me to be beyond question. There is a power to borrow, which means that the Corporation is to obtain money on loan; and if it is not directly provided that the money so borrowed shall be repaid, that is because the obligation to repay follows as a necessary consequence from the right to borrow. A loan implies in law an obligation to repay the money lent, when the subject of the loan is money. Nothing more is required to create an obligation to repay than the fact that the loan was made, because that carries with it an obligation to repay. If there is an express obligation to repay at a definite time, then the lender is entitled to call up his money at that time; if there is no definite time, then the money is repayable on demand or on reasonable notice. But always and in every case, if there is a loan at all it is repayable; and the statutes authorise nothing here except a loan, because the power to borrow is just a power to obtain money on loan. If then this consideration were the only one to be taken into account, I confess I should have no doubt that this money is repayable some time. But then it is repayable with interest. Some confusion may be introduced into the interpretation of the statutes by the use of the term "dividend upon stock"; but that really means nothing more than interest upon money lent.

Nov. 18, 1911. If the loan is repayable some time, the question is whether the statute provides for a time of repayment or not. I think it does by the third subsection of the fifth section, which I have already adverted to. That subsection enacts that such stock shall be redeemable at the option of the Corporation at par after the expiration of a period, to be fixed by the resolution for the first creation of stock, not exceeding sixty years from such creation. If we drop out for a moment the words "at the option of the Corporation," which alone create any difficulty in the construction of this subsection, it is, to my mind, clear what is intended. The Corporation is to borrow money; it is to give the lender a charge upon its revenues, which is to be called stock, and this stock is to be redeemable at par after the expiration of a period which does not exceed sixty years from the first creation of the stock. That appears to me to bear only one meaning. The statute says that the right which the Corporation is to give must be redeemable, and it is to be redeemable at any period to be fixed by the Corporation itself which does not exceed sixty years. During the sixty years, therefore, the Corporation may, if it think fit, leave the charge upon its revenues standing; but they are only to do that for a period which does not exceed sixty years; and therefore when that period has expired, they are bound to relieve their funds of that charge.

It was argued that these words "not exceeding sixty years" would be satisfied by a resolution for repayment of the stock at any time after the passing of sixty years. That is to say, there might be redemption as soon as sixty years had passed, or there might be no redemption until centuries after the sixty years, because the most distant date that can be imagined must be later than the fixed period. I do not think that is a reading which can possibly be put upon the provision of a statute which is intended to regulate a business transaction of a very important kind. The plain meaning of it seems to me to be that, so long as the period allowed by the statute for the charge upon the revenues being unredeemed lasts, the Corporation is not bound to redeem, but at the moment that period is exhausted then the Corporation is bound to redeem.

The only difficulty, to my mind, is created by the introduction of the words "at the option of the Corporation"; but I think that difficulty arises, not from any ambiguity in the words themselves, but from their position. I cannot read the words as meaning that the stock is to be redeemable or not as the Corporation chooses; because I think that would be to subvert the whole series of direct and positive enactments as to the character of the right that is to be created by language intended primarily and obviously to state the specific manner in which the right created is to be carried out. The right given to the Corporation is a right to burden the rates, that is to say, to assess and levy rates for the purpose of the loan among other purposes, and but for the statute, of course, the Corporation would have no power to levy these rates; and, therefore, when the statute says that they may levy rates it does not mean that they may levy rates in perpetuity. The sole purpose as expressed in the word "redeemable," seems to me to be this, that the Corporation may create a charge upon the rates; but it is not to be a perpetual charge, it is to be a charge redeemable under certain conditions.

If that is the plain meaning of the direct provisions of the statute it would be contrary to all reasonable rules of construction to say that all that is to be subverted by the introduction of the term "option," unless it be clear upon the construction of the clauses that the statute intended, first of all, to say that the stock shall be redeemable and that you shall not create a perpetual burden upon the revenues of the Corporation, and then afterwards to say that it shall not be redeemable and that you may create a perpetual burden on the revenues of the Corporation if you like. Therefore we must read this clause in such a way as will enable the "option" to be referred to something else than the redeemable or irredeemable character of the stock itself. The clause is somewhat clumsily constructed; but what it really means, I think, is this, that inasmuch as the Corporation is required to redeem the stock at some time, but not necessarily until after the lapse of sixty years, they may leave it standing for sixty years and then must redeem it, but may redeem it at any such time within the sixty years as they may choose to fix. Its character during the sixty years is to depend on the option of the Corporation. They may redeem or not within the sixty years; after the sixty years they must redeem. That appears to me to be the true meaning of the clause. I think it is preferable to a construction which would be entirely repugnant to everything else which the statute provides.

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If that be the true reading of the Act, it follows, in my opinion, that the capital may be called up at such period as the Corporation may be required to redeem, because what lies at the root of the whole question is that it is a loan. The Corporation has borrowed money, and it necessarily follows that the money has to be repaid. In any other kind of document it may be that the more obvious way of expressing the duty of repayment would not have been to give the debtor power or obligation to redeem, but to provide directly that the money should become due and payable at a certain date; but the explanation of the departure from this very natural form in this Act of Parliament is quite obvious, because the Act is passed to give a power to the Corporation, which they would not otherwise have, to create this charge upon the property of the Corporation. It is quite immaterial whether the one form of language or the other is used for the purpose of determining the period of the loan, because the payment of a secured debt, and the redemption of the security, are not two different things, but two sides of one and the same transaction. It follows, I think, that the lender is entitled to call for payment at the time at which the stocks become redeemable, simply because there is no other known method of redeeming the charge upon the Corporation funds except by paying back the loan for which their funds are impledged, and also because there is no other date of payment stipulated, and the borrowers would have no answer to a demand for immediate payment if it were not a perfectly sufficient answer that the stock is not to be redeemed before a certain date.

Now, if that is the true construction of the Act of 1894, I do not think the Act of 1896, which is the one with which we are immediately concerned, creates any difficulty. The only clause we need to consider is the 83rd; and the difference between the 83rd clause of this Act and the third subsection of the fifth clause of the former Act is certainly immaterial.

Nov. 18, 1911. The Lord Ordinary says it is more favourable to the pursuers than to the defenders. That may or may not be ; the clause provides that the Corporation "may create and issue a new class of stock for all or any of the purposes for which the Corporation may create and issue stock to bear any rate of dividend which the Corporation may fix ; and all stock of such class shall be redeemable at the option of the Corporation at one and the same period to be fixed by the Corporation, but not exceeding sixty years from the first issue of such stock." Now, the main difference in phraseology is that instead of saying it is to be redeemable "after" a period, it says it is to be redeemable "at" a period not exceeding sixty years. I think there is no difference between "at" and "after," in the view I take of the first statute. As in the first statute, so in this, the Corporation is given an option ; the stock is to be redeemable at the option of the Corporation at a period to be fixed by the Corporation, but not exceeding sixty years. The only natural reading of these words seems to me to be that it is to be redeemable, but the period at which it is to be redeemable is to be fixed at the option of the Corporation, provided it be not fixed later than sixty years after creation. The clause gives an option to the Corporation ; they have, however, in my opinion, exercised that option by the terms of the resolution and the certificate they have issued to the pursuers ; because their certificate says that redemption is to be at par after Whitsunday 1927, a determination which is quite within their option. Therefore I take it that the Corporation has issued to the pursuers what is called stock—although I doubt whether the phrase is at all right—but stock redeemable at par at Whitsunday 1927.

I am unable to put any other construction upon the language of the statute, and I am therefore unable to agree with the Lord Ordinary's judgment, which accordingly falls to be recalled and decree granted to the pursuers.

LORD DUNDAS.—I am of the same opinion. I have considered this important and interesting case as well as I can ; and have come to the conclusion that the interlocutor reclaimed against ought to be recalled, and decree pronounced in the pursuers' favour. The matter really comes to resolve itself into a short point of construction of section 83 of the defenders' Act of 1896 (read, so far as necessary, in the light of their earlier Act of 1894), their resolution of 7th April, and the form of certificate issued by them for the stock in question. The stock is throughout characterised as "redeemable" ; and the gist of the matter, as I construe it, is that the Corporation may, at their option, fix by resolution the period of redemption, subject to the provision that the stock must be redeemed within sixty years from its first creation. I think the Corporation did in fact exercise the option conferred upon them when they fixed, by their resolution, the period of redemption of the stock at par "after" 15th May 1927. Looking to the terms of section 83, I read "after" as equivalent to "at," and this again is, I suppose, fairly rendered by the words in the pursuers' summons, "immediately on the expiry of the 15th day of May 1927." The construction indicated seems to me to give due effect to every material word which we have to construe. It gives, on the one hand, a reasonable meaning to the

words "at their option," upon which the defenders so strongly rely, and Nov. 18, 1911. avoids, on the other hand, the result that the Corporation are entitled, by simply doing nothing, to make "redeemable" stock perpetual; and it seems also to afford an answer to the Lord Ordinary's view that "anyone who alleges that a redeemable stock must be redeemed is bound . . . to show the existence of the obligation upon which he founds," for the obligation on the Corporation is, *ex hypothesi*, to redeem the stock at the period which they themselves have fixed by resolution. I do not desire to elaborate the matter further, but am content simply to express my entire concurrence with the reasons for the proposed judgment which have been so fully stated by your Lordship in the chair.

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Lord Dundas.

LORD MACKENZIE.—The British Linen Bank are holders of £254,000 Edinburgh Corporation 2½ per cent Stock issued under the authority of the Edinburgh Corporation Stock Act, 1894, and the Edinburgh Improvement and Tramways Act, 1896. They bring this action to have it declared that the Corporation are bound to redeem the stock immediately on the expiry of the 15th day of May 1927 on the application of the holders. The position taken up by the defenders is that they are not under obligation to redeem the stock at any time, and this is the view given effect to by the Lord Ordinary. The form of the certificate for the stock is in these terms:—

"This is to certify that
the Proprietor of Pounds of Edinburgh Corporation
Two and a-half per cent Redeemable Stock, subject to the Acts of Parliament relating thereto."

A note is appended which contains the following:—"Redeemable at par after Whitsunday 1927."

The statutes referred to in the certificate are the above-mentioned Acts of 1894 and 1896. The sections which require construction are section 5 (1) and (3) of the 1894 Act, and section 83 of the 1896 Act. The stock in question was created under the authority of section 83 of the 1896 Act, but it is necessary to read along with this the provisions of the 1894 Act, in order to discover, not only the procedure to be adopted in exercising the powers conferred by the 83rd section of the Act of 1896, but also the conditions upon which these powers can be put in force. The object of the later Act was to enable the Corporation to borrow money at 2½ per cent. For the money obtained under the 1894 Act the rate of interest was 3 per cent.

Turning to the Act of 1894, the first point to be observed with regard to section 5 (1) is that the procedure is conditional upon the Corporation having for the time being a statutory borrowing power. This is also necessary as regards section 83 of the 1896 Act. If the Corporation has such statutory power, it may proceed to exercise it by the creation of "redeemable stock." The fact that it is a power to borrow which is to be exercised makes it unlikely that the creation of perpetual annuities was in the contemplation of the Legislature. On this point reference may be made to the case of *The Southern Brazilian Rio Grande Do Sul Railway*.¹ Borrowing implies

¹ [1905] 2 Ch. 78.

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repayment at some time and under some circumstances. The succeeding sections of the 1894 Act expressly deal with the formation of a "loans fund" for the redemption of Corporation stock. The fact that the power is to create "redeemable stock" negatives the idea that the stock should, under any circumstances, be irredeemable. The concluding words of section 5 (1) are that the stock "shall," not "may," become redeemable as after provided. The provision for redemption is contained in section 5 (3), which enacts: "The resolution for the first creation of Corporation stock shall provide that such stock shall be redeemable at the option of the Corporation at par after the expiration of a period to be fixed by the resolution not exceeding sixty years from the first creation of the stock, and shall declare whether the stock shall be transferable in books or by deed"; and (4) provides that each resolution for creation of stock shall specify that the stock thereby created is redeemable. The corresponding provision in the 1896 Act is at the close of section 83—"All stock of such class shall be redeemable at the option of the Corporation at one and the same period to be fixed by the Corporation, but not exceeding sixty years from the first issue of such stock." The limitation in point of time to sixty years points strongly to the conclusion that it was not intended that the Corporation should have power indefinitely to delay redemption. The words "at the option of" are founded on as indicating that the Corporation is to have an absolute discretion. In my opinion, these words refer to the period which the Corporation may fix for redemption within the sixty years. The second schedule of the Act of 1894 contains (as provided by section 5 (1)) a form of resolution which may be used on the creation of stock. One clause of the resolution runs: "That such stock shall be redeemable as follows (state terms)." The resolution as to the creation of the stock in question is dated 7th April 1897, and provides—"Third. That such stock shall be redeemable at par after the expiration of a period of thirty years from 15th May 1897." Although the word "after" is here used it must mean "at," because this is the expression in the Act of 1896. When the Corporation passed this resolution, they exercised the option conferred upon them by section 83. The terms of the certificate must be construed with reference to the statute and resolution. When, therefore, a certificate was issued which said as regards this stock, "Redeemable at par after Whitsunday 1927," this must be construed with reference to the statute and resolution as meaning that the stock shall be redeemable at par at Whitsunday 1927. It is not stated in the pleadings what the actual price of issue was. The decision must depend on the effect of the statutes, resolution, and certificate.

It was maintained for the Corporation that there is no obligation, expressed or implied, upon them to redeem the stock in question; that the expression "redeemable" naturally means "liable to be redeemed," not "shall be redeemed"; that the use of the phrase "at the option of" shows (if there were any doubt) what was meant by "redeemable"; that they were entitled, in their option, to fix any period within the sixty years mentioned in section 83, after which they were entitled to begin to redeem (according to this the use of the word "redeemable" was a note of warning to those tendering for the stock). The result of this argument, which has been given effect to by the Lord Ordinary, is that the matter of redemption is

left entirely to the discretion of the Corporation within the period of sixty years. After the sixty years have expired the option ceases, and the stock becomes irredeemable. In order to meet this difficulty the position taken up by the defenders on record, as stated in their third plea in law, is this: "In respect that the stockholders, under the terms of issue of said stock, have no right to demand repayment of their loans prior to 15th May 1957, the defenders are entitled to decree of absolvitor." This contention, however, or admission, is not, so far as can be discovered, based on any statutory provision, and was not made the foundation of the defenders' argument.

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kenzie.

An obligation on the Corporation to repay within sixty years, coupled with a faculty of redemption sooner, would have been in accordance with the policy of Parliament which is shown by the Local Authorities Loans (Scotland) Act, 1891 (54 and 55 Vict. cap. 34), section 5 (1) and (4), as amended by the Act 56 and 57 Vict. cap. 8, section 2. It is no doubt evident that the draftsman of the local Acts of 1894 and 1896 must have had the Acts of 1891 and 1893 before him. He, however, altered the phraseology, and the question is, what has been effected by the language used?

"Redeemable," no doubt, naturally means "liable to redemption,"—*In re Chicago and North-Western Granaries Co., Limited*.¹ It requires, however, to be construed with reference to the context, and if this indicates that it is used in the sense of "repayable," this may be its true meaning in the section. According to the defenders' argument the words "at the option of" add nothing to the meaning of the word "redeemable." That, according to their argument, imports a faculty of redemption and nothing more. The provision, therefore, in this view, would have been complete if it had run: "The stock shall be redeemable after the expiration of a period to be fixed by the resolution not exceeding sixty years from the first creation of the stock." If, however, the expression "at the option of" is referred to the selection of a period short of the maximum of sixty years a definite meaning is assigned to it. The meaning of the clause is therefore this, the stock shall be redeemable, *i.e.*, shall be in fact redeemed sixty years from its first creation, with an option to the Corporation to fix by resolution an earlier period. It was necessary for the period to be fixed by the resolution, because it was essential that persons about to tender should know the terms upon which their money was to be lent. If, as was contended for by the Corporation, the period for redemption was notified in order to warn intending offerers, the words "not exceeding sixty years" seem very inappropriate. They suggest that the Corporation could not defer the discharge of a duty for a longer period. The argument for the Corporation involves that the stock shall not be "liable to redemption" at any period after sixty years. This, in my opinion, would stultify the provision altogether.

It follows, from what is above stated, that the pursuers are entitled, in my opinion, to the decree they ask. I therefore concur with your Lordships.

THE COURT pronounced the following interlocutor:—"The Lords having heard counsel and considered the reclaiming note for the British Linen Bank against the interlocutor of Lord

¹ [1898] 1 Ch. 263.

Nov. 18, 1911.

British Linen
Bank v.
Magistrates
of Edinburgh.

Skerrington, dated 17th January 1911, sustain the reclaiming note and recall the said interlocutor, and find and declare that on a sound construction of the statutes, resolution, and form of certificate mentioned on record and in the joint appendix for the parties, under which the defenders in 1897 created and issued £750,000 2½ per cent Edinburgh Corporation redeemable stock, the defenders are bound to redeem the said stock immediately on the expiry of the 15th day of May 1927 on the application of the holders thereof, and are not entitled to postpone the right of the holders of the said stock to have the same redeemed by the defenders for any further period after said 15th day of May 1927; and decern. . . .”

MACKENZIE & KERMACK, W.S.—SIR THOMAS HUNTER, W.S.—Agents.

No. 24. MRS MARY GIBB OR M'EWEN AND OTHERS, Pursuers (Appellants).—
Sandeman, K.C.—Hon. W. Watson.

Nov. 21, 1911. STEEDMAN & M'ALISTER, Defenders (Respondents).—*Wilson, K.C.—
Paton.*

M'Ewen v.
Steedman &
M'Alister.

Nuisance—Vibration caused by machinery—Trade district.

Title to sue—Interdict—Title of proprietor to interdict nuisance affecting letting value of his property.

Held that vibration due to the working of a gas-engine, whereby the structure of the adjoining premises was injured and the comfort of its occupants affected, constituted a nuisance which might be restrained by interdict, notwithstanding that the premises were situated in an industrial district of Glasgow.

Opinions (per Lord Dundas and Lord Salvesen) that the law of Scotland allows “a proprietor to apply for interdict in respect of operations by a third party, complained of by his tenant, and lowering, or reasonably calculated to lower, the letting value of his tenement.”

2D DIVISION.
Sheriff of
Lanarkshire.

ON 6th October 1909 Mrs Mary Gibb or M'Ewen (with the concurrence of her husband, Charles M'Ewen), James Gibb, and William Gibb, being (along with another whose residence was unknown) the *pro indiviso* proprietors of property at 103 Cathcart Street, Kingston, Glasgow, brought an action in the Sheriff Court at Glasgow against Steedman & M'Alister, cork manufacturers, who occupied premises, in which they had placed a gas-engine, at 35 Ardgowan Street, Glasgow, adjoining the pursuers' property. The pursuers craved the Court “to interdict the defenders, their servants, and all others acting under their authority, from working the said gas-engine in the premises occupied by the defenders at 35 Ardgowan Street, Glasgow, in such a way as to cause vibration of the said property situated at 103 Cathcart Street, Kingston, Glasgow, or at least in such a way as by the vibration occasioned thereby to cause material discomfort and annoyance, and to be a nuisance to the tenants and occupants of the property at 103 Cathcart Street aforesaid.”

The defenders lodged defences in which they averred that the tenement No. 103 Cathcart Street was in the immediate neighbourhood of many large engineering and other works where large quantities of heavy machinery were in constant use.

The pursuers pleaded ;—The vibration occasioned by said gas-engine

being a nuisance, and causing material discomfort and annoyance to the pursuers' tenants and damage to pursuers' property, the pursuers are entitled to interdict as craved. Nov. 21, 1911.

The defenders pleaded;—The pursuers' averments being unfounded in fact, the defenders should be assoilzied, with expenses. M'Ewen v. Steedman & M'Alister.

A proof was allowed and led in the Sheriff Court. The evidence led by the pursuers, as to the effect of the vibration on the structure of their premises, was that the ceilings and plaster of the walls of the rooms were cracked, the pointing in the gable became bare, the brigs between the vents were loosened and the slates were caused to slide. The evidence as to the effect on the comfort of the tenants is summarised in the opinion of the Lord Justice-Clerk. The facts which the Court on appeal held to be proved are given in the following findings in fact in their interlocutor:—“(1) That the pursuers are the proprietors of a tenement forming No. 103 Cathcart Street, Kingston, Glasgow, containing ten dwelling-houses; (2) that the defenders are tenants of an adjacent property where they carry on the business of manufacturers of lifebuoys, &c.; (3) that near to the mutual gable wall dividing the properties the defenders have erected a gas-engine for the purposes of their business; (4) that this gas-engine is worked during week days from about 7 A.M. till about 5.30 P.M., and on Saturdays from about 7 A.M. till 1 P.M.; (5) that as at the date of the action being brought the said gas-engine was being worked in such a way as to cause vibration to the said tenement, and so as to cause injury to its structure, and to raise a reasonable apprehension of further injury if such working is continued; (6) that the vibration occasioned by the working of the said gas-engine caused material discomfort and annoyance to the tenants and occupants of the said tenement.”

On 21st October 1910 the Sheriff-substitute (Fyfe) found that the pursuers “having failed to establish that the defenders are making an unreasonable use of their premises to the detriment of the pursuers' property” were not entitled to the interdict craved, and assoilzied the defenders.*

* “NOTE.—This action raises a question of no small importance to manufacturers and residents in industrial localities. There is no doubt about the general law applicable to neighbouring properties, that each proprietor or tenant, in making use of his property, must pay reasonable regard to the safety of adjoining property and to the comfort of his neighbours.

“But this general rule, if applied in the manner in which the pursuers here seek to apply it, would, I fear, shut up a very large number of industrial concerns in the city of Glasgow, where it happens that there is residential property in the neighbourhood.

“Each individual case must of course be regarded in the light of its own special circumstances, and it is an important element in the present case that the pursuers elected to set down a residential tenement in the very heart of a busy engineering centre of the city. Neither a proprietor who so sets down a tenement, nor the tenants who elect to reside in it, can expect to be free from disturbance.

“The pursuers in their pleadings and the pursuers' witnesses in their evidence have been exceedingly anxious to characterise the defenders' operations as ‘a nuisance,’ but this is a word which is very often misapplied. If disturbing elements to the peace and quietness of residents in a large industrial city constitute a nuisance, I am afraid very few people indeed who reside anywhere within the city of Glasgow are without cause of complaint. It is a resident's own choice to live in an industrial city, and, if he

Nov. 21, 1911. The pursuers appealed to the Second Division, and the appeal was heard on 2nd, 3rd, and 21st November 1911.

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Argued for the appellants;—Although it was true that in a question of nuisance regard must be had to the character of the neighbourhood, yet even in a district devoted to noisy trades a serious addition to the noise might be restrained at the instance of an owner of property in the district.¹ There was no question but that vibration and noise were a nuisance²; and it was proved that the occupants of the pursuers' property had suffered from the noise of, and the vibration caused by, the defenders' engine. The interdict must, therefore, be granted, whatever might be the loss thereby occasioned to the defenders³; and it was no answer to say that the nuisance had been abated.⁴ The respondents could not take objection to the appellants' title to sue, as there was no plea to title on record. Even according to English law the appellants had a good title, seeing that one of their

does so, he must accept certain disadvantages which a resident in a lonely wood or on a mountain top is not subjected to. There are a great many things in a noisy city which quiet people may very well regard as a nuisance in the popular sense of the term, but that is a very different thing from a nuisance in the legal sense, the former being a thing to be endured and the latter a thing to be removed. I do not find in the evidence anything to warrant me holding the defenders' operations to be an offence at law. They are conducting a manufacturing business in premises which have been long used for such a purpose, and in a district of the city mainly devoted to such works. In the conduct of their business they are using necessary machinery, as similar works are doing all round about, and I am unable to hold upon the proof that they are doing so in an unreasonable manner.

"I have all along in this case had some doubt as to the pursuers' exact ground of action. They state only one plea in law as follows:—'The vibration caused by the said gas-engine being a nuisance, and causing material discomfort and annoyance to the pursuers' tenants and damage to the pursuers' property, the pursuers are entitled to interdict as craved.' That is to say, to interdict against the defenders working the gas-engine on their premises in such a way as to cause vibration to the pursuers' property, or at least in such a way as to cause material discomfort and annoyance, and to be a nuisance to the tenants. The ingenious fashion in which the discomfort to the tenants is, in the pleadings, worked in to the allegation of injury to the property, rather suggests doubt on the pursuers' own part as to their ability to establish any relationship of cause and effect between the existence of the gas-engine in the defenders' premises and any specific weakness in the tenement property. The tenement is some forty years old, and the proprietors do not appear to have been anxious to spend much on its upkeep. I am not prepared to accept the theory that some trifling matters which have been spoken to, and which may quite well be the results of ordinary tear and wear, are results of the working of the gas-engine in the adjacent building.

"So far as allegations of damage done to the pursuers' property are concerned, I think the proof entirely fails to establish the occurrence of damage,

¹ *Polsue & Alfieri, Limited, v. Rushmer*, [1906] 1 Ch. 234, [1907] A. C. 121.

² *Gort v. Clark*, (1868) 18 L. T. (N. S.) 343; *Husey v. Bailey*, (1895) 11 T. L. R. 221; *Goose v. Bedford*, (1873) 21 W. R. 449; *Knight v. Isle of Wight Electric Light and Power Co.*, (1904) 73 L. J. (Ch.) 299.

³ *Bank of Scotland v. Stewart*, (1891) 18 R. 957.

⁴ *Seafeld v. Kemp*, (1899) 1 F. 402, *per* Lord Kyllachy, at p. 410; *Kerr on Injunctions*, (4th Ed.) p. 13.

houses was empty and another was occupied by one of the appellants, James Gibb, and also that part of the damage was structural. But Scots law differed on this point from English law¹; and by the law of Scotland a proprietor could interdict a nuisance although he was not in occupation of his property,² just as a superior could protect the lands feued by him,³ or a landlord could prevent trespass on the lands he had leased.⁴

Argued for the respondents;—The district in which the properties were situated was one in which there were many engineering works; and the vibration and noise of which the appellants complained were such as might be expected in a district of that character. There was nothing therefore to justify an interdict. In any case the appellants had no title to sue. The evidence failed to establish either that the appellants' property had sustained structural injuries or that its letting value was depreciated. All that was proved was that some

—far less to connect it with the defenders' operations. I have therefore no hesitation at all in rejecting this branch of the pursuers' claim, upon which it is significant that, neither in the pleadings nor at the proof, any specific figure was put.

"As regards discomfort and annoyance to the pursuers' tenants, I have all along had serious doubt as to the title of the pursuers to sue at all; but, on this branch of the case, the proposition which I think the pursuers mean to present is, although they do not expressly say so, that because the setting up by the defenders of the gas-engine has caused vibration in the pursuers' property—and because the tenants are thereby annoyed—the pursuers' property has been prejudiced as a letting subject, and therefore they can plead that the annoyance to the tenants, although not a claim for material damage to the property, is at least a ground for the landlord seeking interdict. But, unless annoyance to the tenants goes the length of actual prejudice to their property, I do not think the pursuers have any title to use the annoyance to their tenants as a ground for asking interdict against the defenders, and the only prejudice suggested is that the property is rendered less easy to let. But it is a significant circumstance that, in these days of wail about unlet property, this tenement is fully let at the present time, and appears to be a property with the accommodation of which, and the conditions of let of which, the ten tenants are quite satisfied. The factor, no doubt, says now that the current missives were signed upon a condition that he should raise this action, but he has not produced any missive which is so qualified, and I am not able to spell out from the proof that the fact that the gas-engine is there has deterred, or will deter, any tenant, who finds it convenient to reside in this tenement, from doing so.

"Upon the question of annoyance from vibration, a perusal of the notes of evidence confirms the very strong impression which I formed at the proof, that the tenants' evidence is largely hysterical, and upon that I place very little weight. I am inclined to think that with these people (perhaps quite unconsciously to themselves) the wish to get the gas-engine stopped has been father to the thought that the little inconveniences they describe are traceable to the existence of the gas-engine.

"I have very carefully considered the contradictory skilled evidence adduced on either side, and I have come to the conclusion that the prepon-

¹ Rankine on Leases, (2nd Ed.) 572.

² Harvie v. Robertson, (1903) 5 F. 338, *per* Lord Adam, at p. 344, and Lord Kinnear, at p. 346.

³ Marquess of Breadalbane v. Campbell, (1851) 13 D. 647.

⁴ Stewart v. Stephen, (1877) 4 R. 873.

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discomfort had been caused to the tenants. This would give the tenants a right of action; but the landlord could not sue in respect of a transitory nuisance. That was the law in England¹; and there was no ground for holding that Scots law was different. In any event efforts had been made to abate any nuisance there might be, and therefore the interdict craved should not be granted meanwhile.

At advising on 21st November 1911,—

LORD JUSTICE-CLERK.—The pursuers in this case seek to prevent what is alleged to be a nuisance caused to the tenants of premises belonging to them at 103 Cathcart Street, Kingston, Glasgow, through the working of a gas-engine in contiguous premises occupied by the defenders. The engine is placed close to the mutual gable between the two premises, and the supports of the pulleys, which run from that engine for the purpose of working the various machines in the defenders' premises, are attached to the gable.

The form in which the case is presented is unfortunate. The pursuers in their pleadings ask the Court to interdict the defenders and their servants from working the gas-engine at all "in such a way as to cause vibration of the property" at 103 Cathcart Street, Kingston, Glasgow, "or at least in such a way as by the vibration occasioned thereby to cause material discomfort and annoyance, and to be a nuisance to the tenants and occupants of" the property. In the argument before us it was maintained on behalf of the defenders that the pursuers have no right whatever to complain, in respect that although they are the proprietors of the property in question they are not the occupants of it. But as to that contention, it is enough to say that there is no plea as to title on record; and there is also, as Lord Dundas pointed out, no plea as to relevancy. It is indeed rather curious that the latter plea, which appears in almost every record, should be absent in a case like this where it might have proved useful to the defenders. I was always under the impression that this plea was a sort of rubber-stamp plea which was inserted in every record in order to meet possibilities which might arise during the progress of the case. However, it does not appear in this record; and even if both pleas were on record, I should have difficulty in perceiving how they could have been upheld, seeing that one of the pursuers was at the time of this complaint, and I suppose still is, an occupant, and therefore is in the position of being his own tenant in the premises.

As regards the facts of the case, I must say I cannot agree with the learned Sheriff-substitute's view. The Sheriff-substitute has not, I think,

derance of weight is with the defenders. The tenants in this tenement can never expect absolute quietness and freedom from disturbance, and the question which it seems to me I have to answer is, Whether, having regard to the locality, the defenders are making a use of their property which is unreasonable towards the pursuers? I am unable on the proof to hold that they are doing so, and therefore I refuse the interdict craved."

¹ Jones v. Chappell, (1875) L. R., 20 Eq. 539; Battishill v. Reed, (1856) 18 C. B. 696; Mumford v. Oxford, Worcester, and Wolverhampton Railway Co., (1856) 25 L. J. (Ex.) 265; Simpson v. Savage, (1856) 1 C. B. (N. S.) 347; Clark v. Lloyds Bank, Limited, 1910, W. N. 187; Garrett on Nuisance, (3rd Ed.) p. 234.

acted here as a jury would in deciding the question of fact, but has pro-
ceeded upon a theory of his own as to the facts. I cannot doubt that, if
this case had been tried by a jury, the jury would have been directed that,
if they were satisfied upon the evidence that certain things which were
proved to have occurred in the pursuers' premises were indications of injury
by vibration in these premises caused by the use of this large gas-engine in
connection with the various machines in the defenders' premises, then they,
the jury, would be entitled to consider it proved that there was such vibra-
tion or such annoyance as would entitle them to find a verdict for the pur-
suers. But unfortunately the Sheriff-substitute has not dealt with the case
in this way. He has proceeded on his own view that certain witnesses
were "largely hysterical" in the evidence they gave. What the meaning
of "hysterical" evidence is I do not quite understand, but the Sheriff-
substitute has gone upon this view, and not upon the facts which were
proved. If the facts are proved, it does not matter whether the persons
who proved them were hysterical or not. Then the learned Sheriff-sub-
stitute says that he looks upon certain things "as trifling matters which
have been spoken to, and which may quite well be the results of ordinary
tear and wear," and adds that he is not prepared to hold that such things
are the results of the working of the gas-engine in the adjacent building.
Here again I am in the position of not being able to agree with the Sheriff-
substitute. I think that the matters to which he refers, although they
may quite well be such as would result from ordinary tear and wear, are
proved in this case to be due not to that cause, but to the vibration of the
building. No witness was brought to depone that he had examined these
matters and was able to say that they are the result of fair wear and tear
occurring before, or apart from, the establishment of the gas-engine and the
running of the machinery connected with it.

Therefore we must approach the case independently altogether of the
Sheriff-substitute's interlocutor, and must look at the evidence for ourselves,
taking it as evidence which is laid before us in the ordinary way, and giving
our decision upon the question at issue as a question of fact. In the ordi-
nary case we would give very great weight indeed to the views expressed
by the Sheriff who saw the witnesses and heard the evidence, but I do not
think this is a case in which we can do so.

Now, what are the facts? The facts are that from the time that this
engine was established and set to work there were serious complaints made
to the landlords in regard to the effect of its working upon the adjoining
houses which belonged to them. There is evidence, and it is uncontradicted
evidence, that these houses, when the engine was in use, were in a constant
state of vibration or shaking; that that could be seen in any vessel holding
water; that it could be noticed on articles such as dishes on a dresser, or a
mirror standing unfastened on a mantelpiece; that clothes hanging up to
dry were in a constant state of motion; that the tenants felt the motion;
that it had an effect upon them; and that people who came to visit the
houses noticed it and felt it. One very marked instance of that is given
in the evidence of one of the tenants, who tells us that when visitors came
to see her she advised them to keep on the rug in order that they might
feel the vibration less. Many of the witnesses say that it affected their rest—

Nov. 21, 1911. not at the time that the engine was running, for they would not be in bed at that time—but that it affected them nervously, and that various results followed. The doctor who attended one of the tenants attributed the latter's attacks of asthma to the vibration, and gave it as his opinion that in the case of a person susceptible to asthma the vibration would cause nervousness, and thereby produce asthma. I cannot, however, go into the details of all the cases spoken to in the evidence; I can only give the result of my general reading of them. But let me refer to the evidence of Dr Yuill Anderson, who attended patients in the tenement, and who is an important witness. He is a man who, necessarily, from his position, would be observant, and he speaks to certain facts. Thus he says: "After the new gas-engine was installed I noticed the vibration very markedly. I had not noticed anything of the kind before. The place was quite quiet before, and it was a very nice building. The vibration was specially noticeable in Hamilton's house, which was on the north side of the tenement—the side next the engine. One could feel the vibration, and it was very disagreeable." And Mrs Hamilton, whom he attended, he adds, "was so situated that she could not remain there without serious detriment to her health, because of the vibration of the building. I attended Mr Hamilton, not exactly from any effect of vibration, but he was ill and sleepless. He was out most of the day. When I was attending them in October and November 1908 the vibration was very bad; it was always bad when I happened to call in the forenoon or the afternoon. If anyone were ill and in that tenement I would not allow them to remain in the house; they would run a considerable risk in remaining there. Mrs Brown was affected by the vibration to some extent. The vibration was decidedly so bad as to amount to a nuisance." Now, that evidence—and it is that of one who was a visitor to the house, and who is a person accustomed to observe things—is in entire accordance with the evidence of those who lived in the house during the day, and who all speak to the fact of their suffering from this vibration, more or less according to their state of health. That evidence convinces me that there was ground, serious ground, of complaint as regards the working of the defenders' engine. And there is other evidence going further, which I see no ground for disregarding. I refer to the very important evidence which proves that this vibration was not merely in the lower rooms, but that it affected the whole building, so much so, indeed, that the vibration was greater at the very top of the house than it was in the lower storeys. There was a sort of shaking action affecting the whole premises, and the sweep who swept one of the chimneys says that he was afraid lest the vibration might cause him to fall. Now, a sweep is not usually nervous, but he says that he does not like the top of the chimney-head to be shaken, with possible danger to his own safety. With this state of things existing in the building, it appears to me that the judgment of the Sheriff-substitute cannot be justified, and that it will not do to speak of the matters as being "trifling," and the evidence as "hysterical."

The next question is whether the nuisance has been abated or so abated that it is no longer a tangible nuisance. Now, I think we must accept the view that something has been done to make the nuisance less than it was before—at least in a matter to which I have not yet alluded. It is proved

that there was not merely vibration from the working of the engine and machines, but that there were also a series of thumping noises caused by explosions in the exhaust of the gas-engine. That is a separate cause of nuisance, and is of a very serious nature. I am inclined, however, to think that the evidence shows that that has been abated to a very considerable extent, if not wholly.

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Lord Justice-
Clerk.

But coming to the conclusion, as I do, that it has been established that there is a nuisance of which the pursuers are entitled to complain, and which ought to be abated, the next question is what is to be done at the present juncture. Mr Wilson has suggested that if we came to that conclusion, it would be only fair to give the defenders an opportunity of abating the nuisance to the best of their ability, in order that it may be ascertained whether there is any necessity for making the interdict perpetual, and Mr Watson very rightly said that to that there could be no objection. In that view I suggest to your Lordships that some reasonable time should be given, say two months, before the matter is brought up before us again, in order that we may know what proceedings the defenders propose to take in order to avoid the decree which would otherwise follow from the judgment. We must find that what is complained of is a nuisance, and in the meantime I think, as the defenders have been wrong in their contention, according to the view I have expressed, they ought to be found liable in the expenses that have been incurred by the pursuers in the conduct of this case.

LORD DUNDAS.—I am of the same opinion, and shall add very little to what your Lordship has said. A considerable amount of argument was offered to us by the respondents' counsel to the effect that a proprietor who is not in the occupation of the subjects has no title to ask an interdict in respect of alleged annoyance, inconvenience, or discomfort caused to his tenants by the operations of a third party, if the injury is only of what was called a "transitory" character, even though he could show that the letting value of his premises was thereby lowered; and some English cases were cited which were said to support that view. I have not considered these cases, and I do not know how far they may support such a doctrine. But it seems to me that the argument is not open in this case; because, as your Lordship has pointed out, there is no plea to raise it; the defenders' only plea on record is one directed to fact. Mr Wilson, when invited to amend his record by adding a plea raising the question of title to sue, said, and I was not surprised, that he was not prepared to add such a plea, with whatever consequences might attend that addition. If it were necessary to point out further difficulties in the way of this argument, one might observe that one of the houses was unlet at the date of the action, and another was in the occupation of one of the proprietors. Upon the question of title to sue, therefore, I need say nothing; but my impression is that the law of Scotland does allow a proprietor to apply for interdict in respect of operations by a third party complained of by his tenant, and lowering, or reasonably calculated to lower, the letting value of his tenement. The point seems at best to be a purely technical one, for I suppose it might have been got over, if necessary, by inducing one or more of the tenants to lend their names, upon security as to expenses, as pursuers of the action.

Nov. 21, 1911. Upon the merits, I agree with all your Lordship has said. One is, of course, slow to differ upon a question of fact from the Sheriff-substitute, especially a Sheriff-substitute so experienced as the one who tried this case; and, if he had said that from the demeanour of the witnesses, or from some other specified cause, he was unable to accept them as credible or veracious witnesses, one would have attached weight to that consideration. But, as your Lordship has pointed out, all that the learned Sheriff-substitute says is that he formed a strong impression at the proof, which a perusal of the notes of evidence confirmed, "that the tenants' evidence is largely hysterical, and upon that I place very little weight." I am not sure that I understand what hysterical evidence may mean, and the learned Sheriff-substitute does not say that anything in the demeanour of the witnesses led him to disbelieve them, or that for any other definite reason their evidence was not, in his opinion, worthy of credit as honest evidence. I confess that, reading the tenants' evidence for myself, it seems to me to be robust and sensible evidence; and if it is true, which I see no reason to doubt, it appears amply sufficient for its purpose, especially when coupled with that of the other witnesses,—doctors, engineers, and so forth. I think the Sheriff-substitute is wrong, and that we should recall his interlocutor, and find that the pursuers are entitled to interdict; but as Mr Wilson suggested delay for the purpose of seeing what could be done, and as Mr Watson very reasonably said he had no objection, the proper course will be to allow a period, as your Lordship suggests, of two months for that purpose.

LORD SALVESEN.—I concur. There are two grounds upon which the pursuers here ask interdict. The first is that the engine which has been erected in the defenders' premises is causing injury to the structure of their property. In my opinion there is sufficient evidence to the effect that there has been a certain amount of injury to the property through the vibration, and that if the vibration which existed at the time that the action was brought had continued, there was reasonable apprehension of further injury being caused. That of itself would support an action of interdict of this kind. I further hold, for the reasons which your Lordship in the chair has fully explained, that the vibration at the time that this action was raised—and that is the crucial point in determining whether it was properly raised or not—was such as to cause material discomfort and annoyance to the occupants of the property, including one of the pursuers who was himself occupying a house in the tenement.

These two matters of fact being found against the defenders (and I think we should formulate them in a series of findings), there is really no question of law at all. But as the question has been argued and insisted in I wish to state that my impression of the law of Scotland on the question of title to sue is the same as that which Lord Dundas has indicated. I should be very slow to affirm, as at present advised, that a proprietor would not be entitled to complain of operations which affected materially the comfort of his tenants, and might be likely to induce them not to renew their tenancies, on the mere ground that the whole of his property was at the time let, and that he himself was suffering no personal inconvenience from the operations complained of. But that question really does not arise for decision;

because the facts here, being found against the defenders in the way suggested, give ample reason for holding that the pursuers are entitled to the remedy they seek. I only say with regard to the form of this interdict that when we come to consider that, which we need not do at the present time, it seems to me that the first branch of it is much too wide, and will require very serious modification before it can be given effect to in a perpetual interdict.

THE COURT pronounced the following interlocutor:—"Sustain the appeal, and recall the said interlocutor [of the Sheriff-substitute]: Find in fact [here followed the findings quoted *supra*, p. 157]: Find in law that the pursuers are entitled to be protected against a continuance of the said nuisance; but, on the motion of the defenders, not objected to by the pursuers, allow the defenders to take such remedial steps as they may be advised for the removal of the said nuisance, within a period of two months as from this date: . . . *Quoad ultra* continue the cause."

CUMMING & DUFF, S.S.C.—GRAHAM MILLER & BRODIE, W.S.—Agents.

TAYLOR & FERGUSON, LIMITED, Pursuers (Reclaimers).—*D.-F. Dickson* No. 25.
—*D. Anderson.*

JOHN GLASS AND OTHERS (Glass's Trustees), Defenders (Respondents). Nov. 22, 1911.
—*Crabb Watt, K.C.—D. P. Fleming.*

Executor—Trust—Testamentary trustees—Administration—Payment of debts—Provision for contingent debts—Personal liability of trustees and executors. Taylor & Ferguson, Limited, v. Glass's Trustees.

Three years after the death of a testator, who had granted a letter of guarantee, his testamentary trustees were called upon by the persons in whose favour the guarantee was granted for payment of the sum due thereunder. The trust-estate had proved insufficient to pay the testator's creditors in full, and the trustees, having paid away to them the greater part of the estate, had not sufficient funds left to pay the claim under the guarantee. The creditors under the guarantee thereupon brought an action in which they sought to have the trustees found personally liable for the sum guaranteed, in respect that they had received notice of the guarantee, and that it was their duty to have made provision for payment thereof.

The Court *assolized* the trustees from the conclusion for personal liability, *holding* that, as they were not trustees for creditors, they were entitled after six months to pay the testator's debts *primo venienti* without making provision for this contingent claim.

Observations (*per* the Lord President) on the duties of trustees and executors with regard to payment of debts.

ON 16th June 1910 Taylor & Ferguson, Limited, wholesale wine merchants, 11 Oswald Street, Glasgow, brought an action against John Glass and others, the testamentary trustees of the deceased John Glass, 597 Gallowgate, Glasgow, as such trustees and as individuals, for payment of a sum of £500, being the sum due under a guarantee granted by John Glass to the pursuers.

The following narrative of the facts, down to the death of John

1ST DIVISION.
Lord Skerrington.

Nov. 22, 1911. Glass, is taken from the opinion of the Lord Ordinary (Skerrington):—

Taylor &
Ferguson,
Limited, v.
Glass's
Trustees.

" On 23rd March 1900 the late John Glass gave to the pursuers a letter of guarantee which bore that the pursuers were about to advance to John Donohoe the sum of £2100 on loan, 'to continue so long as you (the pursuers) may think fit, and that it has been arranged that I should guarantee you due repayment thereof to the extent after mentioned.' By the said letter the said John Glass bound himself and his heirs, executors, and representatives whomsoever, all jointly and severally with the said John Donohoe, to repay the said loan to the pursuers (at any time, on receiving two months' notice of their desire to obtain repayment), but that only to the extent of £500 sterling, to which sum the said guarantee had been agreed to be limited. The said guarantee further provided that 'although any promissory-note or bill held by you for the said loan is not presented for payment, or is held unenforced, or is renewed, this guarantee shall remain binding upon me, and shall be a continuing guarantee so long as the said sum of two thousand one hundred pounds, or any part thereof, and interest thereon, shall remain unpaid by the said John Donohoe or his representatives.'

" John Glass died on 2nd June 1906, at which date the principal sum due to the pursuers was £1650. Since then £20 has been paid to account, leaving £1630 still due. These figures are not formally admitted on record, but it was not disputed by the defenders' counsel that a much larger sum than £500 is still due by Donohoe to the pursuers."

After John Glass's death the defenders' agent, on 29th June 1906, wrote to the pursuers for a note of the amount standing at the credit of the deceased in their books, and on the same day he received a reply that the pursuers had a letter of guarantee from the deceased for Mr Donohoe for £500.

On 25th December 1906 the defenders' agent wrote to the pursuers as follows:—"The guarantee of the late Mr Glass to you will cause considerable trouble to the trust-estate, and I will be glad to know if you can suggest, outside of payment from the trust-funds, any means whereby the guarantee could be changed," and pursuers replied that they had no suggestion to make.

Nothing further was done until 9th December 1909, when the pursuers intimated to the defenders that they would require payment of the sum guaranteed. On the pursuers pressing for payment, the agent for the defenders wrote as follows:—"There is not the slightest chance of the £500 you refer to being paid in the course of a few days. The trustees have no funds, and the properties are bonded, if not for more than their value, at all events it is up to it."

The pursuers averred;—(Cond. 6) "Since the death of the deceased John Glass the defenders have administered his estate; and although they were aware of the obligation contained in the said letter of guarantee, they have made payments out of the trust-funds to other creditors from time to time. In particular, it is believed and averred that on or about 23rd August 1907 a sum of £780 was divided among certain ordinary creditors of the deceased, being a payment to them of 10s. per £ on the amount of their debts; and that on or about 27th May 1908 a further sum of £385, 7s. 2d. was paid to the creditors in respect of a further dividend of 5s. per £. In these circumstances, in the event of it being the case, which, however, is not

admitted, that there are no available funds in the trust to satisfy the claim of the pursuers, the defenders have rendered themselves personally liable for payment of the said debt, in respect that they have paid away trust funds in their charge without making provision for payment of the pursuers' debt."

Taylor &
Ferguson,
Limited, v.
Glass's
Trustees.

The pursuers pleaded, *inter alia*;—(1) The defenders being liable to make payment to the pursuers of the sum of £500 under the letter of guarantee libelled, decree should be pronounced as craved. (2) The defenders having failed to make provision for payment of the said sum out of the trust funds in their charge before paying away the sums condescended on, they are personally liable to the pursuers therefor."

The defenders pleaded, *inter alia*;—(5) In respect that the defenders acted in good faith and in the ordinary course of trust administration in making the payments to the deceased's creditors condescended on, and that the pursuers at that time made no claim against the trust-estate, the defenders are not individually liable for the sum sued for.

On 8th November 1910 the Lord Ordinary (Skerrington) pronounced the following interlocutor:—"Sustains the fifth plea in law for the defenders, and repels the second plea in law for the pursuers; and assoilzies the defenders from the conclusions of the summons, so far as laid against them personally, and decerns against them as trustees of the deceased John Glass in terms of the conclusions of the summons," &c.*

* "OPINION.—[After the narrative quoted *supra*]—The first ground upon which the defenders, Mr Glass's testamentary trustees, claimed to escape liability was that, subsequent to the death of Mr Glass, the pursuers had continued to renew the bills for the principal sum due by him. It was argued that the clause above quoted had no reference to the period subsequent to the death of Mr Glass. This construction is, in my opinion, far too narrow—the plain object of the parties being that the guarantee should continue until the loan had been repaid, notwithstanding the fact that bills had been held over or renewed. It was further argued that the trustees' liability was barred *mora* and *personali exceptione*, but I find no relevant averments in support of this contention. It follows, in my opinion, that the pursuers are entitled to decree as concluded for against Mr Glass's trustees.

"The pursuers further claim that they are entitled to decree against the defenders as individuals, in respect that the latter have incurred personal liability for the debt by paying to the creditors, other than the pursuers, dividends amounting to 15s. per £. It is doubtful whether the trust-estate still in the hands of the defenders will be enough to provide the pursuers with an equalising dividend. I am of opinion that this claim is unfounded. The pursuers' claim under their letter of guarantee was essentially conditional upon the principal debtor failing to pay when called upon; and it was further in terms conditional upon the pursuers giving to the guarantor two months' notice of their desire to obtain repayment. Instead of liquidating their claim against Mr Glass's estate, as they might have done, by demanding payment from the principal debtor and from Mr Glass's representatives, the pursuers contented themselves with informing Mr Glass's trustees by letter, dated 29th June 1906, that they held the said letter of guarantee. They did not demand repayment, as they no doubt preferred to continue the former course of dealing with the principal debtor. In these circumstances, Mr Glass's trustees were, I think, entitled to pay the creditors

Nov. 22, 1911. The pursuers reclaimed, and the case was heard before the First Division on 20th June 1911.

Taylor &
Ferguson,
Limited, v.
Glass's
Trustees.

Argued for the reclaimers;—The defenders having made payments to some of the creditors of the deceased in knowledge of his obligation to the pursuers, but without making provision therefor, had incurred personal liability in respect thereof.¹ The case might be contrasted with the case of *Stewart's Trustees v. Evans*,² in which payments were made by trustees in the reasonable belief that all debts had been satisfied. It was the duty of the defenders to preserve the trust-estate until the pursuers were paid.³ As trustees the defenders were liable for the full sum sued for, and as individuals, for 15s. in the £, being the amount paid to other creditors of the deceased.

Argued for the respondents;—Whatever might be the duties of executors or testamentary trustees as between beneficiaries and creditors, they had no duty as between different creditors of the deceased, because they were not trustees for creditors.⁴ They were free to act as the deceased might honestly have done; and if the pursuers had suffered prejudice they had only themselves to blame, for they had by their delay taken the risk of their guarantee not being met. Testamentary trustees were not bound to provide for contingent debts.⁵

At advising on 22nd November 1911,—

LORD PRESIDENT.—In this case Messrs Taylor & Ferguson, wine and spirit merchants, sue certain gentlemen who are executors of the late Mr Glass in respect of a letter of guarantee which was granted by Mr Glass during his lifetime, in which he guaranteed the account of Mr Donohoe up to the extent of £500. The Lord Ordinary has granted decree against the defenders in their representative capacity, but he has refused to give decree against them personally, and in the reclaiming note before your Lordships the respondents do not complain of the decree which was given against them in their representative capacity, but the pursuers insist that besides that they ought to have decree against the defenders personally.

Now the state of affairs was this, that Mr Glass died in June 1906. There seem to have been various transactions between Mr Glass and Messrs Taylor & Ferguson, because there was an application by the trustees, through their solicitor, to Messrs Taylor & Ferguson to know what credit he had standing in their books. In answer to that, the trustees and executors were told that there was a letter of guarantee existing which had

who had liquid debts; and it is not, in my opinion, material that they were unable to pay in full, but only paid a dividend.

“I accordingly assoilzie the defenders from the action so far as laid against them personally.”

¹ *Lamond's Trustees v. Croom*, (1871) 9 Macph. 662, Lord President Inglis, at p. 668, Lord Kinloch, at p. 671.

² (1871) 9 Macph. 810.

³ *Heritable Securities Investment Association v. Miller's Trustees*, (1892) 20 R. 675, Lord President Robertson, at p. 691.

⁴ *Laird v. Hamilton and Another*, 1911, 1 S. L. T. 27; *Globe Insurance Co. v. Mackenzie*, (1850) 7 Bell's App. 296; *Stewart's Trustee v. Stewart's Executrix*, (1896) 23 R. 739; *Mitchell v. Mackersy*, (1905) 8 F. 198.

⁵ *Bell's Principles*, sec. 1900.

been granted by Mr Glass for Mr Donohoe to the extent of £500. The Nov, 22, 1911. trustees then asked Messrs Taylor & Ferguson if they had any proposal to make in connection with the letter of guarantee and they said they had none, and upon that nothing was done. I ought to explain that the letter of guarantee was for sums in which Mr Donohoe might be indebted to Messrs Taylor & Ferguson, and no steps were taken by Messrs Taylor & Ferguson at this time to constitute their debt against Mr Donohoe, but their course of dealing with Mr Donohoe was allowed to go on.

Nothing more seems to have been heard of the matter until three years after the death of Glass, when Messrs Taylor & Ferguson proceeded to constitute their debt against Mr Donohoe and then intimated to the trustees that they would require payment of the £500, Donohoe, it seems, not having been in a position to pay what he was due. The trustees intimated that they had not now sufficient money to pay £500, most of the money in their hands having been paid to Glass's creditors. To that Messrs Taylor & Ferguson replied that they "understand Mr Glass's creditors have received a composition of 15s. per £," and that they "think a sum should have been set aside to meet this guarantee. Under the circumstances, we consider that the trustees are responsible." And that is the position that is taken up in this action.

Now, it is perhaps curious that there is not more explicit law upon this subject; but, it seems to me, the matter is really perfectly well settled. I should like to repeat here—as I can now do with more authority—what I said in a case of *Laird v. Hamilton*,¹ which I decided for Lord Guthrie in the Outer House; and there, speaking of an executor, I said that though he is not a trustee for creditors, "I do not think that the proposition that he is not a trustee in a question with a deceased's creditors is exactly the same as saying that he therefore has no duty whatever to them. The authorities are somewhat vague upon what the precise confines of this duty are, but that there is such a duty may be well gathered, I think, from the way in which Lord M'Laren² has expressed the matter in section 2159 of his work."

Now, I think that the duty comes to be this: Emphatically he is not a trustee. That was laid down in a considered judgment of the House of Lords in the case of the *Globe Insurance Company v. Mackenzie*³; and the same proposition was repeated, following, of course, that judgment, in the case of *Mitchell v. Mackersy*,⁴ which reaffirmed the case of *Stewart's Trustees v. Stewart's Executrix*,⁵ and which finally overruled the case of *Gray's Trustees v. Royal Bank*.⁶ Accordingly, we start with the proposition that the executor is not a trustee for creditors. He is *eadem persona cum defuncto*, and as *eadem persona cum defuncto* he is bound to pay, and can be made to pay, the deceased's debts. He cannot be sued within six months, but after the six months, I think he is bound to pay any just debt that is brought to him; and, as it is often expressed, he is bound to pay

¹ 1911, 1 S. L. T. 27, at p. 29.

² Wills and Succession, vol. ii. p. 1161.

³ 7 Bell's App. 296.

⁵ 23 R. 739.

⁴ 8 F. 198.

⁶ (1895) 23 R. 199.

Nov. 22, 1911. *primo venienti*. I do not mean that that expression must be pressed too far. As I said in *Laird's* case,¹ I do not think the executor would be entitled, so to speak, to get up early on the first day after the six months had expired and run round to those creditors whom he liked best and leave the others in the lurch. But, on the other hand, I think he is entitled to pay when persons come forward. If they come forward in such numbers that he sees that the estate is insolvent, I think it would certainly be his duty to give notice to them to that effect and not pay more to one than to another; and, undoubtedly, he is not entitled—because there are cases decided to that effect—he is not entitled to pay a creditor whom he knows to be a deferred creditor and leave the preferred creditor unsatisfied. Of course, there are not many creditors who are in the position of preferred creditors in the sense in which I am using the word, but there are some. On the other hand, the trustee is not bound to turn himself into a trustee in bankruptcy, and I think, therefore, what it comes to is this—that the next step lies with the person who says that the money is due to him.

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Trustees.

Ld. President.

In other words, in this case I think it was Messrs Taylor & Ferguson's business to make up their minds in 1906 either to constitute their debt against Mr Donohoe and then proceed to make good the liability under the guarantee, or else to go on dealing with Mr Donohoe, but in that way to take the risk that the deceased guarantor's money might be paid away to his lawful creditors. Really, when you say that the executor is *eadem persona cum defuncto*, you seem to solve the problem. Suppose one of those other creditors had come to Mr Glass when alive and had said to him, "Pay me my debt," would it have been any answer on Mr Glass's part to say, "No, I cannot pay you your debt in full because I know there is a guarantee under which, in a few years' time, I may be called on to pay, and I must really keep some money to pay that creditor as well as you"? That answer would have been no answer at all, and, therefore, it really comes to this—that we should either have to lay down the proposition that no executor was in safety to pay unless he was actually made to pay by legal process, or else, if that is not so—and it is well settled it is not so,—then we must take the position which I am venturing to take here.

Accordingly, I think this view, which is really merely expressing at rather greater length the conclusion to which the Lord Ordinary has come, is a just one.

LORD KINNEAR concurred.

The Lord President intimated that LORD MACKENZIE, who was absent at advising, also concurred.

LORD JOHNSTON, who was absent when the case was heard, delivered no opinion.

THE COURT adhered.

CAIRNS, M'INTOSH, & MORTON, W.S.—W. B. RANKIN, W.S.—Agents.

¹ 1911, 1 S. L. T. 27.

LAWRENCE DAVID HENDERSON, Pursuer (Reclaimer).—*D. P. Fleming.* No. 26.

D. & W. HENDERSON, Defenders (Respondents).—*C. H. Brown.*

Et e contra.

Nov. 23, 1911.

Process—Reclaiming note—Competency—Failure to box prints—Excusable cause—Conjoined actions—Record in one action only boxed—Judicature Act, 1825 (6 Geo. IV. cap. 120), sec. 18—A. S., 11th July 1828, sec. 77. Henderson v. D. & W. Henderson.

The Judicature Act, 1825, section 18, provides that a party reclaiming against an interlocutor of the Lord Ordinary shall box, along with his reclaiming note, printed copies of the record; and the Act of Sederunt, 11th July 1828, section 77, provides that a reclaiming note against an Outer House interlocutor shall not be received unless there be appended thereto copies of the record.

Objection was taken to the competency of a reclaiming note against an interlocutor of the Lord Ordinary, disposing of two conjoined actions, on the ground that the reclaimer had boxed, with his reclaiming note, copies of the record in one only of these actions. The Court (after consultation with the Judges of the Second Division) *repelled* the objection and ordered the case to be put to the roll, *holding* that it was within the power of the Court to permit prints to be lodged if in their view it was from some excusable cause that they were not lodged at the proper time, and that in the circumstances of this case there was excusable cause, looking to the confusion between the two records brought about by the conjoining of the actions.

By interlocutor dated 21st February 1911, the Lord Ordinary (Cullen) ^{1ST DIVISION.} conjoined two cross actions, the parties to which were respectively the dissolved firm of D. & W. Henderson and Mr Lawrence David Henderson, a partner of the firm. ^{Lord Cullen.}

By interlocutor dated 10th June 1911, the Lord Ordinary assolized the firm from the conclusions of Mr Henderson's action against them, and by the same interlocutor decerned against Mr Henderson in the action at the firm's instance.

Mr Henderson reclaimed against this interlocutor, and boxed with his reclaiming note copies of the record in the action at his own instance against the firm, but failed to box copies of the record in the firm's action against himself.

On 6th July 1911, in Single Bills of the First Division, counsel for the respondents opposed the reclaimer's motion to send the case to the roll, and argued;—The reclaiming note was incompetently presented in respect of the reclaimer's failure to box prints of the record in the firm's action against him. The provisions of the Judicature Act and Act of Sederunt of 11th July, 1828,* on this subject were peremptory and could not be dispensed with.¹

* The Judicature Act 1825 (6 Geo. IV. cap. 120), enacts:—Sec. 18. "And be it further enacted, that when any interlocutor shall have been pronounced by the Lord Ordinary, either of the parties dissatisfied therewith shall be entitled to apply for a review of it to the Inner House . . . provided that such party shall, within twenty-one days from the date of the interlocutor, print and put into the boxes . . . a note reciting the Lord

¹ Counsel referred to the following cases:—*M'Evoy v. Brae's Trustees*, (1891) 18 R. 417; *Wallace v. Braid*, (1899) 1 F. 575; *Blackwood v. Summers Oxenford & Co., Limited*, (1899) 1 F. 868; *M'Lachlan v. Nelson & Co., Limited*, (1904) 6 F. 338.

Nov. 28, 1911. Argued for the reclaimer;—The statutory provisions founded on Henderson v. D. & W. Henderson. were directory, not imperative. The Court might allow prints to be lodged in circumstances where, as here, the mistake was excusable, and the other party had suffered no prejudice.¹ The omission here was excusable; it arose from the mistake of the printer who, having boxed one record with the reclaiming note, did not realise that there were conjoined actions and that two records should have been boxed. Alternatively, if the reclaiming note was held to be incompetent, this was a case in which the reclaimer should be allowed to submit the interlocutor to review by petition under section 16 of the Administration of Justice and Appeals (Scotland) Act, 1808 (48 Geo. III. cap. 151.)²

At advising on 23rd November 1911, the opinion of the Court, (consisting of the Lord President, Lord Johnston, and Lord Mackenzie) was delivered by the

LORD PRESIDENT.—In this case the decisions quoted to us were indubitably conflicting, and accordingly we have reconsidered the whole matter along with the Second Division.

The decision of the Court is that it is within our power to permit prints to be lodged if, in our view, it was for some excusable cause that they were not lodged at the proper time. We think that in this case there was an excusable cause looking to the confusion between the two records brought about by the conjoining of the actions and, accordingly, we shall send the note to the roll. But we wish it to be distinctly understood that this does not mean that there is to be any relaxation of the rules as to printing, and lodging, and boxing, and so on, and that persons must not think they will be allowed to get their cases to the roll unless there is really a very good cause shown.

THE COURT repelled the objection and ordered the case to be sent to the roll.

HUME M'GREGOR & Co, S.S.C.—WEBSTER, WILL, & Co., W.S.—Agents.

Ordinary's interlocutor . . . and if the interlocutor has been pronounced without cases, the party so applying shall, along with his note as above directed, put into the boxes printed copies of the record authenticated as before”

The Act of Sederunt of 11th July 1828 enacts:—“Sec. 77. “That reclaiming notes . . . shall at first be moved merely as single bills, and immediately ordered to the roll Provided always, that such notes, if reclaiming against an Outer House interlocutor, shall not be received unless there be appended thereto copies of the mutual cases, if any, and of the papers authenticated as the record, in terms of the statute, if the record has been closed”

¹ Hutchison v. Hutchison, 1908 S. C. 1001 ; Burroughes & Watts, Limited, v. Watson, 1910 S. C. 727.

² Tough v. Macdonald, (1904) 7 F. 324.

MRS ALICE STANLEY PEAKE OR GRIERSON, Pursuer (Reclaimer).—
Wilson, K.C.—Armit.

No. 27.

CHARLES ERNEST MITCHELL, Defender (Respondent).—
Blackburn, K.C.—Hamilton.

Nov. 24, 1911.

Grierson v.
 Mitchell.

Process—Printing documents for Inner House—Documents not in process.

It is the duty of the Clerks of Court in the Inner House to refuse to receive into process prints of any documents which are not already in process. If a party has failed to lodge a document on which he intended to found, he must move the Court for leave to lodge it.

IN an action at the instance of Mrs Alice Stanley Peake or Grierson, with the concurrence of her husband, James Cullen Grierson, solicitor, Lerwick, against Charles Ernest Mitchell, fishcurer, Northness, Lerwick, the Lord Ordinary (Skerrington), on 21st June 1910, pronounced an interlocutor dismissing the action.

2D DIVISION.
 Lord
 Skerrington.

The pursuer reclaimed, and the case was heard before the Second Division (consisting of the Lord Justice-Clerk, Lord Salvesen, and Lord Guthrie) on 30th June, 24th October, and 7th and 8th November 1911.

While the case was in the Inner House prints of documents for both parties were boxed to the Court and lodged in process. It appeared at the hearing that the documents so printed had not been lodged in process.

At advising on 24th November 1911,—

LORD SALVESEN.—[In the course of his opinion said]—In the Inner House various prints were boxed to the Court containing some correspondence which had passed between the agents for the parties, partly before and partly after the action was raised. It appeared in the end that none of the correspondence was in process, that there was no admission of its genuineness, and it was said by the defender to be incomplete. In these circumstances it was entirely irregular to print and box the various appendices which contain it. It cannot be too clearly understood by the profession that no documents must be printed for the Inner House which have not been lodged in process; and it is the duty of the Clerk to refuse to receive into the process any print of documents which are not already in process. If there has been an error in failing to lodge some document on which parties intended to found, a motion must be made to the Court for leave to lodge it in process. So firmly has this rule been fixed in our practice that the Court is entitled to assume that any appendix which is boxed to it will contain only documents which are in process.

In the circumstances above narrated I think it is the duty of the Court to refuse to look at the correspondence.

The LORD JUSTICE-CLERK and LORD GUTHRIE concurred.

CLARK & MACDONALD, S.S.C.—CARMICHAEL & MILLER, W.S.—Agents.

No. 28.

Nov. 24, 1911.

Barr v.
Musselburgh
Merchants
Association.

JOHN BARR, Pursuer (Appellant).—*MacRobert—J. G. Jameson.*

THE MUSSELBURGH MERCHANTS ASSOCIATION AND OTHERS,
Defenders (Respondents).—*Morison, K.C.—Mercer.*

Reparation—Slander—Trade slander—Representation that person is unworthy of commercial credit—Privilege—Malice—Trade Protection Society.

A local association of traders issued to its members a list of the names and addresses of certain persons in the district. The list bore no title and contained no comment on the persons whose names were included; but it was admittedly compiled from the "black lists." A person whose name appeared in the list brought an action of damages for slander against the association, in which he averred that the list was known in the district as the "black list," and that the defenders by inserting his name in it had represented that he was unworthy of business credit.

The Court *held* (1) that the publication of the pursuer's name in the list was defamatory; but (2) that the defenders were privileged in issuing the list; and, as facts inferring malice were not averred, *dismissed* the action.

Macintosh v. Dun, [1908] A. C. 390, *considered*.

2D DIVISION.
Sheriff of the
Lothians and
Peebles.

JOHN BARR, china-merchant, Musselburgh, brought an action of damages for slander in the Sheriff Court at Edinburgh against the Musselburgh Merchants Association and certain individuals, "members of committee, and as such office-bearers representing the said Association."

The material averments on record were as follows (the passages italicised being added by amendment at the hearing before the Inner House):—(Cond. 2) "The defenders' Association has for a considerable number of years annually printed, published, and circulated, or caused to be printed, published, and circulated, to and among the traders in Musselburgh and district a list of names and addresses of persons in Musselburgh and district. *The said list is prepared and published by the defenders for the purpose of setting forth the names of persons who are unworthy of business credit, and whom it would be unsafe for traders to deal with. It is understood by the members of the Association that the list is composed of the names of persons who are unworthy of business credit, and with whom it would be unsafe to deal. The list is known and referred to as the Black List.* In particular, the said defenders on or about the year 1909 printed, published, and circulated, or caused to be so printed, published, and circulated, among said traders a list of such names and addresses, and in each of said lists the defenders wrongfully and maliciously and without probable cause included the name and address of the pursuer, and published and circulated said lists with pursuer's name included therein. By so including the name and address of the pursuer in their said list for the said year before mentioned, and publishing and circulating the same as aforesaid, the defenders have repeatedly and persistently, falsely and maliciously, and without probable cause, represented to the traders and business community of Musselburgh and district that pursuer is a person who will not or does not pay his debts, that he is absolutely unworthy of business credit, that he is unsafe or untrustworthy in his dealings, and that all transactions with him should be for cash payments, and not left to be dealt with according to the usual course of trade. Further, by wrongfully and maliciously including pursuer's name in said list, the defenders

intended to represent, as they falsely and maliciously did represent, Nov. 24, 1911.
to the traders and business community of Musselburgh and district
that the pursuer is untrustworthy and a person with whom it is not
wise to do business upon the ordinary terms of credit; that the trading
community required to be frequently warned against him; and that
the pursuer was a person whose financial position was so bad as to
render it unsafe for traders to have business relations with him. The
said representations so made by the defenders of and concerning the
pursuer were false and calumnious and unfounded in fact. They
were made maliciously and recklessly by the defenders, who could,
had they taken the trouble to inquire, have discovered they were
groundless. The defenders' statements, as far as not coinciding with
those of the pursuer, are denied. With reference to the case in Court
on 15th March 1905, defender failed to attend Court, but paid imme-
diately after. The pursuer did not know that he had incurred any
liability, his wife having, unknown to him, signed his name to a
cautionary obligation. With reference to the case in 1908, there was
a *bona fide* contest and decree given after proof, and this appeared in
Stubbs' list. The pursuer paid the sum." (Ans. 2) "Denied. The
defenders' Association have issued to their own members only two
lists containing the names and addresses of persons resident in the
locality whose names have appeared in the various publications issued
in Scotland and known as 'black lists.' The first of the said two lists
was issued by the defenders' Association in the year 1908, and the
other in 1909. Pursuer's name was included in the second of said
two lists for the following reasons. Pursuer's name had appeared on
two occasions in the said black lists, once in March 1905 in respect
of a decree against him for £6 obtained in Edinburgh Small-Debt
Court on 15th March 1905, and once in July 1908 in respect of a
decree for £14 obtained in Edinburgh Small-Debt Court on 16th
July 1908. Said decree for £14 was pronounced in an action at the
instance of a Musselburgh man. After the last-mentioned decree was
pronounced the pursuer refused to pay the sums decerned for, and the
holder of the decree proceeded to poind the effects in pursuer's premises.
The pursuer alleged that he was possessed of no means, and that every-
thing on his premises belonged to his wife. The poinded goods were
advertised in the local newspapers to be sold by warrant of the Sheriff
under the said decree and poinding before the present pursuer paid
the amount decerned for against him. These proceedings against
the present pursuer and advertisements were well known among the
trading community of Musselburgh. One of the purposes of the
defenders' Association is to inform its members of the names and
addresses of persons in the locality against whom small-debt decrees
have been pronounced, and in consequence of the foresaid proceedings
against the present pursuer the defenders' Association were justified
in including his name in the said list of names issued by them to
their members. The said list was for private circulation only, and
was not issued to any person not a member of the defenders' Associa-
tion." (Cond. 3) "During the years 1905, 1906, and 1907 the defen-
ders marked, or caused to be marked, in the Musselburgh Directory
of these years the names of such persons in Musselburgh and district
who they represented were unworthy of business credit, and with
whom it would be unsafe for traders to deal, and in the Musselburgh
Directory of each of the said years the defenders wrongfully, maliciously,
and without probable cause marked, or caused to be marked, the name

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and address of pursuer as a person unworthy of business credit, and published, or caused to be published, Musselburgh Directories with pursuer's name so marked. It was known to all those who had cause to consult said Directories the reason of said marking. By so marking the name and address of pursuer in said Directories for each of the said years the defenders have repeatedly and persistently, falsely and maliciously, and without probable cause, represented to the traders and business community of Musselburgh and district that pursuer is a person who will not, or does not, pay his debts, that he is absolutely unworthy of business credit, that he is unsafe," &c. [the rest of the alleged representation being set forth in identical language with that of Cond. 2]. (Ans. 3) "Denied."

The defenders pleaded, *inter alia* ;—(2) The action as laid is incompetent. (3) The pursuer's averments are irrelevant and insufficient to support the conclusions of the summons, and the action should be dismissed, with expenses. (5) The list issued by the defenders' Association having been so issued without malice and in discharge of a duty to the members of the Association and being for their benefit, defenders should be assoilzied from the conclusions of the summons.

On 4th August 1910 the Sheriff-substitute (Guy) pronounced an interlocutor allowing a proof. The defenders appealed to the Sheriff (Maconochie) who on 25th October 1910 recalled the Sheriff-substitute's interlocutor, and dismissed the action.

The pursuer appealed to the Court of Session, and the case was heard before the Second Division on 2nd and 3rd November 1911.

Argued for the appellant ;—(1) The publication complained of was defamatory. It was not disputed that the fact that decree had been obtained against a person might be published with impunity ; but this was so only if the whole facts necessary to a true representation were disclosed.¹ In the present case, if the respondents' publication had stated that decrees had been obtained against the appellant, and had given the dates of these decrees, the appellant would have had no ground for complaint. But the representation in the respondents' list went beyond this. It held up the appellant as unworthy of credit. It would not avail the respondents that *ex facie* the list might not appear to be defamatory. The circumstances attending its publication must be considered,² and these attached to the list a defamatory meaning. In fact, the respondents had placed the appellant's name in a black list ; and this was *prima facie* actionable.³ (2) There was no privilege here. The respondents' rights were no higher than the rights of any member of the public. It was only where communications were made in the interest of the general public that there was privilege.⁴ There was no privilege if the communication was made in the interest of an individual only, or of a class of individuals as here. In *Macintosh v. Dun*⁵ the statement complained of, although it was contained in a confidential document, was held not to be privileged. In *Bayne & Thomson v. Stubbs, Limited*,⁶ the state-

¹ Crabbe & Robertson v. Stubbs, Limited, (1895) 22 R. 860, *per* Lord M'Laren, at p. 864.

² Morrison v. Ritchie & Co., (1902) 4 F. 645.

³ Quinn v. Leathem, [1901] A. C. 495, *per* Lord Lindley, at p. 538.

⁴ Macintosh v. Dun, [1908] A. C. 390, *per* Lord Macnaghten, at p. 399, citing Whiteley v. Adams, (1863) 15 C. B. (N. S.) 392, at p. 418.

⁵ [1908] A. C. 390.

⁶ (1901) 3 F. 408.

ment complained of was held to be privileged, but mainly because it was elicited by a specific request for information. There was no such request in the present case. *Keith v. Lauder*¹ was described by Lord Stormonth-Darling "as dangerously near the line." Even if the list here were held to be privileged, there were facts and circumstances averred in condescendence³ which indicated malice on the part of the respondents. (3) In any case, the respondents were guilty of an actionable wrong. The principle of *Quinn v. Leathem*² applied here. As in that case the plaintiff complained of an attempt by the defendants to prevent other persons employing him, so here the appellant complained of an attempt on the part of the respondents to prevent other traders giving him credit. There was co-operation to injure the appellant in his business. (4) The action was properly laid. The defender in the action was the Association. The individual members were called in their representative capacities, and were conjoined with the Association only in order that the pursuer might obtain a valid decree.³

Argued for the respondents;—(1) The appellant's case was irrelevant. The list contained no heading or comment, and there was nothing to support the appellant's innuendo. But even if the respondents had represented that the appellant was unworthy of credit, that representation was not actionable.⁴ Further, as the list was a private document the appellant must state how, and to whom, it had been published. (2) The respondents were privileged.⁵ Where the members of a trade were all interested in obtaining information for their protection, they were entitled to communicate that information to each other.⁶ In *Macintosh v. Dun*⁷ the decision in favour of the plaintiffs was based on the fact that the defendants were a firm who sold information; and it was clearly indicated in Lord Macnaghten's opinion that had the defendants been a trade association such as the respondents the action could not have been maintained. (3) The appellant's action was for damages on the ground that he had been slandered; and he could not, therefore, rely on the principle of *Quinn v. Leathem*.⁸ (4) The action was not properly laid against the individual defenders. Some of these were not members of the committee of the Association in 1909, and could not therefore be made liable for what had been done in that year.

At advising on 24th November 1911,—

LORD DUNDAS.—The pursuer, who designs himself as a china-merchant, residing and carrying on business in Musselburgh, sues the defenders, an association of traders calling themselves "The Musselburgh Merchants Association," for damages "for injuries sustained by him through the

¹ (1905) 8 F. 356, at p. 361.

² [1901] A. C. 495; *South Wales Miners' Federation v. Glamorgan Coal Co.*, [1905] A. C. 239, *per* Lord James, at p. 251.

³ *Aitchison v. M'Donald*, 1911 S. C. 174.

⁴ *M'Laren v. Robertson*, (1859) 21 D. 183.

⁵ *Bayne & Thomson v. Stubbs, Limited*, 3 F. 408; *Keith v. Lauder*, 8 F. 356; *Jackson v. Kemp*, (1900) 7 S. L. T. 391; *Waller v. Loch*, (1881)

⁷ Q. B. D. 619; *Cooper on Defamation* (2nd ed.), 170.

⁶ *Fleming v. Newton*, (1848) 6 Bell's App. 175, *per* Lord Cottenham, at p. 193.

⁷ [1908] A. C. 390.

⁸ [1901] A. C. 495.

Nov. 24, 1911. defenders having issued to their members a four-page leaflet or 'black list' containing the names and addresses of people in Musselburgh and vicinity, who were therein represented as unworthy of credit, which leaflet or 'black list' maliciously, wrongfully, and without probable cause, included the name and address of pursuer, meaning thereby that he was unable to pay his debts and was a person unworthy of credit, whereby pursuer has suffered in his feelings and reputation." Certain persons named as the "office-bearers representing the said Association" are called as defenders; but the pursuer's counsel explained that this was done merely to obviate any objection to the Association being cited solely in its own name, and not with the intention of asking or obtaining decree against these defenders as individuals. I greatly doubt whether this explanation justifies the pursuer's crave for "decree against the defenders conjunctly and severally"; but in the view which I take of the case it is unnecessary to say more upon this point.

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The Sheriff-substitute allowed a proof; but the Sheriff recalled the interlocutor, and dismissed the action as irrelevant. The pursuer appealed; and at our bar his counsel asked and obtained leave to amend his record. His averments now disclose, in my opinion, a relevant case, apart from the question of privilege, which I shall presently deal with; and it is unnecessary to consider whether or not I should have been prepared to assent to the learned Sheriff's view in regard to the averments as they stood before him. The pursuer alleges that the defenders' Association caused to be prepared and circulated among its members a list of names and addresses of persons in Musselburgh district. "The said list is prepared and published by the defenders for the purpose of setting forth the names of persons who are unworthy of business credit and whom it would be unsafe for traders to deal with. It is understood by the members of the Association that the list is composed of the names of persons who are unworthy of business credit, and with whom it would be unsafe to deal. The list is known and referred to as the 'black list.'" The pursuer states that the defenders wrongfully, maliciously, and without probable cause included his name in their black list, to his loss, injury, and damage. It seems to me that the case thus summarised would, if no questions of privilege and malice were involved, be relevant. I may add, however, that it would, to my mind, be relevant only as an action of slander of the pursuer in regard to his trade or employment; and I decline to follow Mr MacRobert in his ingenious effort to bring the case within the category to which such decisions as *Allen v. Flood*¹ and *Quinn v. Leathem*² belong.

But a further difficulty lies in the pursuer's way. We have to consider whether, even on his own showing, the matter of privilege does not arise; and if it does, whether he has averred (as he would be bound to do) malice on the part of the defenders. This point, which is evidently intended to be raised by the defenders' fifth plea in law, does not seem to have been argued in the Courts below, though the Sheriff-substitute alludes in his note to "malice and privilege as these may be disclosed in the proof." The record on both sides is very meagre (as regards essentials) and ill

¹ [1898] A. C. 1.

² [1901] A. C. 495.

drawn. But I gather from it, and from the admitted conditions of the Nov. 24, 1911. argument at our bar, that the defenders are not a company trading as such for profit, but merely a private association of traders who, at their own expense and for the protection of their mutual trading interests, cause to be prepared and circulated annually among their members (but to no one who is not a member) a list of names such as that which is produced and which includes the name of the pursuer. The list has no heading, nor anything to indicate with what object it has been put together; but, for the purpose of the present argument, we may assume the pursuer's account of that matter to be correct.

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It was not, I think, disputed, and, at all events, I am prepared to hold, that an association of traders for the protection of its members' interests by the mutual interchange of information as to the financial stability of persons with whom they may be called upon to trade is not in itself illegal—see, *e.g.*, *Keith v. Lauder*.¹ Such an association seems to me to stand on an essentially different footing from that of a company formed for the purpose of acquiring and publishing for profit information as to the pecuniary circumstances of persons in whose solvency (or the reverse) subscribers may be interested. Information so communicated is given at the peril of the company which has chosen to engage in a risky and hazardous commercial enterprise; and their statements, if in fact false, though made *in bona fide*, will not be held privileged. But privilege does, I think, extend to the case of information of a similar sort circulated among the members of an association like the present for the protection of their mutual trade interests, unless the information is not only false in fact, but has been obtained and circulated maliciously, or with such recklessness as to its truth or falsehood as the law holds to be equivalent to malice. The law on this matter and the distinction I have indicated are well set out in a recent and authoritative decision of the Privy Council—*Macintosh v. Dun*²—where the opinion of the Committee (consisting of Lord Loreburn, L.C., Lords Ashbourne, Macnaghten, Robertson, Atkinson, and Collins) was delivered by Lord Macnaghten. The defendants there carried on an extensive business as a trade protective society, under the name of "The Mercantile Agency," which consisted in obtaining information with reference to the commercial standing and position of persons in New South Wales and elsewhere, and in communicating such information confidentially to subscribers to the agency in response to specific and confidential inquiry on their part; and they issued to their subscribers forms upon which to fill in the substance of their requests for information. The defendants were sued for damages for libel in respect of certain statements made by them about the plaintiff in response to a request for information by a subscriber. The High Court of Australia entered judgment for the defendants. The Privy Council reversed that decision. The only question raised by the appeal was whether or not the occasion on which the libels (as they were admitted to be) were published was a privileged occasion. Lord Macnaghten's opinion was in the negative. It is important to observe the grounds of his judgment. He first pointed out that the defendants were to be regarded as volunteers in sup-

¹ 8 F. 356.

² [1908] A. C. 390.

Nov. 24, 1911. plying the information, and that their motive in so doing was not a sense of duty, but a matter of business. "Their motive is self-interest. They carry on their trade just as other traders do, in the hope and expectation of making a profit." His Lordship then considered whether it is in the interest of the community and the welfare of society that "the protection which the law throws around communications made in legitimate self-defence, or from a *bona fide* sense of duty, should be extended to communications made from motives of self-interest by persons who trade for profit in the characters of other people," and gave answer in the negative, because "it is only right that those who engage in such a business, touching so closely very dangerous ground, should take the consequences if they overstep the law."

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It seems to me that the present defenders' position places them on the safe or favoured side of the line thus drawn by Lord Macnaghten. The information complained of was circulated by them among their members "in legitimate self-defence"; they are not "persons who trade for profit in the characters of other people." I think *Macintosh v. Dun*¹ affords a clear and authoritative rule for the decision of questions like this. It may be noted that Lord Macnaghten's opinion was delivered after the citation of a great mass of decisions. His Lordship relied upon a well-known passage, "frequently cited, and always with approval," from the opinion of Lord Wensleydale (then Parke, B.), in *Toogood v. Spyring*,² which I shall quote at length, as I believe it to be a correct statement of Scots (as of English) law: "The law considers such publication" (*i.e.*, of statements false in fact and injurious to the character of another) "as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. In such cases the occasion prevents the inference of malice, which the law draws from unauthorised communications, and affords a qualified defence depending on the absence of actual malice. If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits." Parke, B., added, a little later: "If made with honesty of purpose to a party who has any interest in the inquiry (and that has been very liberally construed) the simple fact that there has been some casual bystander cannot alter the nature of the transaction." In *Whiteley v. Adams*,³ Erle, C.J., to whose opinion Lord Macnaghten refers, in explaining the circumstances which warrant a Judge in holding an occasion to be privileged, includes a communication honestly made "on the ground of an interest in the party making or receiving it," and goes on to state (at p. 418) the underlying principle of the matter to be "that it is to the general interest of society that correct information should be obtained as to the character of persons in whom others have an interest."

I see no reason to doubt that the principles of law laid down or approved in *Macintosh v. Dun*¹ are applicable in Scotland as well as

¹ [1908] A. C. 390.

² (1834) 1 C. M. & R. 181, at p. 193.

³ 15 C. B. (N. S.) 392, at p. 414.

in England ; and I think it may be deduced from these that the law does, Nov. 24, 1911.
 in the general interests of society, extend the protection of privilege to com-
 munications made *in bona fide* (though erroneously) about a third person, Barr v.
 where the parties making and receiving them have a legitimate business Musselburgh
 interest in the communication. The conclusion thus reached seems also to Merchants
 fall within the limits of the doctrine laid down by the First Division in Association.
Macdonald v. M'Coll.¹ Accordingly, it appears to me that, when this Lord Dundas.
 Association circulated the leaflet complained of among its members, the
 communication was privileged, because every one of the members had a
 legitimate interest in its contents, and they were entitled to obtain and
 share these, so long as the matter was gone about honestly and without
 malice. We were referred during the discussion to *Bayne & Thomson v.*
Stubbs, Limited,² where Lord Moncreiff appears to have reserved his opinion
 as to a question such as we are now dealing with. I am not sure that some
 of the views expressed by the learned Judges might not, if a similar case
 arose, be subject to reconsideration in the light of the later and authoritative
 decision in *Macintosh v. Dun*,³ but it is sufficient to observe that, in any
 view, *Bayne & Thomson v. Stubbs, Limited*,² forms no obstacle to the dis-
 posal of the present question in the sense I have indicated.

If my view is correct, there seems to be an end of the matter, for, though
 the word "maliciously" is occasionally used by the pursuer, I cannot find
 in his record anything that amounts to a sufficient averment of malice on
 the part of the defenders. I accordingly agree with the learned Sheriff in
 holding—though not upon the same grounds—that the action is irrelevant,
 and must be dismissed.

LORD SALVESEN.—I agree in Lord Dundas' opinion and have little to
 add. The pursuer's record as now amended is, I think, plainly relevant ;
 and I would have held it to be so even in its original form. The mere fact
 that the list of names which the defenders circulate amongst their members
 does not contain any heading is, in my opinion, immaterial, if it in fact
 conveys to the members receiving it the information that the persons named
 are unworthy of business credit. The defenders themselves admit that the
 list contains the names which appear in the various publications issued in
 Scotland known as "black lists"—that is to say, it is a list of persons
 against whom decrees in absence have been obtained, or against whom
 judicial proceedings have been taken, which suggest that such persons are
 in embarrassed circumstances. Indeed, such a list might be the more
 damaging to a particular person included in it because of no reason being
 given why he was so included. Had the case therefore stopped there I
 should have been inclined, differing from the Sheriff, to have allowed
 inquiry.

There is, however, another ground on which the same result as the Sheriff
 arrived at may be reached. The complaint in the initial writ is that the list
 was issued by the defenders to their members, and it appears that these
 members are all traders in Musselburgh, who have formed an association for
 their own protection in dealing with possible customers. Each of them has

¹ (1901) 3 F. 1082.² 3 F. 408.³ [1908] A. C. 390.

Nov. 24, 1911. a legitimate trade interest in knowing the persons from whose past history it might reasonably be inferred that more than the average risk is incurred in supplying them with goods on credit. Now I think that if one trader in Musselburgh communicates to another in good faith information which he has received with regard to a possible customer of both, bearing on such customer's credit, that such a communication is privileged; and it makes no difference that the information is systematically obtained by an official of the Association on the instructions of the members for their guidance in their business dealings. The cases referred to by Lord Dundas quite bear out this proposition. It is probably true that a communication of this kind is not made in the discharge of either a public or a private duty; but it is made by the Association in the conduct of its own affairs in cases where the interests of each and every member is concerned. These are substantially the words used by Parke, B., in *Toogood's case*,¹ and they are in terms applicable to the present. It would have been a different matter if a statement had been published in some newspaper or to members of the public who were not members of the Association. On these short grounds I concur in the judgment proposed.

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LORD JUSTICE-CLERK.—I am of the same opinion. It is quite true that the absence of a heading from the printed list in question might not be enough if it could be alleged that the list had been got up from malicious motives and intent, but I agree with Lord Salvesen that the issuing of such a list among a number of traders, one to the other, stands in no different position from a communication by one individual trader to another. Now I cannot doubt that if one trader comes to another with *bona fide* information as to the solvency of a third party, there will be no liability attaching to such a communication unless it be shown that the informant was actuated by specific malice. I have no difficulty in concurring in the views which Lord Dundas has stated with such accuracy and completeness.

THE COURT pronounced the following interlocutor:—"Dismiss the appeal, and affirm the said interlocutor [of the Sheriff] appealed against: Of new sustain the third plea in law for the defenders: Dismiss the action, and decern. . . ."

G. M. LEYS, Solicitor—ALEX. MITCHELL, Solicitor—Agents.

No. 29.
—
Nov. 25, 1911.

JAMES CAMPBELL, Pursuer (Appellant).—*Moncrieff*.
THE UNITED COLLIERIES, LIMITED, Defenders (Respondents).—
H. P. Macmillan.

Campbell v.
United
Collieries,
Limited.

Reparation—Negligence—Master and Servant—Action laid alternatively at common law or under the Employers Liability Act—Sheriff—Process—Pleadings—Necessity of discriminating between grounds of claim.

In an action brought in the Sheriff Court by a father against a colliery company, concluding for damages at common law, or alternatively under the Employers Liability Act, 1880, in respect of the death of his son who was killed while in the employment of the defenders,

¹ 1 C. M. & R. 181.

the pursuer averred a defective condition of the defenders' works, but Nov. 25, 1911. did not discriminate between the two grounds of claim.

Held that the pursuer's averments were relevant, in respect that they disclosed and gave notice of what was a good ground of claim either at common law or under the Act. Campbell v. United Collieries, Limited.

M'Grath v. Glasgow Coal Co., 1909 S. C. 1250, *distinguished*.

Reparation—Contributory negligence—Disclosure in pursuer's pleadings of case of contributory negligence.

A pursuer in an action of damages in respect of the death of his son, who was killed while working in a coal-pit, averred that the lad, his lamp having become extinguished, continued to advance towards the place of his work on the face, and in doing so stepped on an unfenced piece of machinery in motion, and sustained the injuries from which he died. Averments which were *held* (*diss.* Lord Johnston) not to disclose such a clear case of contributory negligence as to disentitle the pursuer to a proof.

ON 20th July 1911 James Campbell, a miner at Uddingston, brought an action in the Sheriff Court of Lanarkshire at Airdrie against the United Collieries, Limited, in which he claimed £500 as damages at common law, or alternatively £195 under the Employers Liability Act, 1880, in respect of the death of his son, John Campbell, who was killed by an accident in a pit at Uddingston while working in the employment of the defenders. 1ST DIVISION.
Sheriff of Lanarkshire.

The pursuer averred that, on 22nd February 1911, his son, while going to his work on the face in the pit, had to pass a horizontal wheel of about 42 inches in diameter (forming part of the machinery in use in the colliery) which was fixed on a pivot on a level with the pavement, and acted as pulley for an endless rope which worked the haulage of the pit. He further averred:—(Cond. 4) "Shortly before reaching the said wheel the lamp carried by the said John Campbell was extinguished, and the said John Campbell, who continued to advance towards the face, inadvertently stepped upon the said wheel, which was revolving, and sustained very severe injuries, from the results of which he died the following day in the Royal Infirmary, Glasgow." (Cond. 5) "The death of the said John Campbell was due to the fault of the defenders in failing to take precautions for the safety of their employees and to provide safe and suitable plant. In particular, the defenders were in fault in not providing sufficient fencing round the said wheel, whereby persons employed in the pit might be prevented from being caught in the wheel while the same was in motion. The wheel was so placed that it revolved below the level of the rails which carried the hutches, and was in such a position that only one half of it was covered by the boards on which the rails were laid. The remaining half of the wheel, which extended towards the side of the roadway was not covered with boards or otherwise protected. Two boards were fitted to uprights so as to act as a fence parallel to the line of rails, but no cross fencing was fitted up so as to close the passage formed by the space between the uprights and the wall within which the exposed portion of the wheel revolved, with the result that there was nothing to prevent persons who were passing along the said roadway close to said wall from stepping upon said wheel while the same was in motion. The defenders have, since the said 22nd February 1911, completely covered over the said wheel with boards, and the same is now in a condition of safety. Had the

Nov. 25, 1911. said wheel been so covered over, or had any cross fencing been fitted up so as to close the passage between the uprights and the said wall within which the exposed half of the wheel revolved at 22nd February, or had other sufficient fencing been provided, the said accident would not have happened, and the said John Campbell would not have lost his life."

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The pursuer pleaded;—(1) The death of the said John Campbell having been occasioned by fault on the part of the defenders, the pursuer, as father of the said John Campbell, is entitled to reparation as concluded for. (2) In the circumstances condescended upon the sums alternatively claimed as damages are reasonable, and decree should be pronounced as concluded for, with expenses.

On 31st October 1911 the Sheriff-substitute (Glegg) dismissed the action as irrelevant.*

The pursuer appealed to the Court of Session, and the case was heard before the First Division on 25th November 1911.

Argued for the appellant;—The defenders' duty to fence their machinery was clear,¹ and the pursuer had made a substantive averment of defective ways and works, which was relevant to support either ground of action. The case of *M'Grath*² on which the Sheriff-substitute had proceeded was distinguishable. In that case several different grounds of action were suggested in a set of confused averments, and the Court held that the record, as framed, did not give fair notice of the case which the defenders had to meet either at common law or under the Act. Here fair notice was given of a ground of action, *i.e.*, deficiency of ways and works, which was sufficient to instruct liability under either claim. The only bearing of the Employers Liability Act on the present case was that it excluded the defence of common employment. With regard to the respondents' argument on contributory negligence, there was a presumption that the boy would not have proceeded in the dark if means of relighting his lamp had been available. It must therefore be held that he was innocently in the dark until the contrary was proved against him, and no facts and circumstances were averred from which culpability in this respect could be inferred.

* "NOTE.—The only averment directed to instructing liability for fault on defenders' part is condescendence 5. The pursuer there in effect avers that defenders should have fenced a certain wheel, and that it was not fenced. This is a good averment of a defect in plant, but is insufficient in regard to fault inasmuch as it does not disclose whose fault it is that pursuer seeks to hold this limited Company responsible for. The pursuer avoids a good many difficulties by taking no notice of obvious facts, and he is, of course, not bound to raise difficulties if he can avoid them, but he cannot withhold explanations which known circumstances require. As regards his common law case, it may be asked how did this Company become liable for an act of negligence of its servants, and, as regards the Employers Liability case, Who was the negligent servant? Information should have been given on both heads, but instead of doing so, and distinguishing between the two grounds of claim, he simply makes the bald averment mentioned. The case seems to fall within the rule laid down in *M'Grath v. Glasgow Coal Company*, 1909 S. C. 1250, and I accordingly dismiss it."

¹ Coal Mines Regulation Act, 1887 (50 and 51 Vict. cap. 58), sec. 49, Rule 31.

² 1909 S. C. 1250.

Argued for the respondents;—The Sheriff-substitute had decided Nov. 25, 1911. rightly, and the case was ruled by that of *M'Grath*.¹ The pursuer's averments were irrelevant at common law, in respect that they did not specify the person who was responsible for the defective plant. A limited company must delegate the duty of inspection of plant, and its duty was fulfilled if reasonable care was taken to appoint a competent deputy.² It was necessary therefore for relevancy that there should be an averment that the underground manager was incompetent. As to the case under the Act, the provisions of section 1 (1) were qualified by those of section 2 (1), and therefore there should be an averment excluding the application of the latter subsection. In any event the pursuer's averments in cond. 4, to the effect that the lad had allowed his lamp to go out and had proceeded to the face in the dark, disclosed a case of contributory negligence which would disentitle him to succeed in the action.

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LORD PRESIDENT.—I am of opinion that an issue must be allowed here, because I think that the pursuer has stated a perfectly relevant case. The learned Sheriff-substitute has refused a proof, because he thought he was within the rule of *M'Grath v. Glasgow Coal Company*,¹ which was a case where the action was dismissed really because the whole statement was so confused and unprecise that it was impossible for the defender to know what case he was going to meet. I am not saying a word against that judgment; I think it was perfectly right. But when I turn to the present case, I do not find any want of precision. The case made is an extremely simple one. It is that there was a failure of duty in the Collieries Company in leaving certain parts of a revolving wheel unguarded, and that the result of that failure in duty was that the deceased lad met his death by coming in contact with the unguarded part of the wheel.

Now it is also said that there is no proper specification, in the sense of discrimination between the case so far as laid upon common law and so far as laid upon the Employers Liability Act. In some cases, where the ground of action depends upon the Employers Liability Act, I can easily imagine that it would be necessary to give ample notice of this kind. I do not think that the matter ever arises upon the point of relevancy, in the strict sense of the word, because, as has often been pointed out, the Employers Liability Act does not really give a new ground of action; it leaves the grounds of action as it finds them, but takes away certain defences which were competent before the Act was passed. But still, in the other sense in which the word "irrelevancy" is used, viz., insufficient specification and want of fair notice, I can imagine cases in which it might be said that the notice was not sufficient; but here it does not seem to me that any notice is necessary to distinguish between the case so far as laid upon common law and so far as laid upon the Employers Liability Act, because the blunt averment that works and ways were in a defective condition is a good averment of liability both at common law and under the statute. The only difference between the two positions is that a defence which is a good defence to the one action is not a good

¹ 1909 S. C. 1250.

² *Black v. Fife Coal Co.*, 1909 S. C. 152, *per* Lord Low, at p. 160; *Weir & Wilson v. Merry & Cunninghame*, (1868) 6 Macph. (H. L.) 84.

Nov. 25, 1911. defence to the other. At common law it is a good defence to say, of a portion of the works in which an accident has occurred, that it is not a portion of the works which the employer himself undertook to supervise, that the employer had remitted such supervision to a qualified person, and had not in any way interfered with or stopped that person in the procuring of such materials as were necessary for the performance of the work entrusted to his supervision. But under the Employers Liability Act that is not a sufficient defence in itself; the defender has got to show that the works and ways were in efficient condition.

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Limited.

Ld. President.

Well, here I think there is a relevant case; but I understand that one of your Lordships has a difficulty upon the argument that the pursuer's own statement discloses a case of contributory negligence. Now, as to the possibility of such a position, if a pursuer in his account of the accident tells such a story that he shows that according to his view the proximate cause of the accident was his own negligence, I do not doubt that in such circumstances the case cannot go on. But when I look at the averments here, I cannot say that I think they disclose such a situation. I think the pursuer's averments quite clearly disclose this, that there may be proved against him a case of contributory negligence, but they do not seem to me to be tantamount to saying that the deceased was guilty of contributory negligence. Accordingly I think the interlocutor must be recalled and an issue granted.

LORD JOHNSTON.—As the case is presented upon the Sheriff-substitute's interlocutor, I entirely agree with all that your Lordship has said; and I agree that the pursuer has made a sufficiently relevant statement of fault on the part of the defenders. But I confess that my own impression is that at the same time condescendence 4 so clearly discloses, upon the statement of the pursuer himself, that his son was guilty of contributory negligence, which was the proximate cause of the accident, that I think he ought to be nonsuited on his own record, in respect that it would be improper to allow the case to go to proof upon an averment of fault, where there is an admission of contributory negligence which is an absolutely complete answer to that averment of fault. I cannot conceive that a miner who merely states that his lamp was extinguished, and that he continued to advance in the face of a known danger, does anything else but disclose upon the record the unqualified admission that his own negligence or rashness was the proximate cause of his death.

LORD MACKENZIE.—I agree with your Lordships that the pursuer here avers a relevant case at common law and under the Employers Liability Act.

As to the point that his averments disclose a case of contributory negligence, one is very reluctant to deal with that until the facts have been fully ascertained, for the reason that only then can the complexion of the case be known. All I say is that I do not think that condescendence 4 necessarily means that the pursuer's son was guilty of contributory negligence.

THE COURT recalled the interlocutor of the Sheriff-substitute, and remitted to him to proceed.

SIMPSON & MARWICK, W.S.—R. & R. DENHOLM & KEER, Solicitors—Agents.

REV. ALLAN REID, Pursuer.—*Macquisten*.

No. 30.

FREDERICK JOHNSTON & COMPANY, Defenders.—*C. H. Brown—Burns*.

Nov. 28, 1911.

Process—Diligence for recovery of writs—Slander contained in newspaper report—Paragraphs in previous issues inferring malice—Recovery of materials from which paragraphs and report were printed—Recovery of communications from newspaper correspondents and others.

In an action of damages against newspaper proprietors for a slander contained in a report in their newspaper of a political meeting, the pursuer, who averred malice and founded on letters and paragraphs reflecting on his conduct published in previous issues of the newspaper as indicating malice, moved for a diligence to recover—(1) the manuscript notes or reports from which these paragraphs were printed; (2) all communications relating to the subject-matter of the paragraphs (a) passing between the defenders and their local correspondents, or (b) addressed to the defenders by members of the public; (3) (a) all notes of the proceedings of the meeting in question made by the defenders' reporters or correspondents, (b) all written reports of the meeting supplied to the defenders; and (4) all correspondence between the defenders and their local correspondents referring to the publication of the matters complained of.

The Court, in consideration of the detailed averments of malice, granted the diligence.

On 22nd March 1911 the Rev. Allan Reid, minister of the parish of Slamannan, brought an action of damages for slander against Frederick Johnston & Company, publishers and proprietors of the *Falkirk Herald*. The slander complained of was contained in a report in the *Falkirk Herald* of 14th December 1910 of a political meeting held at Slamannan on 10th December 1910 in support of the parliamentary candidature of Dr Chapple.

The pursuer, besides setting forth the report of the meeting containing the alleged slander, averred:—(Cond. 2) "For some time the defenders have been actuated by feelings of malice towards the pursuer, and have taken frequent opportunity of showing active hostility to him. In order to gratify their malicious feelings, they have taken occasion to call in question his fulfilment of his duties as parish minister, and have readily opened the columns of the *Falkirk Herald* to correspondents and contributors who were willing to attack the pursuer. On 9th July 1910, under the heading 'Slamannan Notes,' reference was made in the *Falkirk Herald* to pursuer's remarks at a school demonstration. The said reference contained a wholly inaccurate and fictitious account of pursuer's remarks, and falsely stated that the said remarks had caused great indignation among parents, teachers, and scholars, and in said issue the suggestion was made that pursuer should improve his pastoral efficiency by holding more services. Again, on 1st October 1910, the defenders gave space in their columns to certain statements from their local correspondent at Slamannan containing reflections upon the conduct of religious matters on the part of the pursuer and his elders in connection with the Parish Church of Slamannan, in respect that some communion cards were alleged to have been posted instead of delivered by personal call of the members of the kirk-session. These observations were followed on 8th October by a letter from a correspondent on similar lines, falsely representing that pursuer was remiss in visit-

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Lord Guthrie.

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 Co.

ing his congregation. Subsequently, further letters appeared in the defenders' paper at various dates up to 3rd December 1910 from other correspondents, also containing reflections on the pursuer and his elders. The identity of one of these correspondents, who signed himself 'A Member,' became known to the pursuer, and, on being challenged as to the truth of his comments, this correspondent expressed his regret for the reflections contained in his letter, and wrote to the pursuer and the kirk-session apologising to them for the statements he had made. It was part of his undertaking to the pursuer and kirk-session that he should also write to the *Falkirk Herald* intimating that he had made an apology for making the statements which appeared in that journal, and acknowledging that he had made them on inadequate information. Said correspondent duly sent his apology to the defenders for publication, but the defenders, although they had opened their columns gratuitously to the said correspondent when he wrote a letter containing matter calculated to damage pursuer, and had also published letters from their local Slamannan contributor and others emphasising and adding to said damaging statements, declined to publish the retraction thereof except upon payment for its insertion as an ordinary advertisement. The pursuer believes and avers that in so doing the defenders were actuated by malice towards him."

Issues for jury trial were approved by the Lord Ordinary (Guthrie). These issues referred solely to the report of the meeting and not to any of the publications referred to in cond. 2.

On 28th November 1911, the pursuer moved in the Single Bills for a diligence for the recovery of documents in terms of a specification which contained the following articles:—

"1. (a) The manuscript notes or reports from which the paragraphs headed 'Slamannan' in the issue of the *Falkirk Herald* newspaper of 9th July 1910 were printed; and (b) all letters, memoranda, and other communications passing between the defenders, on the one hand, and Mr James Murphy, their correspondent in Slamannan, on the other hand, in the month of July 1910, having reference to the subject-matter of said paragraphs.

"3. (a) The manuscript notes or reports from which the paragraphs headed 'Slamannan' in the issue of the said newspaper of 1st October 1910 were printed; and (b) all letters, memoranda, and other communications passing between the defenders, on the one hand, and the said James Murphy, on the other hand, during the period from 25th November 1910 to 7th January 1911, having reference to the subject-matter of said paragraphs.

"4. All letters or other written communications addressed to the defenders or to the editor of their said newspaper, or to anyone on the defenders' behalf, (a) by any of their correspondents, or (b) by members of the public, having reference to the subject-matter of the paragraphs mentioned in the immediately preceding article, between 1st October 1910 and 7th January 1911.

"9. (a) All shorthand or other notes made by any reporters or correspondents of defenders' newspaper of the proceedings of a meeting held in Slamannan on 10th December 1910 in support of the said candidature of Dr Chapple; (b) all written reports of said meeting supplied to the defenders; and (c) all letters, memoranda, and other correspondence passing between the defenders or anyone on their behalf, on the one hand, and the correspondent or correspondents in

Slamannan of their said newspaper, on the other hand, in the month Nov. 28, 1911. of December 1910, and having reference to the publication by the defenders of the matters complained of on record."

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Co.

The defenders objected to these articles, and argued;—The defenders accepted responsibility for the articles appearing in their newspaper, and could not, therefore, be compelled to produce the materials from which the articles were printed.¹ Further, the communications between the defenders and Mr Murphy or their other local correspondents were confidential.² The documents sought for could not be used in evidence.

LORD JUSTICE-CLERK.—There is no doubt that this is a request for a fairly sweeping diligence, but in the circumstances of the case I do not perceive any ground for refusing the diligence asked for. If this had been an action of damages for slander of the ordinary nature, there is a good deal in the specification that might be open to objection. But the pursuer's case here is that the statements in the report were put in by the defenders with malicious intent, and the pursuer has indicated that there are facts as to this which he can prove. In these circumstances I do not think that the diligence should be restricted. It may be a question whether some of the documents recovered can be used in evidence, but this must be left to the decision of the Judge who presides at the trial.

LORD DUNDAS.—I concur.

LORD SALVESEN.—I concur. I think this diligence may be justified on the ground that there is a very detailed averment by the pursuer of malice on the part of the defenders. We might have come to a different conclusion if there had been no such averment.

THE COURT granted the diligence.

A. MORISON & Co., W.S.—HENDERSON & MACKENZIE, S.S.C.—Agents.

ROBERT B. WRIGHT, Pursuer (Appellant).—*D. Anderson—Aitchison.*
J. S. LINDSAY AND OTHERS, Defenders (Respondents).—
Cooper, K.C.—M. P. Fraser.

No. 31.

Nov. 30, 1911.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), sec. 6—Remedies against employer and third parties—Election of remedy—Competency of action of damages against third parties—"Recovery" of compensation from employers—Acceptance of compensation under reservation of claims against third parties.

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Under sec. 6 of the Workmen's Compensation Act, 1906, a workman may take proceedings for recovery both of damages and of compensation, but he "shall not be entitled to recover both damages and compensation."

An injured workman claimed compensation from his employers in respect of an accident. His right to compensation was admitted, and payments were made for which he granted receipts which bore that he had "elected to take compensation under the Workmen's Compensation Act." They further bore to be granted "under reservation of my

¹ *Lowe v. Taylor*, (1843) 5 D. 1261.

² *Stuart v. Great North of Scotland Railway Co.*, (1896) 23 R. 1005.

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claims against third parties," and he agreed with his employers to repay the sums received from them if he recovered damages from the third parties whom he alleged to be responsible for the accident.

In an action of damages by the workman against these third parties, *held* that he had not "recovered" compensation in the sense of sec. 6 of the Workmen's Compensation Act, 1906, so as to be barred from pursuing the action.

2D DIVISION.
Sheriff of
Lanarkshire.

IN August 1909 Robert B. Wright, Dalmuir, brought an action against J. S. Lindsay, James M'Allan, Thomas Dickson, and William Gibb in the Sheriff Court at Glasgow for payment of £100 in name of damages for injury which he alleged he had sustained through the fault of the defenders.

The pursuer averred that on 29th June 1909, while engaged as a night watchman in the employment of Messrs J. & H. Williamson, he was knocked down and injured by a motor car belonging to the defenders and driven by one of them, the defender Gibb, for whom the others were responsible, and that the accident was due to the negligent manner in which the car was being driven.

Thomas Dickson's *curator bonis* was sisted as a defender but did not lodge defences. The other defenders lodged defences in which, besides denying fault, they averred that the pursuer had applied for and received compensation from his employers under the Workmen's Compensation Act, 1906, and was therefore barred from recovering damages from the defenders.*

In answer the pursuer averred;—"Explained that any compensation paid to pursuer by his employers has been accepted under reservation of all claims competent to him against third parties."

The pursuer pleaded, *inter alia*;—(3) Having reserved his claims against third parties, pursuer is entitled, in terms of the Workmen's Compensation Act, 1906, to pursue the present action.

The defenders pleaded, *inter alia*;—(8) The pursuer having accepted compensation from his employer, and having thus been fully compensated, the action against these defenders should be dismissed, with expenses.

A proof was allowed and led. The circumstances under which the pursuer received payment of compensation were thus narrated by the Sheriff (Millar):—"The facts are that his employers gave notice to the Railway Passenger Assurance Company, with which they were insured, of the accident, and that, as a result, the pursuer received from them, from 6th July to 16th November 1909, sums amounting in all to £11, 7s. 5d. The circumstances in which the payments were made are described by Robert Beattie, the manager of the insurance company. In his evidence Mr Beattie says that he recognised these payments as full compensation to pursuer in terms of the Act. They stood in the employer's place, and these payments were made by them on the footing that the pursuer was to recover from the party in fault, and

* The Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), enacts:—Sec. 6. "Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof (1) the workman may take proceedings both against that person to recover damages and against any person liable to pay compensation under this Act for such compensation, but shall not be entitled to recover both damages and compensation. . . ."

that the pursuer reserved his right to common law action against that party. It was understood that under the Act the pursuer would have to pay them back if he recovered anything from the party in fault. The receipts granted by the pursuer were in these terms:—
'I, Robert Wright, having elected to take compensation under the Workmen's Compensation Act, hereby agree to accept the weekly sum of 11s. 4½d. in satisfaction of the compensation payable by Messrs J. & H. Williamson for the accident I met with when engaged in their employment on the 29th day of June 1909, under reservation of my claims against third parties.'

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On 19th May 1910 the Sheriff-substitute (Balfour) pronounced an interlocutor in which he found that the accident to the pursuer was due to the negligent driving of the defender Gibb; but found further that after the accident the pursuer claimed and received compensation from his employers under the Workmen's Compensation Act under reservation of his claims against third parties, but that the reservation had no effect, and that the pursuer, having elected to take compensation, was now barred from recovering damages from third parties in respect of the accident. He therefore sustained the 8th plea in law for the defenders, and dismissed the action.

The pursuer appealed to the Sheriff, who, on 25th October 1910, adhered to the interlocutor appealed against.

The pursuer appealed to the Court of Session, and the case was heard before the Second Division (consisting of the Lord Justice-Clerk, Lord Salvesen, and Lord Guthrie), on 16th November 1911. By agreement of parties the appeal was confined to the question of the legal effect of the receipt of compensation by the appellant.

Argued for the appellant;—Section 6 of the Act of 1906, differing in this respect from the corresponding section in the Act of 1897, empowered the workman to take two independent sets of proceedings, the policy of the Act being that he should not be put to his election until he knew the extent of his remedies, and the only limitation being that he could not "recover" both damages and compensation. The Act was intended to give immediate alimentary assistance to injured workmen, and not to protect third party delinquents. The only question, therefore, was whether the circumstances of this case amounted to "recovery" of compensation. "Recovery" implied a final choice by the workman, together with some act or agreement which made his choice irrevocable.¹ In the present case the money was taken under an express reservation of claims against third parties, and on the footing that it was to be returned if damages were recovered. In such circumstances it could not be said that the appellant had made a final election, or had irrevocably bound himself to accept compensation.²

Argued for the respondents;—It was in every case a question of circumstances whether the receipt of money amounted to acceptance of compensation.³ In the present case there were all the elements necessary to constitute "recovery" within the meaning of the Act. There was a claim by the workman,⁴ the right to compensation

¹ Huckle v. The London County Council, (1910) 26 T. L. R. 580.

² Oliver v. Nautilus Steam Shipping Company, Limited, [1903] 2 K. B. 639; Mulligan v. Dick & Son, (1903) 6 F. 126.

³ Mackay v. Rosie, 1908 S. C. 174, per Lord President Dunedin, at p. 178.

⁴ Burton v. Chapel Coal Co., Limited, 1909 S. C. 430.

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admitted by the employer, the payment of money on that footing, and the fact that the workman had elected to accept compensation expressly stated by him in the receipts he had granted. It would be difficult to figure a more complete case of compensation being "recovered." The reservation of his claims against third parties was of no effect, for once the compensation money was in his pocket the appellant might not choose to take any further proceedings, and there was no obligation on him to do so.

At advising on 30th November 1911,—

LORD JUSTICE-CLERK.—The pursuer in this case was injured by a motor car, and the motor driver has been held to be in fault. The pursuer's employers paid him certain sums as compensation, but this was done upon the express footing that the pursuer was to sue the motorman's master for damages, and if he was successful the sums given to him in the meantime were to be returned.

The defenders maintain that the pursuer having accepted payment from his employers, is excluded from his claim against them at common law. They base their plea upon the 6th section of the Workmen's Compensation Act, 1906, which is not the same as the corresponding clause in the older Act, but favours the injured workman in a greater degree. The section strikes only at the workman recovering both from his master and from the wrongdoer. Now, the question in the circumstances of this case is, whether the pursuer has so "recovered" compensation that he is barred from proceeding in his action. Looking to the arrangement made it appears to me that what the pursuer has received is not compensation recovered under the Act. It is of the nature of a sum advanced by the employers under conditions which exclude the idea of its being a final acceptance of compensation under the Act. The arrangement is in every sense reasonable and humane. The employer knows that if his servant cannot get damages from the alleged wrongdoer he must provide compensation. But as the litigation for damages is a long and protracted proceeding, he arranges with the workman,—"I will give you now what corresponds to what would be my liability so that you may be supported, but you must engage to return to me the whole sum I advance if you are successful in getting the fuller compensation from the wrongdoer." I am of opinion that payments made under such an arrangement are no bar to action at law. I am confirmed in that opinion by the English case of *Oliver*¹ quoted to us, in which payments by the master on receipts bearing to be "without prejudice" were held not to bar the workman's action against those in fault for the injury. I can see no reason why that decision should not be an authority to be respected, although not technically binding upon this Court. I would have come to a similar conclusion had there been no such case in the books, but I am glad to be confirmed in my view by the case quoted. The case of *Mulligan*² was a converse case to the present. Mulligan had recovered damages from the defender in an action, and it was held that he could not obtain compensation from his employers. Any other decision would have been manifestly unjust. I hold that where payments received from the employers are made

¹ [1903] 2 K. B. 639.

² 6 F. 126.

under a *bona fide* agreement that the money is to be returned if damages are obtained from the wrongdoer, the case is not one to which the section of the Act applies. This is to my mind clearly a case to which it does not apply.

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Clerk.

I am therefore in favour of recalling the finding of the Sheriff-substitute which holds the pursuer barred from maintaining his claim of damages and sustains the 8th plea in law for the defenders.

As the proof was not before us, it will be necessary that there be further procedure before the case can be finally disposed of.

LORD SALVESSEN.—This case raises an important question under the Workmen's Compensation Act, 1906, which, as it has a general application, deserves careful consideration. The pursuer was injured by a collision with a motor car which belonged to the defenders. He was at the time employed as a night watchman with the firm of J. & H. Williamson. Both the Sheriffs have found that the injuries which the pursuer received were due to the fault of the person in charge of the motor car, for whom the defenders are responsible; and if the case had stopped there, the Sheriff-substitute would as a matter of course have assessed the damages to which he considered the pursuer entitled. The defenders, however, pleaded that the pursuer had already received compensation from his employers, and that his right to recover damages against the defenders is barred by section 6 of the Act. The only findings in fact with regard to this matter are as follows:—"Finds that after the accident the pursuer claimed and received compensation from his employers under the Workmen's Compensation Act for the period from 6th July 1909 to 16th November 1909, amounting to £11, 7s. 5d., and granted receipts therefor: Finds that this compensation was received by the pursuer under reservation of his claims against third parties, conform to the receipt No. 15/1 of process." The Sheriff has, however, supplemented these findings in his opinion by saying that the payments made by the employers' agent were so made "on the footing that the pursuer was to recover from the party in fault," and that "it was understood that under the Act the pursuer would have to pay them back if he recovered anything from the party in fault." These findings were not seriously challenged.

Assuming these to be the facts, the question is whether the pursuer's claim against the defenders is excluded. It would certainly be odd if it should be so, seeing that both the parties to the agreement which is said to operate as a bar understood and intended that the pursuer, notwithstanding the payments, should be at full liberty to proceed against the defenders at common law; and the defenders can show no good ground in equity why they should be absolved from their civil liability to the pursuer. Under the arrangement between the pursuer and his own employers the defenders are secured against being called upon to make any payment to the employers after they have settled the pursuer's claim as judicially ascertained; and counsel for the pursuer expressed his willingness to allow extract of any decree against the defenders to be superseded until he has produced in process a receipt from the employers showing that they had been repaid the amount advanced by them and a discharge of their claims against the

Nov. 30, 1911. **defenders.** Unless, therefore, the language of section 6 admits of no other construction than that put upon it by the Sheriffs, there seems no good ground in principle or in equity why the pursuer should be barred from recovering damages at common law to which *ex hypothesi* he is otherwise entitled.

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Lord Salvesen.

The 6th section of the 1906 Act is expressed in different terms from the corresponding section of the earlier Act. The workman is now entitled to take proceedings both against the third party by whose negligence he has been injured and against his own employers under the Act. In this respect it is more favourable than the earlier Act, which gave the workman only an option to proceed either at law against the third party to recover damages or against his employers for compensation under the Act; but not against both. The only limitation now is that he shall not be entitled to recover both damages and compensation. The Sheriffs in deciding the case against the pursuer have put a very narrow meaning upon the word "recover." In their view it is enough that the pursuer has, as in a question with his employers, accepted payments of money from them as in satisfaction of compensation under the Act. I do not think I should have differed from them if the payments had not been made and accepted under reservation of the pursuer's right to proceed against third parties. But where a payment is made by an employer to his workman on the footing that he shall be entitled to recover damages at common law against third parties, and that the sums which the employer has disbursed are to be repaid out of any damages which he may so recover, I think the case is entirely different. The compensation so paid is in the nature of an advance by the employer for the maintenance of the pursuer pending proceedings to make good his claim; and is only accepted as in full of the workman's right under the Act against his employer in the event of his claim against the third party being unsuccessful. I cannot think that it was ever intended that the Act should make ineffectual an arrangement of this kind, eminently reasonable from the point of view of both workman and employer, and in the interests of both. The English case of *Oliver*,¹ although decided under the previous Act, is a distinct authority for the contrary proposition. There it was held that a claim against an employer by a workman under the Act and receipts signed by the workman "without prejudice" for payments made by the employer did not bar the workman from afterwards suing the actual wrongdoer for damages. The precise point that arose in *Oliver's* case¹ has not been the subject of decision in Scotland; but in the case of *Mulligan*² Lord M'Laren, as I read his opinion, expressed approval of the decision arrived at by the English Judges; and, at all events, it is plain that the decision in *Mulligan's* case² did not in the least impair its authority. The ground of the decision there was that, as the workman had recovered a sum of damages from the actual wrongdoer, he could not make a claim against his employers, as they would not then have the complete right of relief to which they were entitled under the statute. Here there is no prejudice suffered either by the defenders or by the pursuer's employers. In my view, therefore, the word "recover" falls to be construed as implying unconditional payment; and

¹ [1903] 2 K. B. 639.

² 6 F. 126.

does not apply to a case where the money is paid conditionally and falls to Nov. 30, 1911. be repaid to the employer out of the damages that may eventually be awarded against the wrongdoer.

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As parties desired to have the opinion of the Court on this question of law the evidence has not been printed ; and we are, therefore, not in a position to dispose of the case as a whole. It will be open for the defenders to maintain that the findings in fact on which the Sheriffs have affirmed their liability are erroneous ; and it will also be necessary that the damages should either be assessed by us or agreed on by the parties. All that we are in a position to do is to recall the findings of the Sheriff-substitute that the pursuer is barred from recovering damages from the defenders, and that part of his interlocutor in which he sustains their eighth plea in law. In place thereof we must repel this plea in law and continue the cause. Parties can then enrol the case for further procedure.

Lord Salvesen.

LORD GUTHRIE.—I am of the same opinion. I think the effect of the defenders' contention would really be to render nugatory the alteration which section 6 of the Act of 1906 made upon the corresponding section of the previous Act. For, while Mr Fraser admitted that the workman might take a double set of proceedings, he maintained that he could not go on with both. If that were so, the result would be to throw the workman at a later stage into the same position as, under the old Act, he was in at the beginning. He would be bound to elect his remedy before the whole question of liability was decided, which is just what section 6 of the 1906 Act was intended to prevent. If judgment in both sets of proceedings were given on the same day, he would naturally have to make his election then. But if liability is admitted by the employer and compensation received from him, the question is whether he is thereby barred from recovering damages from a third party. I think not. It is unnecessary to decide whether or not an express reservation of his rights is required. If it is, there is such a reservation in the present case.

THE COURT pronounced this interlocutor:—"Recall the said interlocutors [dated 19th May and 25th October 1910], in so far as they find that the pursuer is barred from pursuing this action, and in so far as they sustain the 8th plea in law for the defenders: Repel the said 8th plea in law, and continue the cause: Find the pursuer entitled to the expenses of the appeal, and remit," &c.

DOVE, LOCKHART, & SMART, S.S.C.—CLARK & MACDONALD, S.S.C.—Agents.

No. 32. ANN LAING, Pursuer (Appellant).—*Wilson, K.C.—Lippe.*
 — PAULL & WILLIAMSONS, Defenders (Respondents).—*Morison, K.C.—*
 Nov. 80, 1911. *A. M. Stuart.*
 Laing v. Paull & William- THE LORD PROVOST, MAGISTRATES, AND TOWN-COUNCIL OF ABERDEEN,
 sons. Defenders (Respondents).—*Murray, K.C.—Chree.*

Reparation—Burgh—Street—Foot-pavement—Accident caused by defective pavement—Opening in pavement covered by metal disc—Liability of proprietor of disc—Liability of road authority—Aberdeen Police and Water-Works Act, 1862 (25 and 26 Vict. cap. cciii.), secs. 307, 323, and 344—Aberdeen Municipality Extension Act, 1871 (34 and 35 Vict. cap. cxli.), sec. 143.

A woman, while walking on the foot-pavement of a public street in Aberdeen, in front of P. & W.'s property, placed her foot on a metal disc in the pavement covering an opening into a cellar, with the result that the disc tilted, and her leg was caught in the opening and injured. The tilting of the disc was due to the worn condition of the bevel in the flagstone of the pavement on which it rested.

The disc was the property of P. & W., and the opening which it covered led into their cellar. Under certain local Acts P. & W. were bound to keep the covering of the opening in repair, but the pavement was vested in the Town-Council, and could not be altered without their consent or other lawful authority.

In an action of damages brought by the injured woman against the Town-Council and against P. & W., *held* (1) that the Town-Council, being bound to keep the pavement in a safe condition for the public, and having failed to do so, were liable to the pursuer; but (2) that P. & W. were not liable as they had no control of, and could not interfere with, the pavement.

Laurie v. Magistrates of Aberdeen, 1911 S. C. 1226, followed.

Expenses—Successful and unsuccessful defenders—Liability inter se.

In an action of reparation for personal injuries brought against two defenders, in which each defender maintained that the injury was caused by the fault of the other, the Court in *assoilzieing* one defender found him entitled to expenses against the other.

2D DIVISION.
 Sheriff of
 Aberdeen,
 Kincardine,
 and Banff.

ON 8th July 1910 Miss Ann Laing brought an action in the Sheriff Court at Aberdeen which (as amended) was directed against Messrs Paull & Williamson, advocates, and the Lord Provost, Magistrates and Town-Council of Aberdeen. The claim of the pursuer was for damages in respect of injuries sustained by her on 2nd April 1910, "owing to defenders the said Paull & Williamson having recklessly and negligently failed to replace the metal disc, used for the purpose of covering an opening in the footway leading into the coal cellars belonging to defenders underneath the pavement on the east side of Union Row, in its proper position after taking in coals, whereby pursuer, having stepped on said metal disc (on the afternoon of the foresaid date), causing it to slip off, fell into said opening and sustained serious injuries; and also owing to the negligence of both defenders in having allowed said metal disc and groove, into which it is fitted, to become worn and defective and unsafe for the public using said pavement, and having failed to put and keep the said metal disc in proper order."*

* The Aberdeen Police and Water-Works Act, 1862 (25 and 26 Vict. cap. cciii.), enacts:—

Sec. 307. "All pavements, flagstones, . . . and other materials, laid

A proof was allowed and led in the Sheriff Court. The material facts proved are stated in the following findings in fact in the interlocutor pronounced by the Second Division:—“(1) That on the afternoon of Saturday, 2nd April 1910, the pursuer, when in the course of walking along the pavement on the east side of Union Row, Aberdeen, put her foot on an iron disc which formed the cover of a coal-shoot near the middle of the pavement; (2) that the iron disc in question gave way, and that the pursuer's foot and part of her leg went through into the space below, and she was thus thrown to the ground and sustained injuries to her limbs and an arm; (3) that the coal-shoot is used in connection with the cellar of the adjoining property belonging to the defenders Messrs Paull & Williamsons, and that the disc or covering thereof belongs in property to them; (4) that said disc is fitted into a groove in a granite stone, part of the pavement which is vested in the defenders the Town-Council of Aberdeen and under their management as the street authority; (5) that the accident to the pursuer was caused in consequence of the groove in the pavement having through long continued wear become unsafe as a support for the iron disc; (6) that the dangerous condition of the metal disc as part of the pavement of Union Row could have been ascertained by a reasonable inspection; and (7) that no such inspection was made at any time prior to the accident.”

On 13th February 1911 the Sheriff-substitute (Young) found that it was not proved that the pursuer's accident was due to the fault of the defenders or either of them, and assolizied both defenders.

The pursuer appealed to the Second Division, and the appeal was heard on 9th and 10th November 1911.

or to be laid on the streets made or to be made within the limits of this Act . . . shall belong to and be the property of the Commissioners, and are hereby vested in them for the purposes of this Act.”

Sec. 323. “Every person who wilfully displaces, takes up, or makes any alteration in the pavement, flags, or other materials of any street under the management or control of the Commissioners, without their consent in writing, or without other lawful authority, shall be liable” to certain penalties.

Sec. 344. “When any opening is made in any pavement or footpath within the limits of this Act as an entrance into any vault or cellar, a door or covering shall be made by the occupier of such vault or cellar, of iron or such other materials and in such manner as the Commissioners direct, and such door or covering shall from time to time be kept in good repair by the occupier of such vault or cellar; and if such occupier do not within a reasonable time make such door or covering, or if he make any such door or covering contrary to the directions of the Commissioners, or if he do not keep the same, when properly made, in good repair, he shall for every such offence be liable to a penalty not exceeding five pounds.”

The Aberdeen Municipality Extension Act, 1871 (34 and 35 Vict. cap. cxli.), transfers the powers and authorities of the Commissioners under the above Act to the Town-Council, and by sec. 143 enacts that in the circumstances therein mentioned “the Town-Council may . . . cause footways with proper gutters or channels to be formed and laid out, . . . and the said gutters or channels and footways shall be constructed in such manner and form, and of such construction and breadth, . . . all as the Town-Council may direct, and the Town-Council may cause the carriage-way of such street . . . to be paved . . . and such street shall thereafter be maintained by the Town-Council.”

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Argued for the appellant;—The appellant's accident was due to the fact either that the disc was not in its proper position over the opening, or that the disc was defective either owing to the absence of the weight which should have been attached to it, or because of the worn condition of the rim and of the socket into which it fitted. Both defenders were accordingly liable in damages. Paull & Williamsons would clearly be liable if the accident was due to the fact that the disc was out of place or that the weight was amissing. But they were also liable if the accident was due to the wearing of the rim, because (a) the shoot and disc were their property, and (b) the shoot was under their control and was used only by them.¹ By section 344 of the Act of 1862 the duty of keeping the disc in repair was laid on them as occupiers of the cellar, and they had failed in this duty. *Keeney v. Stewart*² was distinguishable on the ground that in that case the trap causing the accident did not belong to the defender. *Chapman v. Fylde Water-Works Company*³ was similar to *Keeney v. Stewart*.² In *Paterson v. Kidd's Trustees*,⁴ the decision proceeded on the fact that before the accident the floor, which was said to be defective, was inspected and pronounced safe by a competent man. The Town-Council were also liable to the appellant. The disc and its fitting formed part of the foot-pavement in the street; and, as such pavements were under the Acts of 1862 and 1871 vested in the Town-Council, they were responsible to the public for maintaining them in a safe condition.

Argued for the respondents Paull & Williamsons;—These respondents were liable only for injuries occasioned by their use of the shoot.⁵ If, for example, a member of the public was injured through the shoot being open while the respondents were having the cellar filled, or because the disc was not properly replaced after such use, an action might lie against these respondents. But except as users of the cellar they were not responsible to the public. No case of this kind, however, had been established by the appellant. It was not proved that the disc was out of its proper position; but even if this were so, it was not shown that the respondents were responsible for the displacement of the disc.⁶ Nor was it proved that the disc was defective. The fact that there was no weight attached to the disc had nothing to do with the accident. Even if the disc were defective, the respondents could be made liable only if it were also proved that they had been negligent in the matter; and as they had no control over the disc (except that they could remove it for the purpose of using the shoot) they could not be held to have been negligent. They were not responsible for the design of the disc (section 344 of the 1862 Act); the disc was the property of the Town-Council as being part of the pavement or material laid on the street (section 307 of the 1862 Act); these respondents were bound to repair it only when required by the Town-Council to do so (section 344 of the 1862 Act); and, if they

¹ *Laurie v. Magistrates of Aberdeen*, 1911 S. C. 1226.

² 1909 S. C. 754.

³ [1894] 2 Q. B. 599; *Bevan on Negligence* (3rd ed.), vol. I., p. 397.

⁴ (1896) 24 R. 99.

⁵ *Whiteley v. Pepper*, (1876) 2 Q. B. D. 276; *Pickard v. Smith*, (1861) 10 C. B. (N. S.) 470; *Braithwaite v. Watson*, (1889) 5 T. L. R. 331.

⁶ *Keeney v. Stewart*, 1909 S. C. 754; *Paterson v. Kidd's Trustees*, 24 R. 99.

did repair it without authority, they were liable in a penalty (section 323 of the 1862 Act). In *Chapman v. Fylde Water-Works Company*¹ it was held that as the repair of a stopcock in the pavement involved the breaking up of the pavement those parties only who could lawfully break up the pavement could be made liable for injuries caused by the stopcock. That decision was in point here. The pursuer's accident was due either to her own carelessness, in which case she could not recover damages, or to the fact that the groove in the stone on which the disc rested was worn so that the disc was allowed to tilt, in which case the Town-Council alone were responsible.

Argued for the respondents the Town-Council of Aberdeen;—Paull & Williamsons were alone liable to the pursuer. The accident was due to the disc not being in its proper position over the opening; or, otherwise, to the absence of the weight which should have been attached to the disc. If this were so, then these respondents were in no way liable. And, even if the disc was defective, that would not involve liability on the part of these respondents. The disc, and the stone supporting it—which was part of the apparatus for covering the shoot—were the property of Paull & Williamsons. The disc was not part of the pavement, for, if it were, the absurd result would follow that Paull & Williamsons would be liable in a fine every time they removed it (section 323 of the 1862 Act). They were also bound to repair it. Section 344 of the 1862 Act enacted that the occupier must cover any opening in the pavement in the manner directed by the Town-Council, but left the responsibility for keeping the covering in good repair on the occupier. The fact that a statutory obligation to repair was placed on the occupier implied that he had the power to execute repairs and to do what was necessary for that purpose. The opening which the disc covered was in the roof of Messrs Paull & Williamsons' cellar; and there was no ground for distinguishing between the occasions when the shoot was being used and the time when it was not in use. *Pickard v. Smith*² really turned on the question of liability for an independent contractor.³ Paull & Williamsons could at any time have removed the disc and stone for repair; and, if any accident occurred through the opening in the pavement thereby left, the Town-Council would be liable only on the ground that they had not prevented the public using the pavement. All that the Town-Council was bound to do was to take reasonable care that visible defects should be remedied. To all outward appearance the disc here fitted quite properly into the pavement. No ordinary examination of it would have revealed any defect, and it was out of the question to require the Town-Council to cause every such disc to be minutely inspected. Reference was also made to *Wisely v. Aberdeen Harbour Commissioners*.⁴

At advising on 30th November 1911,—

LORD JUSTICE-CLERK.—The pursuer in this case sues the Town-Council of Aberdeen and the firm of Paull & Williamsons of that city, for damages because of an injury caused by an accident. It appears that since 1862 there has been in front of Paull & Williamsons' premises a shoot for coals,

¹ [1894] 2 Q. B. 599.

² 10 C. B. (N. S.) 470.

³ Bevan on Negligence (3rd ed.), vol. I., p. 416.

⁴ (1887) 14 R. 445.

Nov. 30, 1911. which, when not in use, is kept covered by a circular iron plate, and that
Laing v. Paull & William- this plate has been there all the time with the consent of the other defen-
sons. ders, the Town-Council, who own and keep up the pavement in which it is
set. The mode of fitting of the plate is by the granite around the shoot
Lord Justice- being bevelled off so as to have a sloping edge, and the plate, being cut to a
Clerk. similar bevel, is intended to fit into the granite flag so as to lie flush with
the surface of the pavement. The evidence makes it certain that in the long
course of years there has been a wearing of the surfaces, so that the plate is
no longer wedged into the opening so as to fit tightly, but that there is a
certain amount of play causing the plate to be more or less loose in fit, the
consequence of which is that, when pressure is brought to bear near the
edge of the plate, there is a tendency to tip up and so cause the opening of
the shoot to be exposed.

The pursuer alleges that when she was passing over the street, her foot, in stepping upon the plate, caused it to be displaced, and so exposed the opening of the shoot, and that her foot in consequence went down, and her leg was seriously injured. She accordingly maintains that she is entitled to compensation against the city of Aberdeen, in whom the surface, including the flag with the hole in it, is vested, and against Messrs Paull & Williamsons, who are the owners of the metal plate.

That the injury was caused by the pursuer's foot descending into the hole, is not, I think, doubtful.—[His Lordship then examined the evidence, and after stating that there was no evidence that the plate was out of place when the accident occurred, continued]—I am of opinion that the true inference from the evidence is that the accident was caused by the worn condition of the plate and its seating, it being conclusively established by experiment that when stepped on in a particular position it does tip up, so as for the moment to uncover the shoot.

The next question is, did this tipping of the plate result from fault, and if so, on whom does the fault lie? That it was caused by fault I cannot doubt. There was a duty on some person or authority to keep the pavement safe for foot-passengers, and that duty was not fulfilled. It was dangerous, and to have it in a dangerous state was fault. In my opinion, there was fault on the part of the defenders the Town-Council. This particular shoot with its plate undoubtedly required inspection by those responsible for the safety of the streets. More particularly did it require inspection seeing that the construction, with bevelled faces, was not the best construction. Mr Ironside, the engineer examined for Paull & Williamsons, says that a safer construction is to have an iron frame in the stone, and a cover to fit into the frame—that is, of course, with squared edges. He says “that is somewhat safer than the cover in question.” And speaking of this bevelled cover he says,—“Considering its age, I am not surprised to find that the granite is considerably worn round the edge.” And he adds that the iron of the plate is also worn a little, and says that there is a tendency for metal to slip off worn stones. And the assistant burgh surveyor, called for the Town-Council, says,—“We do not allow such discs now.” He says also, speaking of the bevelled edges,—“I would not say that that is so secure as a square check.” At another place he says,—“The new covers sit quite tight of themselves.” And this is confirmed by

Mr Shaw, the streets and roads inspector. All this makes it plain that Nov. 30, 1911. there was a duty to inspect, particularly where the fitting was half a century old. The pattern is obsolete, and it tends to become insecure in its seat. Laing v. Paull & William-sons.

Now, it is admitted that no inspection was made. One of the most extraordinary reasons for this non-inspection was given by one of the defenders' witnesses, who said that inspection was impracticable because the number of these plates in Aberdeen was so great—some 300. The reasoning is curious. If one such plate, if neglected, may cause danger, it should be inspected to avert danger, but if there are 300 such possible causes of danger it cannot be expected that they can be inspected! One would have thought that the more numerous the points where danger might arise the more imperative is it that care should be taken. Lord Justice-Clerk.

Here none was taken, and I cannot hold otherwise than that the city, which owned the pavement, was bound to exercise reasonable care that such arrangements as they sanctioned for openings in the pavement when required should not be a source of danger to the public when closed, whether by faulty construction or by decay from age. They alone could interfere with the granite flags to keep the street safe, and I think they were bound to know whether their pavement as fitted with shoots was in such a condition as to constitute a danger, and were bound to have the cause of danger removed.

It remains to be considered whether Messrs Paull & Williamsons have a responsibility for the accident, they being the owners of the plate which was used to fill up the hole. The question is, had they control of it when it was set so as to complete the continuity of the surface of the footway? I am of opinion that they had not. The whole control of the street as such was in the Corporation, and the owners of the plate would not be liable merely as owners unless it could be proved that they had taken some action creating danger, by removing the plate for the purpose of using the shoot and leaving it unguarded, or by failing to replace the plate in its seat after use. For such fault in using their shoot they would be liable. In short, if they tampered with the street in the use of their shoot, they would have a liability until they had restored the street to the condition in which it was when the shoot was not in use. It was, of course, the duty of the house proprietors to provide and keep up the plate, and by section 344 of the Aberdeen Police Act the proprietor is taken bound to provide a covering to the coal-shoot "as the Commissioners direct," and to keep it "in good repair," and he is liable to a penalty if he does not do so. But this is his obligation to them. They must see that the street is safe for the public, and if it is not safe, must protect the public by a fence or by watching till it is made safe. They do not do their duty if they neglect to see to the condition of this part of the street as much as of any other part. Here the Corporation took no steps as regards the plate, and they do not allege that it was out of repair. The evidence shows that it was not out of repair, and was continued in use after the accident with the acquiescence of the Corporation officials, who knew that an accident had occurred; and that could only have been permitted if they did not consider that the plate was defective. It was the granite seat in their flagstone that was worn and caused any danger there might be—a danger not necessarily obvious to the citizen, but

Nov. 30, 1911. which the officials of the Corporation, acting for them, should have attended to. The proprietor could have no right to interfere with the flagstones.

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Lord Justice-
Clerk.

I attach no importance to the fact that there was a ring on the bottom of the plate from which a chain and a weight might be hung. The evidence establishes clearly that when a weight was hung on to the plate it did not prevent in any degree the liability to tilt, which was caused by the worn condition of the seat.

I am therefore of opinion that fault cannot be found proved against Messrs Paull & Williamsons, there being no proof that they failed in anything which they were called on to do to make the street safe. If the plate was not notified to them by the Corporation officials to be defective, and if there is no ground for holding that after use it was not reset as usual, then I can see no ground for holding them liable.

The result is that the Corporation alone must be held liable, and that being so they must pay damages. I would move your Lordships accordingly, and suggest £50 as suitable damages in the circumstances.

LORD SALVESEN.—[After stating his opinion that the accident occurred through the disc tilting up owing to the worn condition of the granite seating in which it rested]—The mere occurrence of such an accident to a foot-passenger in a public street raises a presumption of fault against the person who has the control of the pavement, including this disc which forms part of it. The owners of the disc were admittedly Messrs Paull & Williamsons, and if they also had the possession and control of it they would be liable, on the principles explained in the case of *Laurie v. Magistrates of Aberdeen*,¹ for their failure to make it safe. If, on the other hand, the control of the whole pavement, including the disc, was vested in the Corporation of Aberdeen, no liability would attach to the owners on the ground of mere ownership, although there might be special grounds on which, even on such an assumption, they might be held liable. Thus, if the disc had been removed for the purpose of filling their cellar with coal, and no precautions had been taken to warn the public of the danger caused by the open hole, they would be clearly liable to a member of the public who inadvertently put his foot into it. Or again, if it could be shown that the accident arose through the disc having been improperly replaced, after such an operation, by someone acting on their behalf and with their authority, they could not escape liability for the consequences of his fault. In either of the cases figured, however, the possession and control of the disc would, for the time being, be in the owners, who were obviously entitled to remove the disc for the purpose of allowing coals to descend into their cellar. As I have already stated, however, I do not think that the accident arose in either of the ways figured.

The history of the disc appears to be as follows: It seems to have been put into the pavement sometime after 1862 (the precise date not being ascertained), and not to have been altered or repaired, in any way, since then. It may be assumed to have been put there with the consent and to the satisfaction of the Corporation, in terms of section 344 of the Aberdeen

¹ 1911 S. C. 1226.

Police and Water-Works Act, 1862. It is of an old-fashioned type, but if Nov. 30, 1911. kept in good repair, is not a source of danger. The disc itself consists of a circular piece of iron three-quarters of an inch thick, except at the circumference, where it is a quarter of an inch in thickness. It rests upon a ledge cut in the granite stone, by which it is supported. This ledge is bevelled, so that when the stone wears away, even to a relatively inconsiderable extent, the support which it gives is insufficient to prevent the disc being tilted by the heel of a passer-by pressing on the circumference. Had the groove been cut square, it would have required very much more extensive wearing away of the stone before the support would have been so lessened as to constitute a source of danger. [After stating his opinion that had there been a weight attached to the under side of the disc it would not have prevented it from tilting, his Lordship continued]—

The Corporation founded upon section 344 of the 1862 Act for the proposition that it was the duty of the owner to keep the disc or covering in good repair, and maintained that it was the breach of this duty that had resulted in the accident. There is no doubt that, as in a question with the Corporation, such liability is created by the section referred to, and the obligation can be enforced by a penalty not exceeding £5; but it is a different matter to say that the duty of keeping the covering in repair is a duty which the owner owes to the public. If it existed in a private road, leading to the owner's own premises, of course it would be his duty to see that there was no trap in the road into which any person legitimately using it might fall; but when it is situated in a public street, which it is the duty of a public authority to keep safe for the use of the public, I think the owner is entitled to rely on the public authority doing their duty and notifying him when its condition becomes unsafe. That the mere obligation to pay for the maintenance of the part of a street dedicated to public uses does not infer liability to members of the public who may be injured by reason of a defect is illustrated by the case of *Christie*.¹ There the frontager was liable to maintain the pavement opposite his property, and had actually been notified to do so by the public authority before the accident which gave rise to the action occurred; yet it was held that he was under no responsibility to a member of the public who was injured by reason of the defects in the pavement before the expiry of the time fixed for the completion of the repair. In the case before us the defect was really not in the disc or covering, but in the granite stone into which it was fitted; and that stone, which was part of the pavement vested in the Corporation, could not have been altered by the owner of the coal-cellar at his own hand. Thus he had not the control of an ordinary owner of property which is essential in order to make him responsible; and I am of opinion here that the defenders Paull & Williamsons are therefore not liable to the pursuer for the accident which occurred.

Are, then, the Corporation of Aberdeen so liable? It was admitted that if any of their inspectors or servants—such as police-constables—observed that part of the pavement of a street was in a dangerous condition, it would be the duty of such servants to report the matter to their superiors,

¹ (1899) 36 S. L. R. 694.

Nov. 30, 1911. and in the meantime, if necessary, to take steps to prevent a member of the public from being injured. It was contended, however, that they had no duty to inspect or to find out any defects except such as were apparent to the eye. In point of fact it is admitted that no inspection was ever made of the coverings of coal-cellars, although, for all practical purposes, these form part of the streets of Aberdeen. In my opinion, the Corporation have acted under a misconception as to their duty in this matter. There may be defects in connection with openings to cellars which are not visible, and yet are not latent in the sense that a proper inspection would disclose them. That was the nature of the defect in question. Had the cover been lifted, the worn state of the stone into which it fitted could easily have been detected by the eye; and the fact that it was no longer a tight fit, as it no doubt had been when first constructed, but had a certain amount of play, was sufficient to lead a skilled inspector to the conclusion that it might not be safe. There was apparently no difficulty in removing the cover from the street; but if it had been necessary to get access to the coal-cellar, in order to remove the cover with a view to seeing whether it was in a safe condition, I do not doubt that the Corporation would be entitled to demand that it should be so removed with a view to a convenient inspection. One of the defenders' witnesses suggested that, as there were 300 similar coverings in Aberdeen, it would be impracticable to make such an inspection. I cannot agree. A comparatively short space of time would enable an inspector to see whether these 300 covers were in a safe condition, and a similar inspection repeated at relatively long intervals would probably be sufficient; but even if an inspection of the kind would involve a great deal of trouble, I think the Corporation, through their servants, were bound to take that trouble. They are charged with the duty of seeing that the streets are not a source of danger to the citizens, and they must take such means, by inspection or otherwise, as are necessary to secure that end. The fault in the present case was small in degree, but it is none the less fault which infers legal liability. I am therefore of opinion, following the decision in the case of *Laurie v. Magistrates of Aberdeen*,¹ that the defenders the Corporation of Aberdeen are liable in damages to the pursuer, just as if the defect which caused her accident had existed in the pavement itself, the materials of which belonged to the Town-Council.

As regards the amount of damages, we must assess that as a jury would; and I think that looking to the fact that no pecuniary damage is proved, and that the pursuer practically recovered from her injuries within a month of the date when she received them, a sum of £50 is reasonable compensation to her for the pain and inconvenience to which she was subjected.

LORD GUTHRIE.—I am of the same opinion. At first, I was inclined to think that there might be liability here against Paull & Williamsons as well as against the Corporation. I agree with Mr Morison that when an occupier removes such a cover, the liability for accident caused thereby remains on him until the cover is properly shut. When it is shut, the liability is on the Corporation.

¹ 1911 S. C. 1226.

The question comes to be, When is the cover properly shut so as to Nov. 30, 1911. relieve the occupier of the liability? Here it is said it was not properly shut in two respects, first, that the cover was so worn that it did not fit; & William- and second, that the weight which was meant to be used along with the sons. cover was not in use at the time. It seems to me that these are both clear Lord Guthrie. defects, for which, in certain circumstances, the occupier might have been liable.

If the pursuer had proved that but for the worn condition of the cover the accident, even looking to the condition of the granite, would not have happened or might not have happened, I should have been disposed to think that there was such liability, although the liability primarily in regard to the streets—and the covers are part of the street—is on the Corporation. In that case, if the cover had been so worn as to have been obviously unsafe, there might have been liability on the occupier as well as on the Corporation; but it seems to me that the evidence of Mr Bennet Mitchell, the leading witness for the pursuer, shows that the cover was so slightly worn that it had nothing to do with the accident.

Again, if the absence of the weight had had anything to do with the accident, that would have been clearly a matter for which the occupier and not the Corporation, primarily at least, would have been responsible; but, as Lord Salvesen has shown, the evidence clearly indicates that the presence or absence of the weight had nothing to do with the accident.

Therefore, while I hold that there were two defects because of either of which, in certain circumstances, the occupier might have been found liable, it seems to me that neither of these defects contributed to the accident. Accordingly, I agree that the Corporation alone are liable.

Counsel for Paull & Williamsons moved for expenses both against the pursuer and against the Town-Council.

Counsel for the pursuer contended that the Town-Council alone should be found liable in expenses to Paull & Williamsons, and cited *Craig v. Aberdeen Harbour Commissioners*.¹

Counsel for the Town-Council contended that as the pursuer had brought Paull & Williamsons into the process, she was liable for their expenses.² The action was originally directed against Paull & Williamsons only, and these defenders were brought in subsequently by amendment. They were not responsible for the appearance of Paull & Williamsons in the action.

THE COURT pronounced the following interlocutor:—"Recall the said interlocutor [of the Sheriff-substitute]: Find in fact [here followed the findings in fact quoted *supra*, p. 197]: Find in law (1) that it was the duty of the defenders the Town-Council of Aberdeen through their servants to have inspected the said coal-shoot and its cover from time to time with a view of ascertaining whether it was in a safe condition; and (2) that their failure to do so and to protect the pursuer as a member of the public from accident renders them liable in damages to her: Assess the damages at the sum of £50 ster-

¹ 1909 S. C. 736.

² *Mackintosh v. Galbraith & Arthur*, (1900) 3 F. 66.

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sons.

ling, and decern against the said defenders the Town-Council of Aberdeen to make payment to the pursuer of the said sum: Assoilzie the defenders Messrs Paull & Williamsons from the conclusions of the action: Find the pursuer entitled to expenses against the defenders the Town-Council of Aberdeen: and Find the defenders the Town-Council of Aberdeen liable in the expenses incurred by the defenders Messrs Paull & Williamsons: Allow accounts of said expenses to be given in," &c.

R. & J. W. STEWART, W.S.—DALGLEISH, DOBBIE, & Co., S.S.C.—
GORDON, FALCONER, & FAIRWEATHER, W.S.—Agents.

No. 33. HENRY MONCRIEFF STEELE, C.A. (Judicial Factor on Andrew Ramsay's Estate), Pursuer and Real Raiser (Respondent).—*Murray, K.C.*—
Nov. 30, 1911. *C. H. Brown.*

Ramsay's
Judicial
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THE BRITISH LINEN BANK, Claimants (Reclaimers).—*Macphail, K.C.*—
F. C. Thomson.

GEORGE KERR AND OTHERS (Miss Christina Ramsay Smith's Trustees), Claimants.—*R. C. Henderson.*

Process—Multiplepinding—Condescence of fund in medio—Real raiser's right of retention against claimant.

In an action of multiplepinding the pursuer and real raiser may state in a condescence of the fund *in medio*, made up after claimants have been ranked by a final interlocutor, any claim of compensation or retention which he has against a claimant who has been ranked and preferred to the whole or part of the fund.

2D DIVISION. (SEE previous report, 1911 S. C. 832.)

Lord
Skerrington.

On 30th June 1909 Henry Moncrieff Steele, C.A., Glasgow, judicial factor on the trust-estate of Andrew Ramsay, who died in 1865, brought an action of multiplepinding to determine the rights of parties in a sum of £9000 forming part of the trust-estate.

Claims on the fund *in medio* were lodged (1) by the testamentary trustees of Miss Christina Ramsay Smith (who, as liferentrix, received the income of the £9000 until her death in 1908) in which the claimants maintained, *inter alia*, that the fund formed part of the residue of Mr Ramsay's estate, and that one-half thereof had vested *a morte testatoris* in Miss Ramsay Smith, who was entitled to one-half of the residue; (2) by the British Linen Bank, who maintained that one-half of the fund had vested *a morte testatoris* in John Crawford Hunter (who died in 1890, and who was entitled to the other half of the residue of Mr Ramsay's estate), and that the Bank was entitled to the same under a bond and disposition and assignation in security executed by Mr Hunter in 1878, whereby he conveyed to them his whole interest in the residue of Mr Ramsay's estate; and (3) by Mr Ramsay's next of kin, who maintained that the fund had fallen into intestacy.

On 22nd January 1910 the Lord Ordinary (Mackenzie) pronounced an interlocutor ranking and preferring the trustees of Miss Ramsay Smith and the British Linen Bank each to one-half of the fund *in medio*, and disposing of the question of expenses. This interlocutor, which contained no decree for payment, was not reclaimed against.

Thereafter the pursuer and real raiser (the judicial factor), lodged a claim "to be ranked and preferred on any amount to which the Bank

may be entitled to the extent of the sum of £4051, 2s. 10d." He Nov. 30, 1911.
 averred that Mr Ramsay's testamentary trustees, who administered Ramsay's
 the estate prior to his (the judicial factor's) appointment, had lent Judicial
 money to Mr Hunter under two bonds and dispositions in security Factor v.
 dated 1874 and 1875 respectively, that the loans had not been fully British Linen
 repaid, and that the sum remaining due amounted to £4051, 2s. 10d., Bank.
 the sum claimed.

On 12th May 1910 the Lord Ordinary (Mackenzie) dismissed this claim as incompetent, and, the judicial factor having reclaimed, the Second Division, on 17th May 1911, adhered to the Lord Ordinary's interlocutor.*

On 6th June 1911 the Lord Ordinary (Skerrington) appointed the pursuer and real raiser (the judicial factor) to lodge a condescendence of the fund *in medio*. The condescendence having been lodged, the British Linen Bank lodged objections thereto, and a record was made up on the condescendence and objections.

In the condescendence of the fund the pursuer and real raiser averred that after the granting of the bond and disposition in security to the British Linen Bank, John Crawford Hunter became insolvent and granted a trust-disposition in favour of creditors; that certain dividends were paid from his estate to Mr Ramsay's trustees; but that a sum still remained due under the bonds and dispositions in their favour. He also averred:—“(8) Except to the extent of the sum to which the trustees of the late Miss Christina Ramsay Smith may obtain decree of payment, and of any excess of the other half of the fund *in medio* over the total sum due by the said John Crawford Hunter and his estate to the judicial factor as brought out in the statement above mentioned, there is no fund *in medio*, the balance of that other half of the said residue of £9000 having been either entirely or almost entirely exhausted in compensating the sum due as aforesaid by the said John Crawford Hunter and his estate to the estate under the charge of the said judicial factor; or having to the extent of the said total sum due by the said John Crawford Hunter and his estate to the judicial factor ceased to be due and payable to the said John Crawford Hunter or those in his right on and after [the dates of his bonds and dispositions in favour of the trustees and of his trust-deed], in respect either of (1) the trustees of the late Andrew Ramsay, or the judicial factor on his estate, having right to retain said balance as against all sums due by the said John Crawford Hunter and his estate as aforesaid, or (2) having ceased to be due and demandable by the said John Crawford Hunter or those in his right, as from one or other of the last-mentioned dates in respect of those representing the estate of the said Andrew Ramsay being entitled to balance the accounts between the two estates according to the law regulating the balancing of accounts in bankruptcy.”

In their objections the British Linen Bank averred that the pursuer's claim of retention and compensation was a re-assertion of the claim which had already been held incompetent in respect that the competition was at an end, and pleaded, *inter alia*;—(1) The competition having been ended, and the fund *in medio* disposed of by a final interlocutor on the merits, the claim of compensation or retention against the fund *in medio* now put forward by the judicial factor is incompetent. (2) In respect that the objectors have been ranked

* Reported 1911 S. C. 832.

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and preferred by final decree of the Court to one-half of the fund *in medio*, the judicial factor is not entitled to set off against the share of the fund belonging to them debts due to the estate by John Crawford Hunter or his estate, nor to retain any part of the said half of the fund *in medio* as against all sums due by Hunter as aforesaid.

On 26th October 1911 the Lord Ordinary (Skerrington) pronounced the following interlocutor:—"The Lord Ordinary, having considered the cause, finds that any pleas of compensation or retention, otherwise competent to the pursuer and real raiser in a question with the British Linen Bank, are still open to him, notwithstanding the interlocutor of 22nd January 1910: Continues the cause for further procedure, and, on the motion of said Bank, grants leave to reclaim." *

* "OPINION.—At an earlier stage of the present case the Second Division (affirming Lord Mackenzie) decided that after an interlocutor had become final disposing of the whole fund *in medio*, and ranking and preferring the claimants the British Linen Bank to one-half thereof, it was incompetent for the pursuer and real raiser to lodge a claim alleging that the trust-estate was a creditor of the Bank's cedent, Mr Hunter, and claiming to be ranked and preferred to the amount of the debt on any sum to which the Bank might be entitled (*Ramsay's Judicial Factor v. British Linen Bank*, 1911 S. C. 832). The pursuer now seeks to accomplish the same result by lodging a condescendence of the fund *in medio*, in which he claims that he has a right of compensation, or otherwise of retention, in respect of the debt which he alleges to be due to the trust-estate by the Bank's author. The interlocutor appointing a condescendence of the fund to be lodged was subsequent in date to the interlocutor of the Inner House already referred to. No argument was addressed to me, and all questions are reserved, as to the relevancy and validity of the alleged claims at the instance of the trust-estate against Hunter, and as to the validity of the rights of compensation or retention claimed by the pursuer. The only question argued was whether these rights, if otherwise well founded, were still open to the pursuer, or whether it was incompetent for the pursuer to insist upon them in the face of the final decree of ranking and preference. If the question is still open I see no objection to its being decided upon a discussion of the condescendence of the fund *in medio*, in the same way as if the pursuer had been only the nominal raiser of the action. See A. S., 11th July 1828, sec. 47; Bell's Com., vol. 2, p. 278, 7th edition.

"The interlocutor of ranking and preference did not contain any decree for payment, but the Court held that it was none the less a final decree completely disposing of the competition, and excluding all other parties except those who were ranked and preferred. But the Court did not decide that a decree of ranking and preference is to all effects and purposes the same as a decree for payment. If a litigant allows a decree for payment to go out against him, I should suppose that he cannot subsequently suspend the decree upon the ground that at its date he had a counter claim, upon which he might have founded a plea of compensation or retention. On principle, however, I see no reason why a merely declaratory decree finally establishing a claimant's right to a part of the fund *in medio*, and so constituting him a creditor of the fund-holder, should be held to preclude the latter from pleading compensation or retention. No question of compensation or retention could arise in the present case until it had been established that a particular claimant, viz., the Bank, was a creditor of the pursuer, or rather of the trust-estate. Accordingly, I am of opinion that it is still open to the pursuer to plead compensation or retention as against the successful claimant. Obviously, however, as a matter of fair play, notice of any such claims ought to be given at the earliest possible moment by the pursuer and real raiser of an action of multiplepinding, and no doubt such notice would

The British Linen Bank reclaimed, and the case was heard before Nov. 30, 1911. the Second Division on 18th November 1911.

Argued for the reclaimer;—It was incompetent for the pursuer and real raiser in his condescendence of the fund *in medio* to deduct any part of it on the ground of compensation or retention as against a particular claimant. It might be that the matter of compensation or retention could be competently raised later when an order for payment of the fund was sought, but it did not arise at this stage. The only *lis* here was as to the settlement of the fund—which was a perfectly distinct process from the competition for ranking¹—and it was usual to approve of the fund *in medio* before the claims were discussed. This was the course of procedure contemplated by the Act of Sederunt, 11th July 1828.* Had the condescendence of the fund been given out with the summons, the pursuer could not have stated his present claim in the condescendence. Bell's statement² and the Act of Sederunt referred to claims against the whole fund. Such claims would not depend in any way on what party was preferred to the fund. Here the respondent's claim was against a part of the fund. It depended on the personality of the successful claimant. Had anyone but the Bank been preferred, the respondent could not have advanced this claim. If the respondent were right, it would follow that if there were, say, fifteen claimants, the pursuer might in the condescendence have to state fifteen claims of compensation or retention. The pursuer here was really trying by another process to establish the claim which the Court had formerly held to be incompetent.³

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Argued for the respondent;—It was competent for the respondent to state his present claim in the condescendence of the fund. It was, indeed, the proper mode of settling the matter, and in the case of a nominal raiser, who *ex hypothesi* did not come into the competition, it was the only method. Bell² and the cases⁴ supported the Lord Ordinary's decision. It was a mistake to say that the respondent's claim depended on the personality of the successful claimant. The loss on the investments fell on the whole estate, and the respondent

have been given in the condescendence annexed to the summons if the point had not been overlooked. The pursuer's present position is quite different from that stated by him when he came into Court, and if expense has been caused by this change of front, it will probably fall upon the pursuer to make it good. I shall pronounce a finding that any pleas of compensation or retention, otherwise competent to the pursuer and real raiser in a question with the Bank, are still open to him, notwithstanding the interlocutor of 22nd January 1910, and I shall continue the case for further procedure."

¹ Walker's Trustee v. Walker, (1878) 5 R. 678.

* The Act of Sederunt, 11th July 1828, provides, sec. 47 :—"Where the person possessed of the funds is the real pursuer, he shall give out a condescendence of the fund in his hands along with the summons, and where he is only the nominal pursuer, he shall, at the first calling of the cause, either give in a precise and articulate condescendence of the amount of the funds in his hands, stating likewise any claim or lien which he may think he has on the fund, or produce objections . . . ; otherwise he shall be held as confessed."

² Bell's Com. (7th ed.) ii. 278.

³ Ramsay's Judicial Factor v. British Linen Bank, 1911 S. C. 832.

⁴ Mackay's Manual of Practice, p. 386, and cases there cited; Mackay's Practice, vol. ii., p. 112.

Nov. 30, 1911. was not bound to make good the deficiency. He could pay over the estate as it stood and leave the beneficiaries to call on Hunter's representatives to make good the loss. The present method was a convenient short cut to the same end.

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At advising on 30th November 1911,—

LORD SALVESEN.—This reclaiming note raises an apparently novel point of procedure. The pursuer and real raiser of this action of multiplepinding has a claim against the late John Crawford Hunter, arising out of certain bonds granted by him in favour of the trust-estate which the pursuer represents—the security subjects conveyed under the bonds having proved insufficient to meet the principal and interest. Mr Hunter became bankrupt in 1887, and his estates were realised under a voluntary trust-disposition. He died in 1890.

The object of the action was to ascertain the persons in right of a sum of about £9000 which had been disposed in liferent to certain ladies who are now dead; and by interlocutor, which was allowed to become final, the Lord Ordinary ranked and preferred the British Linen Bank to one-half of the fund *in medio* as assignees of the late John Crawford Hunter under an assignation dated in 1878. The pursuer thereafter lodged a claim in respect of the unpaid portion of the bonds already referred to. In this claim he asked to be ranked and preferred on any amount to which the Bank had already been found entitled to the extent of £4051, 2s. 10d. This claim was dismissed as incompetent by the Lord Ordinary, and we affirmed his interlocutor. Had it been truly a riding claim it was admitted that it would not have been lodged too late, but as it was really a claim in competition with the Bank, who had already been ranked and preferred to one-half of the fund *in medio*, it was held that it could not be entertained. As at present advised I do not think the pursuer suffered any prejudice by this, for his claim was bad, being framed exactly as it would have been if John Hunter had himself been the successful claimant (in which case it would have been a proper rider), whereas the pursuer could not claim to ride upon the Bank's claim as the assignees of Hunter.

The pursuer thereafter put in a condescendence of the fund *in medio*, in which he proposed to deduct from the one-half share to which the Bank had been found entitled as assignees of John Crawford Hunter, the amount of Hunter's indebtedness to the trust-estate. The British Linen Bank lodged objections, in which they maintained that the claim of compensation or retention against the fund *in medio* put forward by the judicial factor was incompetent. The Lord Ordinary has sustained the competency, and I am of opinion that we ought to affirm his interlocutor.

The main argument by which the reclaiming note was supported was that, while the fund *in medio* might be subject to deduction in respect of sums due to the holder of the fund, the amount of the fund could not be greater or less according as it was decided that one or other of the competing claimants was entitled to it. There is, at first sight, much force in this argument; but in the end I have come to the conclusion that it is not sound. The simplest case would have been if John Crawford Hunter had still been alive and the whole fund *in medio* had been found to belong to

him. In that case I cannot doubt that, in stating the fund *in medio*, the holder of the fund would have been entitled to deduct any sums which were due to him by John Crawford Hunter. In other words, the latter could not have demanded payment of his share of the estate in the pursuer's hands without meeting his indebtedness. On the other hand, had some other claimant been found entitled to the fund *in medio*, no claim of retention could have been made by the pursuer as against such claimant. The fact that the claim is made, not by Hunter, but by his assignees, does not seem to me to alter the right of the pursuer to deduct any sum due by Hunter to him. Nor does it make any difference that the claim of retention only affects one-half of the fund *in medio*. Professor Bell (Bell's Com. ii., p. 278) says that "in stating the amount of the fund, the pursuer is entitled to discuss any claim of retention or of compensation which may be competent to him," and no authority was quoted to the contrary. Counsel for the Bank practically conceded that whatever other answers they might have to the pursuer's claim, it might not be incompetent for him to state it later, before they obtained any decree for payment against him. If so, the point which they raise is one of procedure only, and not of substance, and it is more convenient that it should be ascertained now than at some later stage in the process. A record has been made up on the condescendence of the fund and objections; and the merits of the pursuer's claim can be properly determined on this record. I am therefore for adhering to the interlocutor reclaimed against, and remitting the case to the Lord Ordinary to proceed.

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The LORD JUSTICE-CLERK and LORD GUTHRIE concurred.

THE COURT adhered.

L. & L. BILTON, W.S.—MACKENZIE & KERMACK, W.S.—MORTON, SMART,
MACDONALD, & PROSSER, W.S.—Agents.

THE "ARDEN" STEAMSHIP COMPANY, LIMITED, Pursuers (Appellants). No. 34.
—Sandeman, K.C.—Black.

WILLIAM MATHWIN & SON, Defenders (Respondents).—
Constable, K.C.—James Stevenson.

Nov. 30, 1911.

Ship—Charter-party—Demurrage—Exceptions—"Stoppage at collieries"—
—Temporary restriction of output of colliery—Causes which "prevent or
delay the loading"—Cause occasioning failure to provide cargo—Charterers'
obligation to provide cargo.

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A charter-party stipulated that a vessel should load a cargo of coals in sixty running hours, time not to count in case of "delays through stoppages at collieries with which steamer is booked to load," or "any accidents or cause beyond control of the charterers which may prevent or delay the loading." A colliery company, who were supplying to the charterers a certain class of coal which was to form part of the cargo, having temporarily restricted the output of their pits for the purpose of economic working and thereby diminished the supply of that class of coal, failed to deliver coal alongside the vessel in sufficient quantities to allow loading to proceed continuously, and the consequent delay caused the vessel to exceed her stipulated loading time.

Held that the charterers were not relieved from a claim for demurrage by the clause of exception in the charter-party, in respect (1) that the restricted output of the coal in question was not a "stoppage at

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Lanarkshire.

collieries” in the sense of the charter-party, and (2) that it did not “prevent or delay the loading” but delayed the provision of the cargo, and that the obligation on the charterers to provide a cargo was an absolute duty unless expressly excepted.

IN January 1910 the Owners of the s.s. “Arden,” of London, brought an action in the Sheriff Court of Lanarkshire, at Glasgow, against William Mathwin & Son, coal exporters there, in which the pursuers claimed the sum of £112, 8s. 1d. as demurrage due to them by the defenders for a period during which the “Arden” had been detained in loading a cargo beyond the time stipulated in a charter-party entered into between the parties on 22nd October 1909.

The charter-party stipulated that the “Arden” should proceed to Methil Dock and there load a cargo of coals from such colliery or collieries as the defenders, as agents for the freighters, should direct. “The freighters being allowed for loading the vessel 60 running hours, commencing from first high-water after arrival in roads, and notice given according to the customs of the port, but time, in any case, not to count between 2 P.M. Saturdays and 6 A.M. Mondays. Time not to count on any general holiday, colliery, national, local holiday or fête day, nor in case of pitmen or other hands striking work, or lock-outs, railway detention, or delays through stoppages at collieries with which steamer is booked to load, nor from riots, frost, or floods, or any accidents or cause beyond control of the charterers which may prevent or delay the loading, from date of this charter until the actual completion of loading (time occupied in the shipment of bunker coals not to count; any extra time required for the shipment of the cargo in consequence of its interruption from this cause, or from the vessel not being able to proceed with her loading during any portion of her lay-time, not to count. . . .)” “8. Demurrage.—Demurrage to be paid to the steamer at the rate of sixteen shillings and eightpence for every hour employed beyond the time allowed for loading and discharging, subject to the exceptions contained in this charter unless steamer already on demurrage.”

The pursuers averred that the “Arden” proceeded to Methil where her lay-time, in terms of the charter-party, began at 12.22 P.M. on 26th October 1909; that she proceeded with her loading and finished loading at 4.15 P.M. on 3rd November 1909; that the time thus occupied in loading was 195 hours 53 minutes; that the steamer would have been loaded within her lay-time had the cargo been ready; that deducting from the time occupied in loading the sixty hours stipulated for, and the time of one hour occupied in bunkering, all in terms of the charter-party, a balance remained of 134 hours 53 minutes, on which demurrage at the stipulated rate fell to be paid, amounting to the sum sued for.

The defenders averred in answer:—“Denied that the vessel was on demurrage for 134 hours 53 minutes. . . . Averred that owing to stoppage at the Cowdenbeath pits from which collieries they were booked to load, the charterers were unable to proceed with the loading at once, and this delay continued till Saturday 30th October 1909, which was a colliery holiday at Cowdenbeath pits. This consequently prevented or delayed the loading within the meaning of the exceptions. . . .”

The defenders pleaded, *inter alia*;—(3) The defenders, being excused from loading by reason of exceptions in the charter-party, and the

steamer having been loaded within the time allowed, are entitled to Nov. 30, 1911. absolvitor, with expenses.

A proof was allowed and led. The facts established at the proof with regard to the actual delay in loading the ship are summarised in the first sixteen findings in fact in the interlocutor of the Sheriff-substitute, *infra*. From the proof it also appeared that the cause of the delay in providing the cargo of coal (which was of a class known as "doubles," i.e., small coal sifted out from the larger coal) was that certain vessels which were to take cargoes of the larger coal were not forward, and that accordingly the collieries restricted their working meantime to avoid the trouble and expense of binging the larger coal until these vessels arrived.

On 29th November 1910 the Sheriff-substitute (Fyfe) pronounced the following interlocutor:—"Finds (1) that by charter-party dated 22nd October 1909 the defenders chartered the pursuers' steamship 'Arden' to load at Methil a cargo of coal for Rotterdam; (2) that under the charter the loading time was 60 running hours commencing from first high-water after arriving in the roads and notice given according to the custom of the port; (3) that the exceptions in the charter-party included, *inter alia*, 'delays through stoppages at collieries with which steamer is booked to load,' and also included 'any accidents or cause beyond control of the charterers which may prevent or delay the loading'; (4) that the vessel arrived in Methil roads at noon on 26th October 1909; (5) that notice was duly given as required by the charter-party; (6) that the first high-water after the arrival in the roads and notice given was at 12.22 P.M. of the same day; (7) that on the arrival of the 'Arden' in the roads there were other ships with prior right to go into loading berth; (8) that according to the bye-laws regulating loading at Methil, steamers rank for loading in the order in which they are ready to take in cargo; (9) that the 'Arden' was a vessel taking a mixed cargo; (10) that according to the bye-laws she was not entitled to a berth until the whole of her cargo was available; (11) that the 'Arden' came into dock about noon of 27th October to await a loading berth; (12) that a loading berth was available for her at 10 P.M. on 27th October; (13) that she did not get a berth because her coal cargo was not forward; (14) that the 'Arden' was berthed on 29th October at 9.45 A.M.; (15) that the loading was finished on 3rd November at 4.15 P.M., and the vessel sailed that day about 5 P.M.; (16) that the loading of the 'Arden' was interrupted and she was removed from the berth several times because her coal cargo was not available; (17) that the delay in loading arose from causes beyond the charterers' control and falling within the exceptions of the charter-party; (18) that giving effect to the said exceptions no demurrage is due: Finds in law that in respect the detention of the vessel beyond the stipulated loading time was owing to causes falling within the charter-party exceptions the defenders are not liable in demurrage: Therefore assolzies the defenders and finds them entitled to expenses; allows," &c.

The pursuers appealed, and the case was heard before the First Division (consisting of the Lord President, Lord Johnston, and Lord Skerrington) on 7th November 1911.

Argued for the appellants;—The Sheriff-substitute had not given effect to the distinction in law between the obligation to provide a cargo and the obligation to load. The duty to provide a cargo was absolute, and it was failure to perform this duty which had

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Nov. 30, 1911. caused the delay in this case. The charterers were not relieved of this obligation by the clause of exception which referred only to delays in loading.¹ Further, what had occurred was not a "stoppage at collieries" in the sense of the charter-party, it was a mere restriction of output; nor could the respondents claim relief under the latter part of the clause, as the words "any accidents or cause" must be construed as applying only to accidents or causes *ejusdem generis* with the preceding expressed exceptions, which the cause in question was not.²

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Argued for the respondents;—What had occurred was a "stoppage at collieries" in the ordinary sense of the words, and the respondents were absolved from the consequences of this delay.³ Once it was established that there had been such a stoppage, the Court had no duty to inquire further into its cause.⁴ Alternatively, the occurrence was covered by the words of the general clause of exception which applied to "any cause" beyond the charterers' control. The absence of the word "other" excluded the application of the doctrine of *ejusdem generis*. The cases of *Grant*,⁵ *Gardiner*,⁶ and "*Arden*" *Steamship Company*⁷ did not apply. They only affirmed the proposition that the obligation to provide a cargo was *prima facie* absolute, but here this obligation was qualified by the terms of the charter-party.⁸

At advising on 30th November 1911,—

LORD PRESIDENT.—In this case the defenders, William Mathwin & Son, coal exporters in Glasgow, by charter-party, dated 22nd October 1909, chartered a vessel to go to Burntisland or Methil, which two ports are run in conjunction, to take a cargo of coals. The clause of the charter with which we have to do is this: "The freighters being allowed for loading the vessel sixty running hours, commencing from first high-water after arrival in roads, and notice given according to the customs of the port, but time, in any case, not to count between 2 P.M. Saturdays and 6 A.M. Mondays. Time not to count on any general holiday, colliery, national, local holiday, or fête day, nor in case of pitmen or other hands striking work, or lockouts, railway detention, or delays through stoppages at collieries with which steamer is booked to load, nor from riots, frost, or floods, or any accidents or cause beyond control of the charterers which may prevent or delay the loading, from date of this charter until the actual completion of loading." And then there are some other allowances as to bunker coal, and so on.

Now, the ship arrived, and due intimation was made of her arrival, but she was kept waiting; she was in a berth, but she had to be taken out of the berth more than once, the cause of waiting being that the cargo was not ready.

¹ *Gardiner v. Macfarlane, M'Crindell, & Co.*, (1893) 20 R. 414; *Grant & Co. v. Coverdale, Todd, & Co.*, (1884) 9 App. Cas. 470; "*Arden*" *Steamship Co. v. Weir*, (1905) 7 F. (H. L.) 126; The Lord President referred to "*Knutsford*," *Limited, v. Tillmans & Co.*, [1908] A. C. 406.

² *Thorman v. Dowgate Steamship Co.*, [1910] 1 K. B. 410, at p. 422.

³ *Larsen v. Sylvester & Co.*, [1908] A. C. 295.

⁴ *Letricheux & David v. Dunlop & Co.*, (1891) 19 R. 209; *Mein v. Ottman*, (1904) 6 F. 276; *Glasgow Navigation Co., Limited, v. Iron Ore Co., Limited*, 1909 S. C. 1414; *Turnbull v. Cruickshank*, (1905) 7 F. 791.

⁵ 9 App. Cas. 470.

⁶ 20 R. 414.

⁷ 7 F. (H. L.) 126.

⁸ *Carver, "Carriage by Sea,"* 5th ed., secs. 252 and 257 (a).

Part of the cargo of coals that the ship was meant to take was what is Nov. 30, 1911. known as "doubles," and "doubles" is a small coal which is got by riddling "Arden" the coal, the larger coal being sold under another name. The reason that Steamship the cargo was not ready was that the set of eleven collieries, to which, Co., Limited, through an agent in Glasgow, the order by the charterers had been given for v. Mathwin & Son. a cargo, did not find it convenient to turn out at that moment quite enough Ld. President. "doubles" to complete the cargo of this vessel. They had taken the order, and if all things had gone in an ordinary way as suited them there would have been plenty of coal to supply the order; but some vessels which were intended to take the "round" (that is to say, the larger) coal did not arrive, and, accordingly, the collieries, for their own convenience, and in order to avoid binging, refused to bring up more coal till they could get the "round" coal away, and consequently they were unable to produce enough "doubles" to complete the cargo of the "Arden."

It is not disputed that there was delay over and above the sixty running hours allowed by the charter, and the present action is for demurrage. The Sheriff-substitute has assoilzied the defenders upon the ground that they were excused under the clause I have just read to your Lordships.

I do not agree with the learned Sheriff-substitute. Each of these cases must be taken upon its own clause, but I think it is amply settled that, *prima facie*, there is an absolute duty upon a charterer to provide a cargo, and if he fails in that duty he undoubtedly will have to pay demurrage. Doubtless the charter after all is a bargain, and the charter-party might be so framed as to give an excuse from this duty of providing a cargo. But if that is to be so, the excuse must be very clearly expressed in the charter, because, unless this is very clearly expressed, the duty is, as I have phrased it, an absolute duty.

Now, coming to the clause in question, the argument turned upon two points. First of all, it was said that the cause of delay here was a stoppage at the colliery. I do not think it was, because I think I am entitled to interpret "stoppage at collieries" according to what I conceive to be the ordinary meaning of the phrase when used colloquially or in an ordinary commercial document, and I do not think a colliery is said to be stopped when, for its own purposes, and only for a few hours at a time, it does not choose to put out a certain class of coal. The colliery had not stopped. Stoppage in the ordinary sense implies something that compels the owner of the colliery to suspend his operations, such as a general strike of the men who are working, or a breakdown of the machinery, or an inrush of water into the pit. All these things cause stoppage of a colliery, but I do not think a colliery is stopped when simply one or more of its pits are purposely kept idle because enough ships are not available to carry away one class of coal they produce.

The other portion of the clause which was founded on is "any accidents or cause beyond the control of the charterers which may prevent or delay the loading." Now, I think the whole of this expression is governed by the concluding words, "which may prevent or delay the loading." I think it is amply settled by authority that loading is one thing and providing a cargo is another, and an accident which may prevent a cargo coming forward is not to be construed as an accident which delays the loading,

Nov. 30, 1911. although, of course, unless the cargo is forward the loading cannot go on.
 "Arden"
 Steamship Co., Limited,
 v. Mathwin & Son.

Ld. President.

I think that distinction is most absolutely taken in the case of *Gardiner v. Macfarlane, M'Crindell, & Company*,¹ in a very clear judgment of the Lord Ordinary (Lord Low) in this Court, and also in the case of *Grant & Company v. Coverdale, Todd, & Company*,² in the House of Lords. The latter was a case where it was a question of frost delaying the loading, and the frost froze up the canals by which coals were to arrive at the wharf; no coals came, and it was held that there was no delay in loading, the delay having been in the supplying of the cargo. I think the authorities are clear on this point, and therefore I do not think the charterers escape under this clause of the charter-party. It seems to me that here they took their risk. As matter of fact, they did not make any contract by which they could be certain that the coals would come within the time they wanted them. I am not keeping out of view the fact that the representative of the Fife Coal Company stated that if he had been asked for a guarantee he would not have given one. That is his affair, and the charterers' affair. It seems to me that the charterers were under an absolute obligation to provide a cargo, and that they were not relieved of that obligation by the exception in the charter-party with regard to loading. If they were to have the benefit of that exception it should have been clearly stated in the charter-party that non-providing of a cargo was to be in the same position as delay in loading.

Upon the whole matter, I think the Sheriff-substitute's interlocutor must be recalled.

LORD JOHNSTON.—I concur in holding that the Sheriff-substitute is not well founded in his seventeenth finding in fact and in his consequent finding in law.

The undoubted rule of law is, as stated by Lord Blackburn, that "In the absence of something to qualify it, the undertaking of the merchant to furnish a cargo is absolute"—*Postlethwaite v. Freeland*.³ In the present case sixty hours were allowed for loading, but as cargo was not timeously furnished a much longer time was required. But there were qualifying words in the charter-party in question commencing with "Time not to count." Before examining these words and determining their effect, I think that it is necessary to advert to the fact that there are two possible occasions of delay in loading—first, the non-furnishing of cargo; and second, the tardiness of actual loading. The qualifying clause provides for both these occasions, but it must not be run together as if the whole of it applied to either or both. The first limb of the sentence is, "Time not to count on any general holiday, &c., nor in case of pitmen or other hands striking work, or lockouts, railway detention, or delays through stoppage at collieries with which steamer is booked to load." The different categories of delay have clearly a bearing on the charterer's obligation to furnish cargo, and excuse him for the consequent delay which may occur.

The second limb of the sentence is, "Nor from riots, frost, floods, or any

¹ 20 R. 414.

² 9 App. Cas. 470.

³ (1880) 5 App. Cas. 599, at p. 620.

accidents or cause beyond control of the charterers which may prevent the loading." These different categories of delay have equally clearly a bearing not on the furnishing, but on the loading of the cargo. I am not prepared to restrict "any accidents or cause" to such as are *ejusdem generis* with "riots, frost, or flood." But I agree that they must be accidents or causes beyond the control of the charterers, and they must be such as prevent the loading of a cargo, already furnished, proceeding in ordinary course.

If this be a sound construction of the charter-party, the charterers cannot take benefit from the last part of the exception, for nothing happened to prevent or delay loading. Nor can they take benefit from the first part of the exception, unless they can bring their case under the head of stoppage at the colliery. But stoppage at the colliery must have its ordinary and natural meaning in the collocation in which it is found. There is stoppage of a colliery where accident occurs to pithead machinery, or in the underground workings, or from similar causes, but not where the owners resort for their own purposes to short time or other device temporarily to reduce their output. That is all that the charterers can point to here.

I think, therefore, that the charterers are responsible, not for delay in the loading, but for failure in furnishing a cargo. The case is very similar to *Gardiner's case*¹ and to the "*Arden*" Steamship Company v. Weir.²

The Lord President intimated that LORD SKERRINGTON, who was absent at advising, concurred.

THE COURT pronounced this interlocutor:—"Sustain the appeal: Recall the interlocutor of the Sheriff-substitute, dated 29th November 1910: Of new find in fact in terms of the findings in fact Nos. (1) to (16) inclusive in said interlocutor: Find further in fact (17) that the delay in loading arose from causes for which the charterers are not excused under the charter-party; and (18) that the demurrage amounted to 134 hours 53 minutes: Find in law that, in respect that the detention of the vessel beyond the stipulated loading time was not excused by the terms of the charter-party, the defenders are liable in damages: Therefore decern against the defenders for payment to the pursuers of the sum of £112, 8s. 1d.," &c.

MARTIN, MILLIGAN, & MACDONALD, W.S.—CAMPBELL FAILL, S.S.C.—Agents.

THE MURRAYFIELD REAL ESTATE COMPANY, LIMITED, Petitioners
(Respondents).

No. 35.

LORD PROVOST, MAGISTRATES, AND COUNCIL OF THE CITY OF EDINBURGH, Dec. 2, 1911.

Respondents (Appellants).—*G. Watt, K.C.*—*W. J. Robertson.*

Public Health—Housing—"Back-to-back houses"—Burgh—Housing, Town Planning, &c., Act, 1909 (9 Edw. VII. cap. 44), sec. 43.

Murrayfield
Real Estate
Co., Limited,
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In a petition to a Dean of Guild Court for warrant to erect a block of three-storied tenements,—each storey containing four dwelling-houses, two to the front and two to the back—it appeared from the plans produced that in the centre of each tenement there was a space or well containing a common stair which was roofed over, and that all the

¹ 20 R. 414.

² 7 F. (H. L.) 126.

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houses in each tenement entered from this well. It also appeared that in each storey the division between the front and back houses was formed by the walls enclosing the well in the centre and by an unbroken wall common to the front and back houses on each side of the well.

Held that the proposed houses were "back-to-back houses" within the meaning of sec. 43 of the Housing, Town Planning, &c., Act, 1909, which prohibits the erection of such houses as dwellings for the working classes; and that warrant for their erection fell to be *refused*.

2D DIVISION.
Dean of Guild
Court, Edin-
burgh.

THE MURRAYFIELD REAL ESTATE COMPANY, LIMITED, presented a petition to the Dean of Guild Court of Edinburgh for warrant to erect four tenements, of three storeys each, of dwelling-houses at Piersfield on the west side of Piersfield Grove, Edinburgh, conform to plans produced.

Answers were lodged by the Lord Provost, Magistrates, and Council of the City of Edinburgh in which they pleaded;—Warrant should be refused with expenses to the respondents in respect that (a) the warrant craved is for the erection of back-to-back houses in contravention of the provisions of section 43 of the Housing, Town Planning, &c., Act, 1909,* and (b) that the petitioners have not made sufficient provision for light and ventilation for the proposed tenements.

In their statement of facts the Magistrates averred:—"The four tenements which the petitioners propose to erect on the west side of Piersfield Grove are to consist of three storeys each. The plans produced with this petition show that it is intended to have four houses on each flat—two houses to the front and two houses to the back. Each of the two houses to the front is divided from the adjacent house to the back by an unbroken and continuous centre wall, which prevents effective through ventilation. The houses on the two upper storeys all enter from the staircase which is to be constructed in the centre of each tenement. Their only ventilation is (1) from their respective windows to front or back as the case may be, and (2) from the said staircase, which, together with the passage at the foot thereof, is common to twelve separate residences, and is roofed over with glass and unventilated at the top. The houses, therefore, are what are known as back-to-back houses."

In answer to this statement the petitioners averred:—"Denied that said houses are known as back-to-back houses, or are similar in design and arrangement to houses which are so known. *Quoad ultra* admitted

* The Housing, Town Planning, &c., Act, 1909 (9 Edw. VII. cap. 44), enacts:—Sec. 43. "Notwithstanding anything in any local Act or bye-law in force in any borough or district, it shall not be lawful to erect any back-to-back houses intended to be used as dwellings for the working classes, and any such house commenced to be erected after the passing of this Act shall be deemed to be unfit for human habitation for the purposes of the provisions of the Housing Acts. Provided that nothing in this section (a) shall prevent the erection or use of a house containing several tenements in which the tenements are placed back-to-back, if the medical officer of health for the district certifies that the several tenements are so constructed and arranged as to secure effective ventilation of all habitable rooms in every tenement; or (b) shall apply to houses abutting on any streets the plans whereof have been approved by the local authority before the first day of May nineteen hundred and nine, in any borough or district in which, at the passing of this Act, any local Act or bye-laws are in force permitting the erection of back-to-back houses."

under the explanation that the plans permit of the through ventilation of each house and also of the common passage and staircase. The petitioners are willing, if required, to amend said plans by the introduction of a ventilator at the top of the staircase."

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They also averred:—"The petitioners deny that the houses proposed to be erected by them are back-to-back houses in the meaning of the said Act. Such houses are invariably formed by the introduction in a tenement, consisting of two houses only, of a continuous longitudinal centre wall, the doorways of the respective houses not communicating with each other, and entering from different streets formed on either side of the tenement. The petitioners' plans show no such wall. The houses are all entered from one street by a common passage, which is carried through the tenement to the back-green, common to the tenants and occupiers, and, as regards the upper flats, by a common stair, which is lit from the roof."

The Magistrates also referred to section 49 of the Edinburgh Municipal and Police Amendment Act, 1891, as amended by section 80 of the Edinburgh Corporation Act, 1900,* and averred that the petitioners' plans did not make sufficient provision for the light and ventilation of the tenements, in respect that (a) the common stair was lighted only from the roof; and (b) that there was no provision for through ventilation of the houses in the tenements.

On 16th February 1911 the Dean of Guild repelled the plea in law for the Magistrates, and granted warrant in terms of the prayer of the petition.†

* The Edinburgh Municipal and Police (Amendment) Act, 1891 (54 and 55 Vict. cap. cxxxvi.), sec. 49 (as amended by the Edinburgh Corporation Act, 1900 (63 and 64 Vict. cap. cxxxiii.), sec. 80), enacts:—" . . . The Dean of Guild Court may decline to grant warrant for the erection of any house or building, or for the alteration of any existing house or building, until the said Court is satisfied that the plans provide suitably for strength of materials, stability, mode of access, light, ventilation, water-closets, and water supply, and other sanitary requirements, and are otherwise in conformity with the provisions of the Edinburgh Municipal and Police Acts."

† "NOTE.— . . . In considering the question of the applicability of clause 43 of the 1909 Act, the first question which the Dean of Guild Court had to consider was whether the term 'back-to-back' houses was known either in Edinburgh or in Scotland as a description of a certain class of house. The unanimous answer of all the members of the Court was that it was an unknown term.

"The petitioners supplied to the Court some information as to the nature of back-to-back houses in England, and this information was corroborated by the Master of Works, who has had English experience.

"It appears that back-to-back houses in England are built in terraces, and the buildings have a solid party wall running parallel to two terraces, and the houses are built on each side of this party wall, one set of houses facing one terrace and the other set facing the other. In such houses the means of ventilation is from the front of the house except in the case of the houses at the end of the terraces where there is ventilation on the front and one side.

"The Court having thus been informed of what back-to-back houses in England are, they considered whether the houses in the present case were back-to-back houses in the English sense, and they came to the conclusion that they were not; because in the proposed houses there is ventilation not only from the front of the houses but also into the well of the staircase at the back of the houses, although there is no ventilation from open air to

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The Magistrates appealed, and the case was heard before the Second Division (without the Lord Justice-Clerk) on 2nd December 1911. No appearance was made for the petitioners at this hearing.

Argued for the appellants;—(1) The houses for which warrant was sought were “back-to-back houses” within the meaning of sec. 43 of the Housing and Town Planning Act, 1909. As the term “back-to-back” was not defined in the Act, it must be interpreted in the ordinary and popular sense; and in ordinary usage houses were said to be “back-to-back” if three sides of each house, as here, formed party-walls of the adjoining houses so that the house could be ventilated only from one side.¹ The object of sec. 43 was to prevent the erection of houses without sufficient provision for ventilation; and here the Dean of Guild in his note stated that in the proposed tenements proper ventilation could not be obtained. The provisos (a) and (b) in the section did not apply here. In point of fact the medical officer of health had refused to grant the certificate required by proviso (a), and there were no provisions in any local Acts or bye-laws which could bring the case under proviso (b). (2) In the circumstances the Dean of Guild was bound to refuse the warrant in view of the terms of the local Acts referred to by the appellants. It was true that the language of these Acts was permissive, and purported to confer a power only, but where a duty was coupled with a power, as here, a statutory provision was held to be obligatory.²

open air as there is in the case of houses running from the front to the back of a tenement. In these circumstances, the Court considered section 43 of the Housing Act of 1909 was inapplicable, and that they could not refuse warrant on the ground that the houses would be back-to-back.

“The Court then considered what was the principal objection intended to be struck at by the 43rd section of the Housing Act of 1909, and they were unanimously of opinion that it was defective ventilation. They further considered that the system of having four houses on each floor as proposed in the present plans is objectionable from the point of view of ventilation, because proper ventilation cannot be obtained merely by means of the well of a staircase like that in the plans before the Court.

“In these circumstances the Court had to consider whether they should exercise the powers conferred upon them by section 49 of the Edinburgh Municipal and Police (Amendment) Act, 1891, as amended by section 80 of the Edinburgh Corporation Act, 1900. If the power conferred by these sections had been conferred upon the Court recently the Court would have had no hesitation in rejecting the present plans; but, during the time these enactments have been in force, the Court have passed many similar plans to these in question, and have previously authorised similar buildings on the petition of the present petitioners in the same street, where the proposed buildings will be situated.

“In these circumstances, the Court considered that it was undesirable to exercise the power conferred upon the Court, and they therefore resolved that, subject to certain amendments of detail, the petitioners’ plans should not be rejected on the second ground pled by the respondents.

“At the same time the Court take this opportunity of intimating that in the case of future proposals possessing the features shown on the plans now under review but unattended with the specialty of the present case they reserve to themselves the right to refuse plans showing four houses to the flat. . . .”

¹ Howkins’ *The Housing Acts and Town Planning*, p. 109.

² *Julius v. Lord Bishop of Oxford*, (1880) 5 App. Cas. 214; *Nichols v. Baker*, (1890) 44 Ch. D. 262.

LORD DUNDAS.—This is an application made by the Murrayfield Real Estate Company, Limited, to the Dean of Guild Court in Edinburgh for a warrant to erect certain buildings upon property which, I understand, admittedly belongs to themselves. They propose to erect four tenements on the west side of Piersfield Grove which are to consist of three storeys each, with four houses on each flat ; and we have before us the plans which show very clearly what the general nature of the proposed houses is to be. We see that there are to be two houses to the front and two to the back, and that the houses to the front are separated from the houses to the back by a centre wall in which there are only certain door openings which lead into a common well.

The petition was opposed in the Court below by the Corporation of Edinburgh upon grounds of public policy and public duty. The Dean of Guild repelled the objections of the Corporation, and the Corporation have appealed to us. No appearance has been made at the bar on behalf of the respondents. This is to be regretted, because we have not had the advantage of any argument by counsel in support of the view taken by the Dean of Guild in the Court below ; but we have had the case very fairly stated to us by counsel for the Corporation, and I think we are in a position to give judgment upon it.

It seems to me that the Dean of Guild has erred. The main ground of objection taken by the Corporation is that the houses proposed are back-to-back houses within the meaning of section 43 of the Housing and Town Planning, &c., Act, 1909 (9 Edw. VII. cap. 44). That section provides :—“Notwithstanding anything in any local Act or bye-law in force in any borough or district, it shall not be lawful to erect any back-to-back houses intended to be used as dwellings for the working classes ; and any such house commenced to be erected after the passing of this Act shall be deemed to be unfit for human habitation for the purposes of the provisions of the Housing Acts.” Then follow two provisos which I need not read, because it has been explained satisfactorily that neither of them applies to the present case. The first proviso excludes cases where the medical officer of health for the district certifies that the tenements will secure effective ventilation ; and we are told here that not only has no certificate been produced, but that a certificate has been refused. The other proviso deals with the case of there being any local Act or bye-laws in force permitting the erection of back-to-back houses ; and we are told that no such local Act or bye-laws here exist.

That brings one to consider what are back-to-back houses within the meaning of section 43. The phrase is not defined by the interpretation clause of the Act. We are informed by the Dean of Guild that the phrase is not known in the building trade in Scotland. The Dean of Guild seems to have considered, therefore, that it was something of a technical phrase, and that he must discover the meaning of it elsewhere. He obtained information with regard to the meaning or application of the phrase “back-to-back houses” in England, with the view, apparently, of discovering from English practice or experience what the technical or special import of the phrase was. He states in his note :—“It appears that back-to-back houses in England are built in terraces, and the buildings have a solid party wall

Dec. 2, 1911. running parallel to two terraces, and the houses are built on each side of this party wall, one set of houses facing one terrace and the other set facing the other." Then he says the houses here are not of the description known in England as back-to-back houses, and concludes that therefore they do not fall within the phrase "back-to-back houses" as used in the Act.

Lord Dundas. I cannot think that that is a satisfactory or exhaustive way of dealing with the matter. These houses may, I should think, be back-to-back houses within the meaning of the Act, although they do not correspond precisely to what are known in England as back-to-back houses. I do not think the phrase is a technical one; it appears to me rather to be used in the Act in a popular and general sense. I apprehend that if it had been intended to have a definite and restricted meaning, it would have been specially so defined by the Act. I do not propose to attempt any definition of what back-to-back houses may mean—an attempt which has not been made, probably wisely, by Parliament—but looking at the plans and considering the description of the houses given, it does seem to me clear enough that the front houses and the back houses do stand to one another in the relation of back-to-back houses.

Now, we have it from the Dean of Guild,—to whose practical knowledge and experience we should, of course, pay the greatest deference,—that his Court "considered what was the principal objection intended to be struck at by the 43rd section of the Housing Act of 1909, and they were unanimously of opinion that it was defective ventilation." That is matter of legal construction. But he goes on to say: "They further considered that the system of having four houses on each floor as proposed in the present plans is objectionable from the point of view of ventilation, because proper ventilation cannot be obtained merely by means of the well of a staircase like that in the plans before the Court." Now, it seems to me that is just the main objection which section 43 of the new Act had in view when it prohibited back-to-back houses. I therefore feel less difficulty in differing from the Dean of Guild's conclusion about the matter, because we have it from himself that the system of ventilation shown in the plan is objectionable; and I think, when one takes that objection and reads section 43 in the light of it, one must reasonably conclude, without attempting any general definition of the phrase, that the proposed buildings are back-to-back houses within the meaning of the section.

It is unnecessary, therefore, to consider the further objection stated by the Town, which is founded upon their own Municipal Acts—section 49 of the Act of 1891 as amended by section 80 of the Act of 1900,—and I prefer to offer no opinion as to the manner in which that objection was dealt with in the Dean of Guild Court. I propose that we should recall the deliverance of the Dean of Guild and remit to him to refuse the warrant asked.

LORD SALVESEN.—I am of the same opinion. There is no interpretation clause in the statute defining what are back-to-back tenements. I assume from the absence of such a clause that there is no technical meaning attached to the phrase; and, that being so, we must apply our own minds to the question whether the tenements for which a warrant is asked are, in an

ordinary and reasonable sense of the term, back-to-back tenements. If they are, then we must, following the Act of Parliament, exercise our jurisdiction over the Dean of Guild Court to prevent it granting a lining for buildings which the Act of Parliament has, in the public interest, declared to be illegal. That is, to my mind, a quite sufficient ground of judgment in this case. I do not find it necessary to express an opinion in regard to the other matter to which your Lordship has referred.

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LORD GUTHRIE.—I am of the same opinion. It seems to me that the Dean of Guild states the question correctly when he says that it is whether these houses are back-to-back houses within the meaning of section 43 of the Act of 1909. It is quite clear from the first proviso that the object of the Act was to secure effective ventilation of the habitable rooms in every tenement. Back-to-back houses, if one may attempt a definition, are houses facing opposite ways and with one common back wall. I am not prepared to say that there might not be houses which would correspond to that definition but which still would not be back-to-back houses within the meaning of section 43. Mr Robertson suggested that you might have back-to-back houses with ventilating flues going from front to back, which would be perfectly sufficient for securing the effective ventilation of the habitable rooms in every tenement; and if the Dean of Guild were to be of opinion that houses constructed as proposed here, but providing for through ventilation by means of such flues, secured effective ventilation, and if this were certified by the medical officer of health, then it might be that such houses would fall under proviso (a) of the section, and not within the prohibition of back-to-back houses in the leading portion of the section. That is excluded here, because the medical officer of health has refused to certify the houses, and the Dean of Guild has found that they have no through ventilation at all, the attempt to provide any through ventilation by means of the well of the staircase being quite insufficient. I therefore concur in the judgment proposed.

THE COURT pronounced the following interlocutor:—" . . . Sustain the appeal, and recall the said interlocutor appealed against; sustain the first branch of the plea in law for the respondents; remit to the said Dean of Guild to refuse a lining to the petitioners for the erection of the proposed four tenements of three storeys each at Piersfield, all as shown on the plans lodged in process, and decern."

DEAS & Co., W.S.—SIR THOMAS HUNTER, W.S.—Agents.

No. 36. GEORGE WILLIAM SMITH, Pursuer (Respondent).—*M'Clure, K.C.—Normand.*

Dec. 5, 1911. JAMES WALKER, Defender (Reclaimer).—*G. Watt, K.C.—D. Anderson.*
 Smith v. Walker. *Reparation—Slander—Innuendo—Failure to aver facts and circumstances supporting innuendo.*

In an action of damages for slander the pursuer founded on a sentence taken from a letter written by the defender, and innuendoeed it as charging him with a fraudulent attempt to obtain money. He maintained that he could prove facts and circumstances which would substantiate this innuendo, but in his record he did not state what these facts and circumstances were, nor did he quote any part of the letter except the single sentence complained of.

The Court *refused* an issue on the ground (1) that the sentence complained of was not *prima facie* slanderous, and (2) that the pursuer was not entitled to an opportunity of proving facts and circumstances which would give to that sentence a slanderous meaning without specifically averring them, and without producing the rest of the letter in which the sentence occurred.

1ST DIVISION. ON 17th August 1911 George William Smith, a turf commission-
 Lord Cullen. agent in Leeds, carrying on business under the name of George Drake, brought an action of damages for slander against James Walker, a licensed publican in Aberdeen.

The pursuer averred :—(Cond. 2) “On or about 2nd June 1911 the defender was introduced personally to the pursuer by Robert Evans, turf commission-agent, at Epsom races, where the pursuer was carrying on business under his trade name. The said introduction was for the purpose of enabling the defender to bet with the pursuer on credit, and the pursuer relying on the recommendation of the said Robert Evans, did enter into certain betting transactions on credit with the defender, as a result of which the defender became indebted to the pursuer to the amount of £95. The pursuer subsequently rendered to the defender an account for the said transactions, a copy of which is herewith produced and referred to.” (Cond. 3) “In a letter dated 12th June 1911, and addressed and sent to the said Robert Evans, the defender wrote, ‘As regards your friends Lee & Drake, neither of whom I have had the distinguished, I may say the very distinguished, pleasure of meeting, and as I always bet with the ready only on the racecourse, I think it rather out of place for them to send alleged accounts to me.’” (Cond. 4) “The said statements in the said letter, written and sent by the said James Walker to the said Robert Evans, were written of and concerning the pursuer, and are false, malicious, and calumnious. By said statements the said James Walker represented, and intended to represent, that the pursuer, though well knowing that no betting transactions had ever taken place between him and the defender, had attempted to obtain money by fraudulently presenting to the defender accounts showing a balance due by the defender on certain betting transactions. Further, the said statements represented and were intended to represent that the pursuer, having received full and final payment in ready money from the defender of all sums due to him in respect of any transactions between them, relying on the absence of any receipt, was endeavouring fraudulently to obtain a second payment from the defender in respect of the same transactions. The said statements were calculated to injure, and did

injure, the pursuer in his professional reputation, and being published Dec. 5, 1911. to a third party, are defamatory according to the law of England."

The defender admitted that the letter complained of was written by him to Evans, but denied his alleged indebtedness to the pursuer, and averred in answer:—"The defender never had any transaction with the pursuer. He is not aware of ever having met him, and does not know him." Smith v.
Walker.

The defender pleaded, *inter alia*;—(1) The pursuer's averments are irrelevant and insufficient to support the conclusions of the action. (2) The defender not having slandered the pursuer is entitled to absolvitor.

On 15th November 1911 the Lord Ordinary (Cullen) approved of the following issue for the trial of the cause:—"Whether on or about 12th June 1911, the defender did write and send to Robert Evans a letter containing the following words, viz.:—"As regards your friends Lee & Drake, neither of whom I have had the distinguished, I may say the very distinguished, pleasure of meeting, and as I always bet with the ready only on the racecourse, I think it rather out of place for them to send alleged accounts to me," and whether the whole or any part of the said words are of and concerning the pursuer, and were meant and intended to represent, and did falsely and calumniously and injuriously represent, that the pursuer was attempting to obtain money from the defender by presenting fraudulent accounts to him showing sums due by the defender on alleged betting transactions between the pursuer and the defender, to the loss, injury, and damage of the said pursuer? Damages laid at £500."

The defender reclaimed, and the case was heard before the First Division (consisting of the Lord President, Lord Kinnear, and Lord Ormidale) on 5th December 1911.

Argued for the reclamer;—Without putting an unreasonable and strained interpretation on the sentence of the letter complained of it could not be regarded as doing more than denying that the alleged accounts were due. Such a denial was not slanderous, and therefore the words complained of contained no issuable matter. The issue allowed in the case of *Blasquez v. Lothians Racing Club and Reid*¹ was distinguishable from the issue in the present case, because the issue here sought depended upon an innuendo which the words complained of would not bear.

Argued for the respondent;—The slanderous meaning which the words complained of bore had been distinctly stated, and it was not necessary that extrinsic facts should be averred from which that meaning was to be inferred.² The language of the letter was not unambiguously innocent, and it was a question for a jury to consider, in the light of facts and circumstances which would be proved, whether it bore the innuendo that the pursuer put upon it.²

LORD PRESIDENT.—This is an action at the instance of George William Smith, a turf commission-agent, against James Walker, a licensed publican carrying on business in Aberdeen. The pursuer sets forth that he is a turf commission-agent—which, in common parlance, is a bookmaker—and that

¹ (1889) 16 R. 893.

² *Sexton v. Ritchie & Co.*, (1890) 17 R. 680.

³ *Mackay v. M'Cankie*, (1883) 10 R. 537, L. P. Inglis, at p. 539; *Blasquez v. Lothians Racing Club and Reid*, 16 R. 893.

Dec. 5, 1911. he carries on business under the name of George Drake. He then sets forth
Smith v. that on a certain date in June 1911 the defender was introduced personally
Walker. to him by Robert Evans, another turf commission-agent, at the Epsom races,
Ld. President. and he says that he entered into certain betting transactions on credit with
the defender. The defender denies that betting transactions were entered
into, but of course at this moment we must take it that the pursuer's state-
ment is correct. Then in the next condescendence the pursuer says: "In
a letter dated 12th June 1911, and addressed and sent to the said Robert
Evans, the defender wrote"—he does not quote the whole letter, but he
simply takes this quotation—"‘as regards your friends Lee & Drake,
neither of whom I have had the distinguished, I may say the very dis-
tinguished, pleasure of meeting, and as I always bet with the ready only
on the racecourse, I think it rather out of place for them to send alleged
accounts to me.’" The letter is admitted to have been transmitted. Upon
that the pursuer raises an action of damages for slander against the defender,
and an issue has been granted by the Lord Ordinary which runs thus—[His
Lordship quoted the issue].

I am of opinion that that issue ought not to be granted. The law upon
this matter is, I think, perfectly well settled, and I might quote many cases
in which it has been laid down, but I will take one in the House of Lords.
It is an English case, but in this matter there is no distinction between the
law of England and the law of Scotland, and the words I take are those of Lord
Selborne, the Lord Chancellor, in the case of the *Capital and Counties Bank*
v. Henty.¹ Lord Selborne says there: "In *Sturt v. Blagg*,² Wilde, C. J.,
said: 'It is the duty of the Judge to say whether a publication is *capable* of
the meaning ascribed to it by an innuendo: but, when the Judge is satisfied
of that, it must be left to the jury to say whether the publication has the
meaning so ascribed to it.'" There the quotation ends, and Lord Selborne
proceeds in his own words: "If the Judge, taking into account the manner
and the occasion of the publication and all other facts which are properly in
evidence, is not satisfied that the words are capable of the meaning ascribed
to them, then it is not his duty to leave the question raised by the innuendo
to the jury." And then he goes on, in a sentence I need not quote, to say
that there must be something which, to a reasonable mind, would suggest
the innuendo. It therefore always comes to be this, if the words are not
slandrous in themselves, and an innuendo is suggested, does the Court
think that the words are reasonably capable of sustaining that innuendo?

I am of opinion here that the words are not reasonably capable of sustain-
ing the innuendo. I think when you say, "I am a person who always bets
in ready money, and therefore it is absurd for anyone to send me accounts
for an alleged debt," you show, of course, perfectly clearly that you repudiate
the idea of owing anything; but you do not seem to me to say anything
which can be reasonably construed into an averment that the attempt to say
that you did owe something was a fraudulent attempt.

Now, I think that as the argument developed, Mr M'Clure was driven to
admit that, if you take the mere words as they stand, that view is correct.

¹ (1882) 7 App. Cas. 741, at p. 744.

² (1847) 10 Q. B. (Adolphus & Ellis), 906, at p. 908.

But his argument was this. He said: "If I am allowed to prove all the surrounding circumstances of these people, I shall show that it was not unreasonable to take this meaning out of the words, and I cannot do this unless I have the opportunity of submitting the circumstances to a jury." I do not doubt that Mr M'Clure, so far, was perfectly right; that is to say, that you may, by bringing in extraneous facts and circumstances, give a point to words which without these extraneous facts and circumstances they would not bear, but which in the light of these extraneous facts and circumstances they may bear.

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But then I think the facts and circumstances must be there. In other words, going back again to Lord Selborne, it is "taking into account the manner and the occasion of the publication and all other facts which are properly in evidence." I need not remind your Lordships that, of course, the English method of jury trial is different from ours. There is no issue. Demurrer in such cases is unknown. The case goes to trial, and the question that we are now trying is not tried, as here, upon a question of granting an issue, but is tried and concluded at the trial itself; and it resolves itself into a consideration by the presiding Judge whether he shall take away the case from the jury or not, that is to say, whether he shall say to the jury, "Well, now, gentlemen, consider if these words reasonably can bear the innuendo," or whether he shall say to the jury, "I tell you that, inasmuch as I am of opinion that the words will not reasonably bear the innuendo, there is nothing more for you to do except to return a verdict for the defendant." Now, applying that to our practice, we have got to do that at the stage of approving the issue. And, accordingly, if you translate Lord Selborne's words "taking into account the manner and the occasion of the publication and all other facts which are properly in evidence" into words which exactly fit our practice, you must substitute for the words "properly in evidence" the words "which are properly averred on record."

Now, when I come to the record, I find no averment of that sort; there is a mere naked averment. And I also find this—that even the whole letter is not put forward. It might have been possible to put a colour upon the words from the position that this sentence occupied in the letter. If I may use the expression—colloquial, perhaps, more than literary—if a thing is brought in by the head and the heels, it is of course very much easier to show that it has a sinister meaning than if it comes in its place in the context in the natural course of the letter. If I might be permitted to make a guess about this quotation, it looks like an answer to something said before, but that, of course, I cannot tell. If, however, there was colour to be got from the facts and circumstances, the pursuer ought to have set them forth. Instead of doing that, he takes out of the letter this little sentence, harmless in itself, and says: "If you will allow me to prove all I want to prove, I think I can show it has a sinister meaning." In my opinion he cannot be allowed to do that, and I think the innuendo cannot reasonably be taken out of the words as they stand.

My view, accordingly, is that the interlocutor of the Lord Ordinary ought to be recalled, and that the action should be dismissed.

LORD KINNEAR.—I am of the same opinion. I think that the words

Dec. 5, 1911. **Smith v. Walker.**
 Lord Kinnear. complained of will not reasonably bear the meaning the pursuer puts upon them. He takes a single sentence out of a letter, and upon the words of that sentence he alleges that he has a good action for slander. The sentence taken by itself seems to me to come to no more than a rather more peremptory version of what the defender says in stating his position upon record, because the pursuer begins by alleging that he had a transaction with the defender as the result of which the defender became indebted to him to the amount of £95, and the answer is that the defender never had any transaction with the pursuer; he is not aware of ever having met him, he does not know him, and he denies that the account is due. Now, if there is ground for that defence, it is a perfectly relevant statement which a man is entitled to make when he is asked for money that he denies to be due.

I think it very possible that words, in themselves apparently innocent, may be shown to have a slanderous meaning when they are read with reference to the circumstances in which they were uttered or written, or with reference to the context in which they occur. But then, if the pursuer intends to make a case to justify an innuendo upon these grounds, he is bound relevantly to allege the circumstances which he says tend to show the meaning of the words complained of; and above all, he is bound to produce the whole document out of which he has chosen to pick a single sentence to form the subject of this complaint. I think there is no relevant averment here of any fact which would enable a jury to put a different meaning upon the words than the innocent meaning which they naturally bear; and, if the pursuer intended to make a complaint of slander from the use of language in one sentence of a letter, he was bound to give us the context in which it occurred as well as the particular sentence of which he complained. I therefore agree with your Lordship that there should be no issue.

LORD ORMIDALE concurred.

THE COURT dismissed the action.

MACKENZIE & KERMAK, W.S.—JAMES A. B. HORN, S.S.C.—Agents.

No. 37.
 Dec. 8, 1911.
 Mitchell
 Innes'
 Trustees v.
 Mitchell
 Innes.

GEORGE DALZIEL AND OTHERS (Mitchell Innes' Trustees),
 First Parties.—*Macphail, K.C.—Hon. W. Watson.*
 ISABELLA MITCHELL INNES AND OTHERS, Second Parties.—
Blackburn, K.C.—Pitman.

Process—Special case—Competency—No real contention between the parties—Trust—Power to sell.

A special case, to which the parties were the trustees on a trust-estate and the beneficiaries interested in the estate, was brought to determine a question as to the trustees' power to sell certain heritable subjects, the trustees maintaining that they had no such power, the other parties maintaining that they had. All the parties, however, were agreed that a sale would be expedient.

The Court, following *Galloway v. Campbell's Trustees*, (1905) 7 F. 931, held that, although there was no real contention between the parties, the special case was competent; and answered the question.

ON 25th May 1911 a special case was presented for the opinion and judgment of the Court on a question as to the power of the trustees of the late Thomas Shairp Mitchell Innes to sell the estate of Phantassie. Dec. 8, 1911.
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The *first parties* to the case were the trustees, and the *second parties* were all the beneficiaries interested in the trust-estate.

The case stated as follows:—"The first parties are satisfied that it would be in the best interests of the trust-estate to sell the estate of Phantassie, and the second parties are desirous that the first parties should do so. A question, however, has arisen as to whether the power of sale conferred by the trust-disposition and settlement extends to the estate of Phantassie, and the first parties are not prepared to sell without having the matter judicially determined; further, it is necessary to have this judicially determined in order to satisfy intending purchasers, and to enable the first parties to afford an unquestionable title to a purchaser. 1st Division.

"The first parties maintain that the general power of sale conferred on them by the trust-disposition and settlement does not extend to the estate of Phantassie, which is otherwise specifically dealt with throughout the deed. The second parties maintain that the power of sale conferred on the first parties extends to the whole trust-estate, including the estate of Phantassie, which was the only heritable estate left by the truster."

The question of law was:—"Are the first parties entitled, under the powers of sale conferred by the trust-disposition and settlement of the said Thomas Shairp Mitchell Innes, to sell the estate of Phantassie? or, otherwise, Are they entitled to do so with the consent of the beneficiaries?"

The case was heard before the First Division (without Lord Johnston) on 8th December 1911, when *Galloway v. Campbell's Trustees*¹ was referred to as an instance of similar circumstances in which the Court had answered such a question in a special case.

LORD PRESIDENT.—In this case, had it not been for the decision in *Galloway v. Campbell's Trustees*,¹ I should have had great doubt whether the question stated here could be competently raised in a special case, because parties are agreed as to the expediency of the sale, and there is no proper contention between them. But *Galloway v. Campbell's Trustees*¹ is a direct precedent, and I am prepared to follow it. On the merits I have no doubt whatever that the trustees have power to sell.

LORD KINNEAR.—I agree, but should like to add that though I think we must follow *Galloway v. Campbell's Trustees*¹ in this case, I still think that the Court must always be cautious in entertaining cases of this kind where there is no real litigation because, if any conflict of interest should arise hereafter of which we know nothing at present, our answer to this question will not be *res judicata*, and yet may embarrass the decision of a real question of disputed right. If, therefore, it seemed probable that a purchaser might object to the title, I would be against entertaining the question now. But, looking at the whole case, I agree with your Lordship that that is hardly a practical difficulty, because if a purchaser, which is

¹ (1905) 7 F. 931.

Dec. 8, 1911. hardly probable, should take objection, it would still be open to him to bring the question before the Court.

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LORD MACKENZIE concurred.

THE COURT answered the question of law in the case in the affirmative of its first alternative.

TODS, MURRAY, & JAMIESON, W.S.—J. & F. ANDERSON, W.S.—Agents.

No. 38. LEGGAT BROTHERS, Pursuers (Respondents).—*Horne, K.C.—Christie.*
GEORGE GRAY, Defender (Appellant).—*Crabb Watt, K.C.—Kemp.*
Dec. 9, 1911. MOSS' EMPIRES, LIMITED, Defenders.

Leggat
Brothers v.
Gray.

Sheriff—Process—Defences—Documents challengeable ope exceptionis—“Deed or writing”—Decree of Court—Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. cap. 51), First Schedule, Rule 50.

Rule 50 of the First Schedule to the Sheriff Courts (Scotland) Act, 1907, enacts:—“When a deed or writing is founded on by any party in a cause, all objections thereto may be stated and maintained by way of exception, without the necessity of bringing a reduction thereof.”

Held that a decree of Court pronounced *in foro* was not a deed or writing in the sense of this rule, and could not be objected to *ope exceptionis* in a Sheriff Court action.

Sheriff—Jurisdiction—Furthcoming—Arrestee subject to the jurisdiction—Whether jurisdiction must be founded against common debtor—Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. cap. 51), sec. 6, subsec. (g).

The Sheriff Courts (Scotland) Act, 1907, enacts, section 6:—“Any action competent in the Sheriff Court may be brought within the jurisdiction of the Sheriff . . . (g) where in an action of furthcoming or multiplepoinding the fund or subject *in medio* is situated within the jurisdiction; or the arrestee or holder of the fund is subject to the jurisdiction of the Court.”

Held, in construing this section, that an action of furthcoming may competently proceed in the Sheriff Court if the arrestee is subject to the jurisdiction, without the necessity of founding jurisdiction against the common debtor.

Observations as to the necessity of intimating to the common debtor that decree of furthcoming is being asked for.

1ST DIVISION. IN August 1910 an action of furthcoming was brought in the Sheriff Court at Glasgow by Leggat Brothers, printers there, against George Gray, a music-hall performer, residing in London, and Moss' Empires, Limited, a company having a place of business in Glasgow. Gray, the common debtor, held certain shares in that company which had been arrested by the pursuers, and the pursuers now sought to make these available in satisfaction of a debt due to them by Gray.

Sheriff of
Lanarkshire.

Defences were lodged by Gray, but Moss' Empires did not appear to defend the action.

The pursuers' averments, and the defender Gray's answers thereto, were as follows:—(Cond. 2) “The defender George Gray, by letter dated 1st December 1905, guaranteed to the pursuers a printing account by Richard Murray and Charles Mussett, sometime carrying on business as ‘Events Publishing Company’ in Glasgow.” (Cond. 3) “The defender George Gray, though called upon to make payment,

under said guarantee, to the pursuers, failed to do so, and on 15th Dec. 9, 1911. June and 4th July [1910] the pursuers obtained a decree *in foro* in the Sheriff Court of Lanarkshire at Glasgow, against the said George ^{Leggat} Gray for the sum of £125 sterling of principal, with interest thereon ^{Brothers v.} Gray. from 19th January 1910, and £20, 0s. 11d. of expenses. The extract decree is herewith produced." (Ans. 2 and 3) "Believed to be true that the pursuers raised an action against the defender George Gray in this Court. At the time said action was raised, and during the dependence thereof, there was no jurisdiction to entertain it. No such action was served upon him, and he gave no instructions to any one to defend such an action. The said decree is inept, irregular, and illegal, and the said decree does not constitute any debt against this defender. It is referred to for its terms, beyond which no admission is made. *Quoad ultra* denied." (Cond. 4) "On the dependence of said action the pursuers, on 18th February 1910, used arrestments in the hands of the defenders Moss' Empires, Limited. The execution of said arrestment is herewith produced." (Ans. 4) "The execution of arrestment is referred to for its terms, beyond which no admission is made. Explained that the said arrestments are inept, invalid, and illegal, in respect that they were used against a foreigner without jurisdiction having been constituted against him. Explained that the defender was not aware of said arrestment until the present action was raised, no notice of these or of any arrestments having been made to him." (Cond. 5) "Said arrestment attached, in the hands of Moss' Empires, Limited, 145 Preference Shares, as enumerated in the prayer of the petition, and 100 Ordinary Shares, as also enumerated in the prayer of the petition. The said shares belong to the defender George Gray, and are registered in his full name of George Herbert Gray." In answer to cond. 5 the defender denied that the shares alleged to have been arrested were his property, and averred that they belonged to the trustee under his marriage-contract.

The pursuers pleaded, *inter alia* ;—(1) No relevant defence. (4) The defender George Gray being indebted to the pursuers in the sums mentioned in the condescendence, and the said shares having been duly attached by arrestment, warrant to sell and apply the proceeds as craved, and authority to register, should be granted, with expenses.

The defender pleaded, *inter alia* ;—(1) The action is incompetent. (2) The action is irrelevant. (4) No jurisdiction in the action of constitution or in the action of furthcoming following upon it. (5) Said arrestments being inept, invalid, and illegal, in respect that they were used on the dependence of an action against a foreigner without jurisdiction having been constituted against him, the action should be dismissed. (6) Said arrestments being inept, invalid, and illegal, in respect of no service, either of the action of constitution or of warrant to arrest, the action should be dismissed.

On 16th November 1910 the Sheriff-substitute (Fyfe) repelled the first plea for the defender, and sustained the pursuer's first plea, and, without meanwhile pronouncing any operative decree, granted leave to appeal.*

* "NOTE.—Strictly speaking, as I have sustained pursuers' plea to the relevancy of the defence, I should remit to a stockbroker to sell the shares, but that would not be an appealable interlocutor, and it would be obviously useless to consider the competency or the relevancy of the defence if the

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The defender Gray appealed to the Court of Session, and the case was heard before the First Division on 26th October 1911.

Argued for the appellant;—Even if the appellant had been rendered subject to the jurisdiction in the action of constitution by personal service while within the jurisdiction, and consequently the arrestments on the dependence of that action had been competently laid on, still they did not avail to found jurisdiction against the appellant in the present action of furthcoming, because a furthcoming was a new proceeding, and it was indispensable that the common debtor should be competently cited in such a process.¹ Section 6, subsection (g), of the Sheriff Courts Act, 1907, as was clear when it was read along with Rule 128 of the First Schedule, operated only to regulate proceedings as between one Sheriff Court and another, and did not alter the former law,² so as to render a foreigner subject to the jurisdiction.

shares have been sold. Both parties accordingly request that I should at present pronounce only upon the first plea stated for each party, and grant leave to appeal.

“I have no hesitation at all in repelling the defender’s first plea. The action is an action of furthcoming following upon a decree of this Court, the extract of which is No. 7/1 of process. If the decree is to stand, the validity of the execution of arrestment is not challenged. The only ground for the plea of incompetency is that jurisdiction was not founded in the action in which decree has been granted. In other words, the defender now wants to get behind the decree No. 7/1 of process. That he cannot competently do in this Court, either in the present process or any other. A decree of Court cannot be reduced by exception, for it is not a deed or writing in the sense of Rule 50 of the Sheriff Courts Act, 1907. A direct action of reduction not being competent in the Sheriff Court, the only notice which I could take here of the defender’s first and fourth pleas would be to sist this process to await the issue of an action in the Court of Session to reduce the decree No. 7/1 of process.

“The defender, however, does not ask the process to be sisted, but wants to challenge the decree in this Court, and that, in my opinion, is clearly incompetent.

“I have a little more hesitation in sustaining the pursuers’ first plea, because, however absurd it may appear to regard the letter of No. 10/1 of process as a marriage-settlement, it is quite possible that, according to the law of England, that document might be a foundation for the more formal deed, No. 9/1 of process, and the two together may, for all I know, constitute a marriage-settlement. But there is one aspect of the matter which seems to me to render it unnecessary to consider at all the effect of this document. Assuming for the moment that the antenuptial settlement, No. 9/1 of process, can be put into competition with a creditor’s diligence, and assuming—which is a large assumption—that the single word ‘shares’ includes the shares referred to in this action, which admittedly the common debtor did not acquire till years after the date of the settlement, it is agreed at the bar that the shares now in question never were transferred to the trustee under the marriage-settlement, and I think it is perfectly obvious that nothing short of a completed title on the part of the marriage-contract trustee can be pleaded in competition with a creditor’s diligence. I think that the defender’s averments, even taking the very best view of them, are not a relevant answer to the pursuers’ claim to have their *ex facie* valid arrestment, following upon an *ex facie* valid decree, allowed its usual operative effect.”

¹ Graham Stewart on Diligence, 227; Harvey, Hall, & Co. v. Black & Son, (1831) 9 S. 785; Wightman v. Wilson, (1858) 20 D. 779.

² Burn v. Purvis, (1828) 7 S. 194.

The case of *Burns v. Monro*¹ did not relate to proceedings in the Sheriff Court. If, however, the appellant was held to be subject to the jurisdiction, it would be necessary to remit to the Sheriff to allow proof as to whether the shares arrested were in fact his property. Dec. 9, 1911.
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Argued for the respondents ;—A decree of Court was not a “deed or writing” in the sense of Rule 50 of the First Schedule to the Act of 1907, and the appellant’s objection on record to the decree founded upon could not be competently maintained in this process. In any event, jurisdiction had been competently established in the action of constitution by personal service within the jurisdiction. The case of *Wightman v. Wilson*² had been superseded, because it was not now necessary that the common debtor should be subject to the jurisdiction of the Court in which an action of furthcoming was raised.³ That case and the case of *Burn v. Purvis*⁴ had been reconsidered.⁵ Shares belonging to the defender having been validly arrested, no further arrestment was necessary to found the present action of furthcoming,⁶ and the arrestees being subject to the jurisdiction of the Sheriff Court in Glasgow, the action had been competently brought in that Court.⁷

At advising on 9th December 1911,—

LORD PRESIDENT.—This is an action of furthcoming, raised in the Sheriff Court at Glasgow, in which Leggat Brothers, who are the holders of a decree against George Gray, seek to have certain shares made furthcoming which stand in his name, and which they have arrested in the hands of Moss’ Empires, Limited, a company admittedly subject to the jurisdiction of the Sheriff Court in Glasgow, and having a place of business there. The decree which the pursuers aver is evidenced by an extract decree for payment obtained in the Sheriff Court at Glasgow on 4th July 1910, *in causa Leggat Brothers v. George Gray*. The defender in that action, the common debtor, has appeared in this furthcoming, and pleads on three grounds that no decree should be granted.

His first ground is that he is not subject to the jurisdiction of the Sheriff Court in Glasgow, and that the decree of 4th July 1910 is inept. The answer to that is that the extract decree, beyond which in this case we cannot go, shows on the face of it that it is a decree *in foro*, and I think it is quite clear that Rule 50 of the First Schedule to the Sheriff Courts Act, 1907, does not apply. By that rule it is enacted :—“When a deed or writing is founded on by any party in a cause, all objections thereto may be stated and maintained by way of exception, without the necessity of bringing a reduction thereof.” I am clearly of opinion that a decree of Court is not a “deed or writing” in the sense of that rule, and so long as the decree is not reduced, it is beyond our competency to consider whether it was rightly granted or not.

¹ (1844) 6 D. 1352.

² 20 D. 779.

³ Sheriff Courts (Scotland) Act, 1876 (39 and 40 Vict. cap. 70), sec. 47 ; Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. cap. 51), sec. 6, subsec. (g).

⁴ 7 S. 194.

⁵ *Valentine v. Grangemouth Coal Co.*, (1897) 35 S. L. R. 12.

⁶ *Burns v. Monro*, 6 D. 1352.

⁷ Sheriff Courts (Scotland) Act, 1907, sec. 6, subsec. (g).

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The second objection is that no steps were taken by arrestments *jurisdictionis fundandæ causa* in this action of furthcoming. The arrestments which are the foundation of the furthcoming were executed on the dependence of the action in which we have an extract decree *in foro*. Whatever may have been the law in the cases quoted, this point seems to me to be settled by the Sheriff Courts Act, 1907, which enacts, section 6 :—"Any action competent in the Sheriff Court may be brought within the jurisdiction of the Sheriff . . . (g) where in an action of furthcoming or multiplepoinding the fund or subject *in medio* is situated within the jurisdiction ; or the arrestee or holder of the fund is subject to the jurisdiction of the Court." In this case the arrestees, Moss' Empires, Limited, are admittedly within the jurisdiction of the Sheriff Court at Glasgow. Accordingly, I think that the second objection is settled by the statute. I only add that, that being so, I do not make any pronouncement as to what mode of intimation would be necessary to give the common debtor a fair chance of being heard, especially in a case where the decree on which the arrestments are used was a decree in absence. That question is obviously of no moment in this case, because the common debtor has had sufficient intimation to make him appear, and therefore he cannot be heard to complain of want of notice. I only say this by way of precaution, because I think the Sheriff Courts Act makes it unnecessary to found jurisdiction against the common debtor, and, if the decree which the pursuers hold had been a decree in absence, it would have been necessary to see that the common debtor had got fair notice that his property was being taken in execution.

The only other matter is that of the supposed transference of the shares in question by an alleged marriage-contract. I think the Sheriff-substitute has satisfactorily dealt with that matter. Accordingly, upon the whole matter, I think the appeal should be refused.

LORD JOHNSTON'S opinion, which, in his Lordship's absence, was read by the Lord President, was as follows :—[After referring to a previous action between the same parties]—Having now discovered that there are shares in Moss' Empires registered in the common debtor's name, the pursuers have raised another action against him, this time in the Sheriff Court at Glasgow, but without, so far as appears—and this, in the absence of any assertion by the pursuers to the contrary, I assume is the fact—arresting to found jurisdiction, and have obtained decree. This decree for £125, with £20, 0s. 11d. of expenses, is undoubtedly one *in foro*—though again this is not directly stated, nor are we told how the defender was cited. I say undoubtedly, for the extract does not bear that the decree was in absence, as I think it would if that had been the case, but more particularly because the expenses are not those of a Sheriff Court decree in absence. On the dependence of this action the pursuers have arrested certain shares, and raise this action to have the shares made furthcoming to satisfy their debt. It is not alleged that the common debtor had any domicile or was personally in Scotland when the furthcoming was brought. And he now pleads that it is incompetent. This he rests, I understand, on two grounds—first, that there was no jurisdiction in the action on dependence of which the arrestments were used. He further avers that he gave no authority for a defence to be lodged in his name. So

long as the decree stands, being a decree *in foro*, neither of these objections to it can, I think, be listened to, even in the Sheriff Court (Act 1907, Rule 50), *ope exceptionis* and without reduction of the decree. In so deciding, I confine myself to the case before the Court of a decree *in foro*, and reserve my opinion as to how this case would have been decided had the decree here been one in absence, in case any distinction can be drawn. Second, the common debtor maintains that the furthcoming itself was not preceded by arrestment to found jurisdiction. This plea is, I think, directly met by the decision in *Burns v. Monro*.¹ Given that a good decree has been pronounced against a defender, and for the purposes of the present judgment this must be assumed, nothing more is wanted to make effectual the diligence done on it than that the arrestee should be subject to the jurisdiction, the common debtor being merely called for his interest. The authority of *Wightman v. Wilson*,² which at first sight would seem to support the common debtor's contention, has been displaced by the Sheriff Courts Act, 1907, section 6.

I am therefore for adhering on this branch of the case.

But the common debtor maintains further that there was nothing to attach. Here also I agree with the Sheriff, and for the reasons given by him.

LORD KINNEAR and LORD MACKENZIE concurred.

THE COURT dismissed the appeal, affirmed the interlocutor of the Sheriff-substitute, and remitted to him to proceed.

JAMES G. BRYSON, Solicitor—JAMES D. TURNBULL, S.S.C.—Agents.

DAVID ROBERTSON WILLIAMSON, Appellant.—*Murray, K.C.—Mercer.* No. 39.
JOHN STEWART, Respondent.—*Cooper, K.C.—Chree.*

Dec. 9, 1911.

Lease—Outgoing—Valuation of sheep stock—Arbitration—Basis of valuation.

Williamson v. Stewart.

A lease of a farm provided that the tenant should, at the end of the lease, leave the sheep stock on the farm to the proprietor or incoming tenant at a valuation to be fixed by arbitration. In a case stated under the Agricultural Holdings (Scotland) Act, 1908, with regard to the basis of valuation to be adopted by the arbiter, *held* that it is the duty of the arbiter to value the sheep upon the basis of their value to an occupant of the farm in view of the arbiter's estimate of the return to be realised by such occupant from them, in accordance with the course of prudent management, in lambs, wool, and price when ultimately sold; and not upon the basis either (1) of market value only, or (2) of the cost and loss which would be involved in the re-stocking of the farm with a like stock if the present sheep stock were removed. *Held* further that the arbiter is entitled to take into account both current market prices and the special qualities of the sheep, both in themselves and in their relation to the ground, which in his opinion will tend either to enhance or to diminish the return to be realised from them by an occupant of the farm.

Observations, per curiam, on the valuing of the stock as part of the farm as a going business, and on the consideration to be given to acclimatisation.

¹ 6 D. 1352.

² 20 D. 779.

Dec. 9, 1911. (SEQUEL to *Stewart v. Williamson*, 1909 S. C. 1254, *aff.* 1910 S. C. (H. L.) 47).

Williamson v.
Stewart.

1ST DIVISION.
Sheriff of
Perthshire.

On 27th March 1908 a case was stated to the Sheriff of Perthshire under the Agricultural Holdings (Scotland) Act, 1908, by Peter M'Intyre, arbiter in a reference under that Act between Colonel Williamson of Lawers and John Stewart, formerly a tenant of Colonel Williamson of the farm of Fordie, to fix the value of the sheep stock left upon that farm to the proprietor, in terms of a lease between the parties which had terminated at Whitsunday 1909, when the tenant removed from the farm.

Shortly before the removal of Stewart from the farm a litigation was entered into between the parties as to the procedure to be followed with regard to the valuation. As the result of this litigation the House of Lords decided, on 29th April 1910 (affirming the judgment of the First Division of the Court of Session)¹ that the value of the sheep stock fell to be determined by a single arbiter in accordance with the provisions of the Agricultural Holdings (Scotland) Act, 1908. Thereafter the present arbitration was instituted.

The farm of Fordie was let by Colonel Williamson to Stewart by a lease dated 24th May and 19th June 1869, by which the tenant bound himself, *inter alia*, "To take over and pay for the whole stock of sheep on the farm according to the valuation of neutral men to be mutually chosen, with power to name an oversman, and at the expiry of this lease to leave the sheep stock to the proprietor or incoming tenant, according to the valuation of neutral men mutually chosen, with power to name an oversman, but the proprietor or incoming tenant shall not be bound to take a larger amount of stock than the tenant has been in the usual practice of keeping on the farm during this lease." In terms of this provision, Stewart took over the whole stock of sheep on the farm at his entry according to the valuation of two neutral men and an oversman, and the valuation, as was admitted by the parties, was made according to "use and wont."

On the expiry of this lease in 1884 the parties entered into a new lease, to terminate in 1894, which contained no provision for the taking over of the sheep stock at its beginning, Stewart being the tenant in possession owning the stock. The provision of this lease regarding the sheep stock at the tenant's waygoing was in similar terms to that in the previous lease, being as follows:—"And the said John Stewart hereby binds and obliges himself at the expiry of this lease to leave the sheep stock on the farm to the proprietors or incoming tenant, according to the valuation of men mutually chosen, with power to name an oversman, but the proprietors or incoming tenant shall not be bound to take a larger amount of stock than the tenant has been in the usual practice of keeping on the farm during this lease."

After the expiry of this lease in 1894, and until Whitsunday 1904, Stewart possessed the farm from year to year by tacit relocation. His tenancy was continued for a further period of five years from that date under a missive-letter which provided that the conditions of tenancy should be the same as those contained in the formal lease which expired in 1894.

The arbiter was appointed in September 1910 and met the parties'

¹ Reported *sub nom.* *Stewart v. Williamson*, 1909 S. C. 1254, and 1910 S. C. (H. L.) 47.

agents, when certain questions arose, and on 27th September 1910 the Dec. 9, 1911.
landlord applied to the Sheriff of Perthshire (Johnston), in terms of Rule IX. of the Second Schedule to the Agricultural Holdings (Scotland) Act, 1908, for a direction to the arbiter to state a case on certain questions of law. Williamson v. Stewart.

By interlocutor, dated 22nd October 1911, the Sheriff directed the arbiter to state a case, and in obedience to that order the present case was stated.

The contentions of the parties and the questions raised were set forth in the case in these terms:—

“The contentions of the said Colonel David Robertson Williamson are as follows:—

“(1) That on a sound construction of the lease, the said sheep stock falls to be valued at market value, *i.e.*, the price or exchangeable value which it would bring if exposed for sale unconditionally to the test of competition in the open market. And, in any event, that no alleged practice or custom having the force of law with regard to the basis of valuation to be adopted, can be read into the lease to the effect of adding anything to the price to be ascertained as aforesaid.

“(2) That if the valuation is not restricted to market value, as above contended for, then the basis on which the valuation is to proceed is to allow only such sum in excess of market value as an incoming tenant would be prepared to give if he were buying the same stock in the market to bring it back to the farm.

“(3) That the portion of the sheep stock, which in the ordinary course of management of the farm fell to be sold in the market in the autumn of 1909, should, in any event, be separately valued at market value only.

“The contentions of the said John Stewart are as follows:—

“(1) [This contention was abandoned.]

“(2) That the contract of submission is perfect and intelligible and was settled and acted on by the parties as being so, and the said Colonel Williamson is under personal exception against repudiating the distinctness of his own contract, and the construction he gave to it when he accepted Mr Stewart's performance of the antecedent obligation as to taking over the sheep stock at Mr Stewart's entry to the farm.

“(3) That the arbiter is the sole judge of the various elements of value that fall to be considered in executing the reference; and

“(4) That the word ‘valuation’ is used in its plain, ordinary, and popular acceptance, and there can be no reasonable doubt of the meaning of the submission. Its popular meaning accords with the practice or usage of sheep farming in the district, including Colonel Williamson's estate and throughout the Highlands of Scotland—a practice which is so long established, uniform, and notorious that judicial cognisance has been taken of it, and both of the parties here contracted with it in view, namely, that the arbiter, who is chosen for his technical knowledge and local knowledge, shall apply these in determining the value upon a consideration of all the elements which in his judgment go to constitute, enhance, or diminish the value at a specified time of the sheep stock of a particular farm to the tenant of that farm. The quarrel of Colonel Williamson is with the arbiter's mode of ascertaining the *quantum* of value—a matter which the parties have committed entirely to the arbiter, and into which Courts of law have no jurisdiction to inquire. In leases of sheep farms

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throughout Scotland the words 'to value' or 'valuation' have been used and understood as contended for by Mr Stewart, and qualification or limitation of the elements of value when intended is wont to be expressed in the submission. Examples of the different clauses are given in the Juridical Styles, (1907) vol. 1, at pages 434 and 449. Here the word 'valuation' was used without qualification, and the limited construction, for which Colonel Williamson contends, is inadmissible. Colonel Williamson, in his first contention, seeks to insert a limitation by adjecting 'market' to 'value.' On the other contentions he seeks to qualify the obligation in other illegitimate ways. It is enough that the lease provides that the sheep stock of the farm are to be left there, and that the value to be determined is the value to the proprietor or incoming tenant of that farm. As to the element of 'acclimatisation,' the stipulation that the sheep should go with the land was made in the interests of both parties, because (1) the land cannot be profitably used except for sheep farming; (2) the process of acclimatising a stock is long and costly, for, even under the most favourable conditions, some years must pass before the death-rate and birth-rate respectively will attain normal proportions in a new stock; and (3) at Whitsunday, which was here (as usual) the term of entry and outgoing, removal of the stock from the farm is impracticable, because the ewes are then in low condition after lambing, and lambs are only from six weeks to a few days old—indeed, removal of hill sheep to a public or auction market at Whitsunday is almost unknown. In stipulating that the land and stock should be held together as a going concern, the parties necessarily intended that, at the changes of tenancy contemplated under the contract, the stock should be valued as part of a going concern. The provisions for valuation of the stock at Mr Stewart's entry and outgoing were identical, and he claims that as it was valued at his entry, so it should be valued at his outgoing.

" *Observations by arbiter.*—The arbiter only desires to add, for the information of the Court and of his own knowledge, that generally the valuations of sheep stock as between an outgoing tenant and the proprietor, or an ingoing tenant, in Perthshire and many other parts of Scotland, where the stock is bound to the farm (*i.e.*, by a clause such as that in the lease in question), have, according to a recognised and well-established custom, been invariably conducted on the principle, which is termed 'use and wont,' of putting an acclimatised or hefting value upon the regular sheep stock beyond the value which they would have if removed from and sold off the land, because they have a higher value to the proprietor or incoming tenant who is to continue to hold them on the farm. The reason for such higher value being placed on the stock is that sheep bred and retained on the land are known to settle, live, and thrive much better than strange sheep brought on to the same ground. The result is that such sheep are less liable to a heavy death-rate, while at same time they are less expensive to herd, as they seldom stray from their own ground.

" The questions of law submitted for the opinion of the Court are:—(1) Is the arbiter sole judge of the principle of valuation and of the various elements of value that fall to be considered by him in executing the reference? (2) Or otherwise, upon what principle of valuation, on a sound construction of the lease, is the arbiter bound to proceed in making his valuation of said sheep stock and executing the reference?"

On 25th May 1911 the Sheriff (Johnston) pronounced an inter-locutor in which he found in law, in answer to the questions stated by the arbiter :—“(1) The judgment of the arbiter upon these matters is subject to the finding of the Court upon any matter which the Court holds to be matter of law; (2) it is the duty of the arbiter to value the sheep upon the basis of their value to an occupant of the farm in view of the arbiter's estimate of the return to be realised by such occupant from them in accordance with the course of prudent management in lambs, wool, and price when ultimately sold, and not upon the basis either (1) of market value *only*, or (2) of the cost and loss which would be involved in the re-stocking of the farm with a like stock if the present sheep stock were removed: The arbiter is entitled to take into account both current market prices and the special qualities of the sheep, both in themselves and in their relation to the ground, which in his opinion will tend either to enhance or to diminish the said return to be realised from them by an occupant of the farm.”*

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* “NOTE.—[In the course of his note the Sheriff said]—Accordingly, for the reasons stated, I reject as the basis of valuation (1) the current price only of sheep in the market; (2) the loss to the landlord if the farm were left without sheep; (3) a bargain between the tenant and the landlord postulated as both free, but faced the former with the dread of getting no more than market value if the landlord does not buy, and the latter of suffering the heavy loss of re-stocking the holding if the tenant does not sell to him.

“I shall now explain what I conceive to be the true principle which I have given effect to in my finding.

“In my opinion, in an agricultural valuation such as the present, the principle supported both by law and by general practice is that where the article to be delivered over is of more value to the incoming tenant than to anybody else, the basis of valuation is the return which the article will yield to him as occupant. This is not necessarily the same as the cost of replacing the article if it were taken away, and is not therefore to be measured by the loss which would be sustained if it were removed and not handed over.

“Speaking of a turnip crop, in the case of *Scott v. Ritchie* (7 S. L. R. 135), Lord President Inglis said, ‘The waygoing tenant is to be paid for the turnips by the landlord or incoming tenant. *Now what would he have got if he had been able to eat them off himself?* According to the oversman's opinion two-thirds of the value of the turnips go to flesh and bone of the stock fed upon them and one-third to the land from the dung made by the stock. The tenant is just as much entitled to receive the third he would have got as dung as the two-thirds that he would have got as flesh and bone.’

“Now here the sheep stock upon the farm considered as a stock to remain upon the farm represents so much wool, so much progeny, and eventually so many cast ewes, or it may be so much mutton. These are what the sheep would have yielded to the outgoing tenant if he had been able to remain and realise them. To adapt the words of Lord President Inglis, they are ‘what he would have got for them if he had been able to use them on the holding himself.’ These, too, represent what these sheep will yield on realisation to the occupant who takes them over. It is right that the arbiter should have regard to the market price of sheep as being the market or collective estimate of the value and prospects for the time being of such stock. It is right, too, that he should take into account the acclimatisation of the stock. If the stock is an acclimatised one, it may well be that these sheep will be healthier on the holding, and that accord-

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The landlord appealed, and the case was heard before the First Division on 6th July 1911. In the course of the argument (which is sufficiently set forth in the contentions of the parties quoted *supra*) the undernoted cases were referred to.¹

At advising on 9th December 1911, the opinion of the Court (consisting of the Lord President, Lord Johnston, and Lord Mackenzie) was delivered by the

LORD PRESIDENT.—The question of what is a proper valuation in the circumstances before us is a question of mixed law and fact.

There is a certain difficulty in distinguishing the law from the fact when as yet the valuation has not been made, but it is obviously so expedient that the arbiter should be assisted, that I think we are bound to make the attempt.

It is probably the easiest method to begin by considering the extreme

ingly there will be fewer deaths, more and better lambs, and eventually more and better cast ewes or mutton, all as the ultimate return to the purchaser for these sheep against the price which he pays for them and his outlays in maintaining them. But, on the other hand, the tenant being under covenant to leave the stock, as the landlord is to take it, it appears to me that it would be illegitimate for the arbiter to proceed upon the footing of what would be the position of matters if the ground were left bare and the landlord or incoming tenant were obliged to stock it with strange sheep or to turn it to some other purpose. The suggestion that, because a farm is unhealthy for strange sheep and great loss would be caused if the present stock were removed, therefore the sheep are to be valued on the basis of such loss seems to me to be as illegitimate as would be the suggestion that because a farm being far from a market and at the end of a rough five-mile road, the manure, straw, turnips could not be replaced except at great cost, therefore the manure, straw, and turnips which the tenant is bound to leave are to be valued on the basis of such cost.

“I shall endeavour to make the matter plain by an illustration, and, of course, I take round and random figures. I postulate a farm unhealthy to strange sheep but stocked with well acclimatised sheep which the tenant is bound to deliver over. Now in these circumstances if an arbiter were to say, ‘If this farm had to be re-stocked with strange sheep many would die, many would get into poor condition, the fleeces would be lighter, many would abort, a number would stray—the loss would be equivalent to half the whole stock. Therefore whilst the price of the present stock if sold in the market is 30s. per head, the value to the incoming tenant of the stock which the outgoing tenant is bound to deliver over is 60s. per head, although that is an amount which the incoming tenant can never ultimately realise from these sheep,’—that, in my view, would be an unsound principle. But, on the other hand, if the arbiter were to say, ‘The price of these sheep if sold now in the market is 30s. per head. But no occupant would sell them in the market, for, as sheep to be retained upon the farm, being acclimatised, they would do much better than in the hands of some stranger purchaser, they represent an eventual return to the occupier in produce and ultimate sale, the present value of which is 40s. per head, and that must be their price as between the outgoing and the incoming tenant,’—that, in my

¹ Scott v. Ritchie, (1865) 7 S. L. R. 135; Erskine's Trustees v. Crombie, (1870) 9 Macph. 54; Frier v. Earl of Haddington, (1871) 10 Macph. 118; Lord Advocate v. Earl of Home, (1891) 18 R. 397.

contention on either side. For the landlord it was argued that the valuation must proceed on market value and market value alone. Dec. 9, 1911.

For the tenant it was contended that the valuation should be made according to "use and wont," which was explained to mean the adding of a percentage to market value to represent acclimatisation value. Williamson v. Stewart.
Ld. President.

We do not think either of these views is, as stated, correct.

To begin with, we think a good deal of confusion is caused by the term "market value." The subject here is a sheep stock—in particular a ewe stock—to be handed over at Whitsunday. Now, in one sense there is no such thing as a market value for such a stock. It is not the custom to sell a ewe stock in a mart as a whole in one lot, or to sell individual lambs which are too young to be removed from their mothers, or ewes which are not in condition. If, therefore, the stock was simply taken off the ground at Whitsunday, and, so to speak, forcibly conveyed to a mart and there sold, it is obvious that it would yield very little. It would be like "scrapping" machinery, or selling a business at a break-up value.

On the other hand, there is a market value which has an obvious bearing on the question. When the lambs become old enough they will be partly sold, and when a ewe is cast it will be parted with for value. The breeding ewe has also a value. The prices that are, so to speak, reigning in the market must affect the arbiter's view of the value of each component item of the stock. The value is the value of each item in a going business, not a break-up value.

We agree with the Sheriff in thinking that the determining consideration is what can be made out of the stock, viewing the stock and farm as a going business. For it must always be kept in view that the question of the farm is inextricably mixed up with the question of the value of the stock. If the farm cost the tenant nothing, he could, so to speak, "afford" to give more for the stock. But he has to pay rent—and even the landlord,

opinion, would be the sound principle which it would be the duty of the arbiter to follow.

"In estimating the value of sheep on the basis of the return to be got for them, regard must, of course, be had to outgoings, including the annual value or rent of the farm. In my opinion, this annual value or rent of the farm for this purpose is the annual value or rent of such a farm let as a farm with a continuous sheep stock—the rent which the late tenant would presumably have paid had there been a renewal on fair terms of the lease. This coincides with the Lord President's suggested test of value above referred to. What would the tenant have got for them had he remained in the holding?"

"In this connection I may point out that the principle of exchangeable value as defined by Lord M'Laren, viz.:—the price which the subject would bring when exposed to the test of competition, coincides with the principle of valuation which I have indicated, although to make the test directly applicable it is necessary to figure particular circumstances different from the present. The arbiter may regard the matter in this way. 'If this farm were in the hands of the proprietor as a farm with this stock upon it, and there were several offerers for it at the rent which I, the arbiter, consider the ordinary rent of such a farm, year in, year out, when carrying this stock, and if, in these circumstances, the proprietor were to invite the offerers to tender for the sheep stock, what price would he get in such a competition?' . . ."

Dec. 9, 1911. if it is he that is taking over the stock, must be here considered as if he was a hypothetical tenant. Accordingly the arbiter must consider the farm as he finds it, and fixing in his own mind a fair rent for the farm as a first expense, must then go on to consider what the incoming man can afford to pay for the stock as it exists, in view of what prices he will eventually get in the market when the component parts of the stock as a going stock will be sold from time to time.

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Ld. President.

This view does allow for a value in which has been included acclimatisation. But it is quite different from what has been termed "use and wont," a term, in our view, quite inappropriate to such a matter. The idea of adding a fixed percentage, the figure of which is arrived at because others have done it in other arbitrations, is, we consider, really to disregard the matter in hand; and it is this habit which has led to what everyone knows has been a great injustice in such valuations. For it leaves altogether out of sight the crucial question, viz., whether after he has paid a rent the incoming man can at such prices make the farm pay as a going concern.

On the whole matter we think the Sheriff has come to a right conclusion, but we have thought it better to express our judgment in our own words.

THE COURT affirmed the judgment of the Sheriff.

HAMILTON, KINNEAR, & BEATSON, W.S.—CONNELL & CAMPBELL, S.S.C.—Agents.

No. 40.

ROBERT THOMSON, Complainer (Reclaimers).—*Moncrieff*.
THE BENT COLLIERY COMPANY, LIMITED, Respondents.—
Horne, K.C.—M. P. Fraser.

Dec. 12, 1911.

Thomson v.
Bent Colliery
Co., Limited.

Process—Appeal—Competency—Sheriff—Summary removing—Refusal of written answers—Discretion of Sheriff—Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. cap. 51), First Schedule, Rules 119, 121, 122.

In a summary removing in the Sheriff Court the allowance of written answers is a matter for the Sheriff's discretion, and, even where written answers are tendered, a Sheriff is entitled to refuse them and to dispose of the cause summarily, with the effect of excluding review.

Statute—Construction—Repeal—Reference to practice under repealed statute—Usage.

Question whether a repealing statute can be construed by reference to the practice which prevailed under the statute which it repeals.

1ST DIVISION.
Lord Cullen.

IN a note of suspension and interdict at the instance of Robert Thomson, miner, against the Bent Colliery Company, Limited, the complainer craved suspension of a warrant for ejecting him from subjects at 23 Raith Place, Bothwell Haugh, Bothwell, occupied by him.

The complainer averred that, on 23rd November 1910, the respondents, who were the proprietors of the subjects, presented in the Sheriff Court of Lanarkshire, at Hamilton, a petition craving that a warrant should be granted by the Court for removing and ejecting the complainer from these subjects. (Stat. 5) "The complainer appeared before the Sheriff-substitute upon 29th November 1910, and craved leave to lodge answers in writing, conform to the provisions of section 38 of the Sheriff Courts (Scotland) Act, 1907, and

the Rules for regulating procedure contained in the First Schedule Dec. 12, 1911.
annexed to the Act.* The complainer further offered to find caution Thomson v.
for violent profits. The Sheriff-substitute refused this application Bent Colliery
and directed the case to be tried without answers in writing. In so Co., Limited.
refusing the complainer's application, the Sheriff-substitute acted
oppressively and in direct disregard of the statutory forms. . . ."
(Stat. 6) "On 6th December 1910 the Sheriff-substitute pronounced
decree as follows:—'At Hamilton, the sixth day of December nine-
teen hundred and ten years, the Sheriff grants warrant for ejecting
the said Robert Thomson, defender, and others mentioned in the
complaint from the subjects therein specified.'"

The complainer pleaded, *inter alia*;—(2) The complainer having at
the calling of said petition craved leave to lodge written answers and
offered caution for violent profits, the Sheriff-substitute was not
entitled to conduct the proceedings in the manner regulated by the
Small-Debt Acts, and the said decree is accordingly null and of no
effect, or alternatively is subject to review in common form.

The respondents pleaded, *inter alia*;—(1) The averments of the
complainer are irrelevant and insufficient to support the crave of the
note, which should be refused. (2) In the circumstances conde-
scended upon, the note is incompetent and should be refused. (3)
The proceedings complained of being regular and in accordance with
statute, the note ought to be refused.

On 13th June 1911 the Lord Ordinary (Cullen) refused the note.†

* The Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. cap. 51), enacts,
with reference to actions for summary removing:—

First Schedule.

Rule 119. "Such causes shall be conducted and disposed of in the
summary manner in which proceedings are conducted under the Small-
Debt Acts and shall not be subject to review."

Rule 121. "The Sheriff may order written answers or adjourn the hear-
ing of such causes, but where defences cannot be instantly verified, the
Sheriff shall ordain the defender to find caution for violent profits, unless
the Sheriff shall dispense with caution, which he may do if he sees fit."

Rule 122. "Where a defender has given in answers, and caution for
violent profits has been found or has been dispensed with, such cases shall,
as nearly as may be thereafter, be conducted according to the procedure in
ordinary actions of removing, and shall be subject to review in common
form."

† "OPINION.—I am of opinion that the respondents' plea to the com-
petency of this application is well founded.

"Rule 119 of the 1907 Act provides that summary removings shall be
conducted and disposed of in the summary manner in which proceedings
are conducted under the Small-Debt Acts, and shall not be subject to
review.

"Rule 121, however, gives power to the Sheriff to order written answers,
with the proviso that where defences cannot be instantly verified, the Sheriff
shall ordain the defender to find caution for violent profits, unless he shall
dispense with such caution, which he may do if he thinks fit.

"Rule 122 goes on to provide 'that where a defender has given in answers,
and caution for violent profits has been found or dispensed with, such
cases shall, as nearly as may be thereafter, be conducted according to the
procedure in ordinary actions of removing, and shall be subject to review
in common form.' I read this rule as prescribing the form of procedure,
&c., in cases where the Sheriff has ordered answers and dealt with the
matter of caution in virtue of Rule 121. In the present instance the Sheriff

Dec. 12, 1911. The complainer reclaimed, and the case was heard before the First Division (without Lord Johnston), on 12th December 1911, Mr William Hunter, K.C., being present as Lord Probationer.

Thomson v.
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Argued for the reclamer;—The Lord Ordinary was wrong in holding, as he did in the result at which he had arrived, that where caution was offered and written answers were tendered the Sheriff had a discretion to refuse the answers and so to deprive a defender of all right of appeal. In these circumstances, under the Sheriff Courts Act, 1838,¹ section 13, the Sheriff was bound to receive the answers; and the practice under that Act had been to receive answers when tendered.² Rules 119, 121, and 122 of the 1907 Act did not expressly deprive a defender of his established right to put in answers, and, *in dubio*, the new Act should be construed as being intended to continue the existing practice.

Argued for the respondents;—The Act of 1907 instituted a change in the procedure in actions of removing. Rule 119 of the First Schedule to that Act was imperative in its terms, and the only exceptions to the procedure under that Rule were those provided by Rules 121 and 122 which were permissive in their terms, and left the receiving of written answers entirely to the discretion of the Sheriff. The provisions of the Sheriff Court Act of 1838 with reference to summary removings could not be appealed to, for that Act had been repealed by the Act of 1907, and the practice under the former Act could not affect the construction of the latter, which was clear in its terms.

The following opinion was delivered by

THE LORD PROBATIONER (WILLIAM HUNTER, K.C.).—In this case the complainer and reclamer seeks to suspend a warrant ejecting him from premises occupied by him of which the respondents are proprietors. The ground, as I understand it, upon which he seeks to do so is that he offered to give in written defences, which were not received, and he maintains that on that account he is entitled to have the warrant of eviction suspended.

The procedure in summary applications for removal is now determined by the provisions of the Act of 1907, and solely by these provisions, the provisions which appeared in the earlier Act of 1838 being entirely repealed; and I would only say with reference to these earlier provisions, that, at all events in one or two respects, they are substantially different from the subsequent provisions. That is especially the case so far as the matter of caution is concerned. But it seems to me that the Rules of the Sheriff Courts Act, 1907, particularly Rules 119, 121, and 122, provide completely for the disposal of these summary applications in the Sheriff Court. The ordinary rule is Rule 119, which provides that the applications are to be dealt with summarily, and that what the Sheriff determines is not to be subject to review. Rule 121 provides: "The Sheriff may order written

did not order answers, and the cause therefore was not taken out of Rule 119 but remained a summary one not subject to review.

"I shall accordingly dismiss the note."

¹ Sheriff Courts (Scotland) Act, 1838, (1 and 2 Vict. cap. 119), secs. 8, 11, 12, 13.

² Dove Wilson, Sheriff Court Practice, 483.

answers or adjourn the hearing of such causes, but where defences cannot be instantly verified, the Sheriff shall ordain the defender to find caution for violent profits, unless the Sheriff shall dispense with caution, which he may do if he sees fit." By Rule 122, a right, a limited right, of review is given. That rule comes into application, as the Lord Ordinary has held, only where certain condition are satisfied. They are two: (1) that the defender has given in answers; and (2) that caution has been found or has been dispensed with. In this case caution, although offered, was not found, and was not dispensed with. In point of fact the Sheriff, in exercise of the discretion conferred upon him under the previous rule, considered that this was not a case for written answers at all. Under these circumstances I think that the complainer is not entitled to the redress which he seeks. I am therefore of opinion that the Court should refuse the reclaiming note.

Dec. 12, 1911.
 Thomson v.
 Bent Colliery
 Co., Limited.
 Lord
 Probationer.

LORD PRESIDENT.—In this case I agree with the opinion that was delivered by the Lord Probationer. I think the Lord Ordinary's judgment is right and that it should be sustained, and I think he has with very great succinctness given the true reasons for the judgment. I shall only say one word more. The argument that Mr Moncrieff addressed to us really turned upon this—that, *in dubio*, we ought to construe the Rules of the Sheriff Courts Act of 1907 in the light of what he says was the practice under the Sheriff Courts Act of 1838. Now, I think it is at least a doubtful question whether one is entitled, upon a question of the construction of the statute which undoubtedly rules the matter, to consider what was the practice under a repealed statute where the words used were not identical. Apart from usage there is another reason which I think excludes the construction which the complainer desires, and it is this. It is directed, in both statutes, that these removings shall be conducted as small-debt processes. Now under the Small-Debt Acts there is no right in a defender to insist on written pleadings. In a Small-Debt Court it is only with the permission of the Sheriff that written pleadings can come in. Accordingly you begin, so to speak, with an entire absence of written pleadings, and you come to Rules 121 and 122 of the First Schedule to the 1907 Act, and the construction of these is clearly as the Lord Ordinary has found.

Accordingly, on the whole matter, I propose that we should refuse the reclaiming note.

LORD KINNEAR.—I agree with your Lordship, and only add that I cannot think that there is any sufficient ground for construing a repealing statute by usage which may have followed upon the statute which has been repealed. It has been held that the ambiguous provisions of a statute may be construed with reference to usage which has followed on the statute itself, but even in that case the usage, as is explained in the well-known case of *The Clyde Navigation Trustees*,¹ is only an aid to interpretation, more or less valuable according to the circumstances, and cannot absolve the Court from the duty of determining the true construction of the statute for itself when it comes into controversy. But so far as I know it has never

¹ (1883) 10 R. (H. L.) 77.

Dec. 12, 1911. yet been held that usage which has followed upon one Act can construe a more recent Act which, for aught we can tell, repeals it just because of the practice that may have followed upon it. Upon the construction of the statute itself I entirely agree with your Lordship.

Thomson v.
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Co., Limited.

LORD MACKENZIE concurred.

THE COURT adhered.

SIMPSON & MARWICK, W.S.—ERSKINE DODS & RHIND, S.S.C.—Agents.

No. 41.

Dec. 13, 1911.

Ballantyne &
Co. v. Paton
& Hendry.

R. B. BALLANTYNE & COMPANY, Pursuers (Appellants).—
Murray, K.C.—C. H. Brown.

PATON & HENDRY, Defenders (Respondents).—*Sandeman, K.C.—
Russell.*

*Ship—Charter-party—Construction—Discharge of cargo—Liability for
damage to ship through negligent discharge.*

A charter-party provided :—"Cargo to be loaded, stowed, and discharged free of expense to steamer, with use of steamer's winch and winchmen if required."

Held that this clause had not the effect of transferring the duty of discharging the cargo from the shipowner, on whom it rests at common law, to the charterer, so as to render the latter responsible for damage received by the ship in the course of discharge.

Reparation—Ship—Damage to ship in course of discharge—Liability of charterers—Negligence of stevedores engaged and paid, but not controlled, by charterers.

In an action brought by the owners against the charterers of a ship for damages in respect of injury received by the ship during the discharge of the cargo, the pursuers averred that the defenders were liable, in respect that they had employed and paid the stevedores and the owners of a crane engaged in the discharge, by whose negligence the injury was caused.

Held that, as it was not averred that the defenders had undertaken the control of the discharge of the cargo, the pursuers had failed to set forth a relevant case; and action *dismissed*.

2D DIVISION.
Sheriff of
Lanarkshire.

ON 27th September 1910 R. B. Ballantyne & Company, Glasgow, owners of the steamship "Bessie Barr," brought an action in the Sheriff Court at Glasgow against Paton & Hendry, Glasgow, who had chartered the vessel to carry a cargo of stones from Portland to Glasgow. The pursuers' claim was for damages in respect of injuries caused to the vessel during discharge at Glasgow while under charter to the defenders.

The charter-party, which was dated 30th March 1909, contained the following clause:—" (12) Cargo to be loaded, stowed, and discharged free of expense to steamer, with use of steamer's winch and winchmen if required."

The pursuers referred to the charter-party, and averred ;—"It was provided therein that the cargo was to be loaded, stowed, and discharged by the charterers, and free of expense to the steamer." In answer the defenders stated :—"By the said charter-party it is pro-

vided that the loading, stowing, and discharging is to be done by the Dec. 13, 1911. pursuers, but free of expense to the steamer."

The pursuers also averred;—(Cond. 2) "On 12th April 1909, in ^{Ballantyne & Co. v. Paton} course of the discharge, and while a large stone was in course of ^{& Hendry.} being taken out of the hold, and after being raised in the hold it was

allowed by those discharging the ship to swing about and finally catch under the combings of the hold, whereby the chain of the crane or sling-chain by which the stone was being hoisted up, broke, and the stone was precipitated some distance on to the floor of the ship. Damage was done to the sheathing, ceiling, and floor of the hold, and to two ladders therein." (Cond. 3) "The defenders, in carrying

out the terms of the charter-party by themselves or others for whom they are responsible, employed and paid the stevedores and owners of the crane engaged in the discharge of the vessel, and they are liable for the fault of persons employed in doing such work." (Cond. 4)

"Said accident was due to the fault and/or negligence of those discharging the said vessel, for whom the defenders are responsible under said charter-party, in not taking precautions to see that the said stone when in course of being hoisted was kept clear of the combings, and further, that the hoisting was carried out cautiously, so that, if there was risk of the stone catching on the combings, same should have been released and hoisting stopped before the chain had been broken."

The pursuers' remaining averments referred to the damage suffered.

The pursuers pleaded;—(1) The defenders having undertaken by the terms of said charter of pursuers' vessel to discharge the cargo carried, and same having been done in such negligent manner as to cause the loss and damage claimed by the pursuers, decree should be granted therefor, with interest and expenses as craved. (2) The defenders' statements are irrelevant.

The defenders pleaded, *inter alia*;—(1) The action is irrelevant. (2) The pursuers not having sustained any loss and damage through the fault or negligence of the defenders or those for whom they are responsible, the defenders are entitled to absolvitor with expenses.

On 11th November 1910 the Sheriff-substitute (Fyfe) sustained the defenders' first plea in law, and dismissed the action.*

The pursuers having appealed, the Sheriff (Millar), on 15th February 1911, adhered.†

* "NOTE.— . . . There is, I think, no doubt about the general maritime law, that the work of loading and discharging falls within the ship's duty, unless there is some special contract to the contrary. All the operations connected with the loading and discharging are ship's operations, whether these are actually conducted (as in theory, perhaps, these operations always are) by the ship's crew, and with the ship's appliances; or (as in practice they generally are) conducted by stevedores, with the aid of appliances outside the ship. The mere fact that some other person is to relieve the ship of the expense connected with the discharge of some duty of the ship, does not affect the legal situation at all (*M'Iver & Co., Limited, v. Tate Steamers, Limited*, [1903] 1 K. B. 362). . . ."

† "NOTE.—The ordinary rule of law is that the shipowner is bound to deliver the goods from the side of his ship. In the charter-party which has been produced the parties have embodied this rule into the written contract. In Article 4 it is said 'cargo to be brought to and taken from alongside free of expense.' Article 12 seems rather to be a method of settling the charges which were to be paid by the charterers to the shipowners, and does not affect this condition. Accordingly, I

Dec. 13, 1911.

Ballantyne &
Co. v. Paton
& Hendry.

The pursuers then appealed to the Court of Session, and the case was heard before the Second Division (without Lord Salvesen) on 13th December 1911. During the course of the hearing the pursuers were allowed to amend their record by deleting from cond. 4 the words "under said charter-party," and by substituting, in their first plea in law, for the words "by the terms of said charter of pursuers' vessel" the words "as condescended on."

Argued for the appellants;—(1) At common law the duty of discharging a vessel admittedly lay on the owners of the vessel. But in this case the provision in clause 12 of the charter-party transferred the duty to the charterers. This was necessarily the effect of the clause, for otherwise the words "with use of steamer's winch" would have no intelligible meaning. It would be absurd for the owners, if the duty of discharging was on them, to contract for the use of their own winch. The words meant that the charterers were to discharge the vessel, and, for that purpose, were to be entitled to use the steamer's winch. (2) Apart from the provisions of the charter-party, the defenders here were liable for the damage done to the ship. It was averred on record that they had in fact undertaken to discharge the vessel, and had employed and paid the stevedores and others engaged in its discharge. The defenders had the control, therefore, of those employees, and were liable for their negligence.¹

Argued for the respondents;—(1) At common law the duty of discharging a vessel lay on the owners; and no contract involving an alteration of that liability could be found in clause 12 of the charter-party.² That clause dealt solely with expenses. It provided that while the appellants (in accordance with the established practice) were to be responsible for the discharge of the vessel, they were to be repaid their expenses by the respondents, with the exception that the latter were not to be charged for the use of the steamer's winch or winchmen. (2) There was no relevant case against the respondents apart from the charter-party. Employment and payment of the stevedores, &c., did not necessarily infer control of them, and it was control that involved liability.³

LORD GUTHRIE.—The case was presented by the appellants under two heads. The first view was founded on the terms of clause 12 of the charter-party, and they argued alternatively that, whatever the charter-party provided, the charterers did in fact undertake the discharge of the vessel, and employed and paid the stevedores, thus becoming responsible for the damage which is alleged to have been caused to the ship by the falling of a stone as it was being taken out of the hold.

It was conceded by Mr Murray that under the record as originally framed

agree with the learned Sheriff-substitute in his interpretation of the contract. . . ."

¹ Rourke v. White Moss Colliery Co., (1877) 2 C. P. D. 205; Donovan v. Laing, Wharton, & Down Construction Syndicate, [1893] 1 Q. B. 629; Cairns v. Clyde Trustees, (1898) 25 R. 1021; Harris v. Best, Ryley, & Co., (1892) 7 Aspinall's Maritime Law Cases, 272.

² M'Iver & Co., Limited, v. Tate Steamers, Limited, [1903] 1 K. B. 362.

³ Carver's Carriage by Sea (5th ed.), secs. 273-4; Quarman v. Burnett, (1840) 6 M. & W. 499; Blaikie v. Stembridge, (1859) 6 C. B. (N. S.) (Scott's Reports), 894.

the alternative case was neither averred nor pled so as to entitle the pursuers to inquiry, and he accordingly proposed to amend by deleting from the first plea in law for the pursuers the words "as condescended on," and by substituting for the words "by the terms of said charter of pursuers' vessel." I do not think that this part of the case is relevantly averred even on the record as so amended. There is no averment that the charterers undertook the control of the discharge of the cargo. Even if they employed and paid the stevedores, this will not by itself infer liability for damage in carrying out the discharge—(*Blaikie v. Stenbridge*¹; *Harris v. Best, Ryley, & Co.*²).

The remaining question arises on clause 12 of the charter-party, with which alone the Sheriffs have dealt. That clause is in the following terms: "Cargo to be loaded, stowed, and discharged free of expense to steamer, with use of steamer's winch and winchmen if required." The pursuers allege that by that clause "it was provided that the cargo was to be loaded, stowed, and discharged by the charterers." On the other hand, the defenders aver that "by the said charter-party it is provided that the loading, stowing, and discharging is to be done by the pursuers" (the owners). The Sheriffs have not sustained either view, but agreeing in result with the defenders' contention, have held that the clause in question did not vary what they have held to be the common law rule placing the duty on the owners. Now, it was admitted by the appellants that the Sheriffs were right in their view of the common law rule. It is therefore for the appellants to show that in this charter-party the duty of discharging cargo was transferred to the charterers.

It is common ground that if the clause had stopped at the words "free of expense to steamer," the duty of discharge would have rested as at common law, but it was said that the concluding words, "with use of steamer's winch and winchmen if required," can only mean that the charterers were to discharge the vessel, because if that duty rested on the ship, there could be no case in which a requisition could be intelligibly made for the use of the steamer's own winch and winchmen. It seems to me that the respondents only need to suggest a reasonable interpretation of this clause which would be consistent with the common law duty, because if the common law is to be altered by the terms of the charter-party, that must be done by a clause which admits of no other reasonable interpretation. The respondents suggest that the clause was inserted to prevent the owners, if their winch and winchmen were used, claiming payment for them, in addition to being relieved of all other expense of discharging. This is an intelligible explanation of the clause, and is consistent with the maintenance of the owners' common law duty. I therefore think that the view which the Sheriffs have taken is sound. The result will be that the interlocutors of the Sheriffs will be affirmed, and the appeal dismissed.

LORD DUNDAS.—I agree, and I think the point is a very short one. It is plain, and indeed was not really disputed, that on the record, as originally framed, the case turned entirely on clause 12 of the charter-party. I concur

¹ 6 C. B. (N. S.) (Scott's Reports), p. 894.

² 7 Aspinal, 272, 274.

Dec. 13, 1911. in thinking that, on the case thus intended to be presented, the Sheriff is right, and that the clause in question makes no alteration on the common law rule that the duty of discharging rests on the ship and not on the charterers.

Ballantyne & Co. v. Paton & Hendry.

Lord Dundas. As regards the amendment proposed and allowed at the bar, I cannot see that it makes the matter any better. I do not think that a record framed to meet one case can be so easily adapted to the requirements of another, as by the simple deletion of four words in the condescendence, and of a few more in one of the pleas in law, with the effect of making the pleadings more vague than they were. This case, which the appellants endeavour to make independently of the charter-partly, would have needed very careful and specific averments, and as these have not been made, that case must fail. I cannot avoid the impression that, if the facts had truly admitted of such averments being made, they would have been tendered.

The LORD JUSTICE-CLERK concurred.

THE COURT adhered.

J. & J. Ross, W.S.—WEBSTER, WILL, & Co., W.S.—Agents.

No. 42.

THOMAS M'LAUGHLIN, Appellant.—*Lippe—Duffes.*

Dec. 15, 1911. THE WEMYSS COAL COMPANY, LIMITED, Respondents.—*Horne, K.C.—Strain.*

M'Laughlin v. Wemyss Coal Co., Limited. *Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58)—Appeal by stated case—Procedure—Appellant allowed to lodge a condescendence—Expenses.*

In an appeal by stated case from the decision of an arbitrator dismissing an application for compensation in respect that the workman had failed relevantly to aver the happening of an accident, the Court permitted the workman to submit a condescendence of the specific facts on which he relied, and thereafter *allowed* it to be received, and remitted to the arbitrator to proceed; but, in a question as to the taxation of the parties' accounts, *refused* to allow the appellant (who had been awarded the expenses of the appeal), the expenses of preparing and lodging the condescendence.

Expenses—Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58)—Stated case.

In a stated case under the Workmen's Compensation Act, 1906, the Court found the appellant entitled to the "expenses of the appeal." Upon a note of objections to the report of the Auditor, who had disallowed the expenses of obtaining the stated case from the Sheriff, the Court *allowed* a modified fee of three guineas for these expenses, and *observed* that in future a modified fee of three guineas and a half would be allowed.

M'Govern v. Cooper & Co., (1901) 4 F. 249, and *London and Edinburgh Shipping Co. v. Brown*, (1905) 7 F. 488, *commented on*, and *observed* that there is no distinction between an award of "expenses of the appeal" and an award of "expenses of the stated case."

1ST DIVISION. Sheriff of Fife and Kinross. IN an arbitration under the Workmen's Compensation Act, 1906, in the Sheriff Court at Cupar, in which Thomas M'Laughlin, stone breaker, sought compensation from the Wemyss Coal Company, Limited, the

Sheriff-substitute (Armour-Hannay) dismissed the application as Dec. 15, 1911. irrelevant, and at the request of the workman stated a case for appeal.

The case set forth:—"The claimant applied for an award of compensation under the Workmen's Compensation Act, 1906, against the respondents, and averred that he was a stone breaker in respondents' employment, and his average weekly earnings were twenty-eight shillings per week. That he 'on or about 7th February 1911, at an old building at and used in connection with Denbeath Coal Mine, Fifeshire, was, by accident arising out of and in the course of his employment, injured by a septic abscess developing on the palm of his right hand, due to the absorption of septic matter through blisters and cracks on his hand and fingers from bricks taken from said building, which he was breaking into small pieces, and which in the course of his employment he was continually handling, whereby he was totally incapacitated for work.'

M'Laughlin v.
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"The respondents resisted the claim on the ground that any incapacity from which the claimant might suffer was not due to an accident within the meaning of the Workmen's Compensation Act, 1906. They maintained that the claimant had not relevantly averred that he sustained an injury by accident in the course of his employment with the respondents. The respondents averred that the claimant's weekly earnings did not exceed seventeen shillings.

"After hearing the agents for the parties I dismissed the application, in respect that the claimant had not relevantly averred that his incapacity was due to an accident in the sense of the Workmen's Compensation Act, 1906, and found the claimant liable in Four pounds and four shillings of modified expenses. On a consideration of the claimant's averments, I took the view that the claimant's incapacity was not due to unlooked-for mishap or accident, but was the ordinary and necessary consequence of continuous work lasting for some time—it was stated that the claimant had been engaged for some four days at the work in question. On the claimant's own showing his incapacity was due not to 'one unexpected happening,' such as a scratch, cut, or prick, but to his working for some time—say four days—at a kind of work quite likely to cause a septic abscess to develop if he were not careful."

The question of law for the opinion of the Court was:—"Has the claimant relevantly averred that his incapacity was due to an 'accident' in the sense of the Workmen's Compensation Act, 1906?"

The case was heard before the First Division on 28th October 1911.

Argued for the appellant;—An application for compensation should not be disposed of on relevancy without inquiry.¹ The Sheriff-substitute had improperly regarded the initial writ, which was in the form prescribed by the Sheriff Courts Act, 1907,² as containing averments in support of the claim for compensation. The applicant did not need to set forth in the initial writ the facts on which he relied. These facts would fall to be ascertained by inquiry, and, on inquiry here, the case would be found to be one of personal injury by accident.³

Argued for the respondents;—The appellant had set forth no

¹ *Coyne v. Glasgow Steam Coasters Co.*, 1907 S. C. 112, Lord Kyllachy at p. 114; *Rankine v. Alloa Coal Co.*, (1903) 5 F. 1164.

² Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. cap. 51), First Schedule, Rule 1.

³ *Clover, Clayton, & Co. v. Hughes*, [1910] A. C. 242.

Dec. 15, 1911. definite time at which anything in the nature of an accident had happened, and therefore no case of injury by accident was relevantly averred.¹ Inquiry was unnecessary for the disposal of the case, because if the facts stated by the appellant were all established there would still be no proof of an accident,² or—as it had been defined—of any “unforeseen and undesigned occurrence causing injury to the workman.”³ In fact, so far from setting forth an accident, the appellant’s averments showed quite clearly that his disablement was really due to disease.

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Co., Limited.

The opinion of the Court (consisting of the Lord President, Lord Kinnear, and Lord Johnston) was delivered by the

LORD PRESIDENT.—The opinion of the Court is that before the case is disposed of the appellant should have an opportunity of submitting the condescendence he would ask the Sheriff-substitute to receive if the case were sent back to him. If the condescendence is found to be irrelevant the appeal will be refused.

The appellant having submitted a condescendence, the Court on 18th November 1911 pronounced an interlocutor allowing it to be received.

The case was further heard (before the Lord President, Lord Johnston, and Lord Mackenzie) on 24th November 1911. At the close of the argument the Lord President stated that there must be inquiry, as it could not be held that the appellant’s averments were necessarily irrelevant; and accordingly on 25th November 1911 the Court pronounced the following interlocutor:—“Find it unnecessary to answer the question of law as stated: Recall the determination of the Sheriff-substitute as arbitrator, and remit the cause to him to proceed as accords: Find the appellant entitled to the expenses of the appeal, and remit the account thereof to the Auditor to tax, and to report.”

In his report on the appellant’s account of expenses the Auditor allowed a sum of £9, 10s. 8d., being charges in connection with the preparation of the condescendence submitted to the Court, and disallowed a sum of £3, 14s. 2d. charged in connection with obtaining the stated case from the Sheriff prior to its presentation to the Court of Session. In this latter sum was included £1, 10s., being dues of the stated case paid to the Sheriff-clerk.

The appellant objected to the Auditor’s report, in respect that he had disallowed the charges in connection with obtaining the stated case; and the respondents objected to the report in respect that the Auditor had allowed the charges in connection with the preparation of the condescendence.

Parties were heard on their objections before the First Division (without Lord Johnston) on 15th December 1911.

Argued for the appellant;—(1) The appellant had been found entitled to the expenses of the appeal, and as the expenses of obtaining a stated case were a necessary part of the appeal,⁴ he was entitled to

¹ Eke v. Hart-Dyke, [1910] 2 K. B. 677.

² Haley v. United Collieries, Limited, 1907 S. C. 214.

³ Kelly v. Auchenlea Coal Co., 1911 S. C. 864, Lord Kinnear, at p. 867.

⁴ Workmen’s Compensation Act, 1906 (6 Edw. VII. cap. 58), Second Schedule (17) (b).

recover these expenses.¹ The case of *M'Govern v. Cooper & Company*,² Dec. 15, 1911. which the Auditor believed excluded the allowance of such expenses, was not an authority to that effect, for there the expenses had been incurred by the respondent, not by the appellant; and they were disallowed on the ground that they were unnecessary and unreasonable. *M'Laughlin v. Wemyss Coal Co., Limited.* (2) The Auditor had rightly allowed the charges in connection with the preparation of the condescendence, these having been incurred in course of the proceedings in a successful appeal, to the expenses of which the Court had found the appellant entitled.

Argued for the respondents;—(1) In the case of *M'Govern v. Cooper & Company*² the arguments addressed to the Court were directed to the question as to when an appeal began, and it must be held to have been decided in that case that it did not begin until the stated case was presented in the Court of Session. Accordingly, expenses incurred prior to the case being presented in Court were not expenses of the appeal, and had been rightly disallowed. In the case of *London and Edinburgh Shipping Company v. Brown*,³ in which such expenses had been allowed, the respondents were found entitled not to "the expenses of the appeal," but to the "expenses of the stated case." (2) The expenses of preparing a condescendence were not expenses of an appeal but of an arbitration, and if a successful party was entitled to these they fell to be dealt with by the Sheriff and allowed on the Sheriff Court scale. The receiving of a condescendence was not a matter that fell within the powers of the Court of Appeal as they were defined in the Act,⁴ but within those of the Sheriff.

LORD PRESIDENT.—There are two questions in this case, and in order to make the matter clear it is perhaps as well that I should remind your Lordships of what exactly has happened in the case.

It is a claim for compensation by one Thomas M'Laughlin against the Wemyss Coal Company, Limited. He applied for an award of compensation in respect that, on or about a certain date, while working on an old building, he was injured by a septic abscess developing on the palm of his hand. Now, the Sheriff, acting as arbitrator, found that his statement, as made in his initial writ, was so jejune and inexploratory that it did not constitute a relevant claim at all, and, accordingly, he so held, and dismissed the application. Thereupon the claimant asked for a case to be stated, and a case was stated, which at much greater length set forth the facts that I have just stated. The case was heard before your Lordships, and the claimant urged that, if he was only allowed to develop more particularly the general indication of claim which he had given in his initial writ, he was confident that he could show a relevant case. Well, your Lordships after that discussion came to the conclusion that it was difficult to judge of that without seeing what precisely he could say if he was allowed to do it. We accordingly allowed him to lodge a condescendence, with a view to seeing whether, when the condescendence was lodged, it did set forth a

¹ *London and Edinburgh Shipping Co. v. Brown*, (1905) 7 F. 488; *Dempster v. Baird & Co.*, 1908 S. C. 722.

² (1901) 4 F. 249.

³ 7 F. 488.

⁴ 6 Edw. VII. cap. 58, Second Schedule (17) (b); A. S., June 26, 1907, sec. 17.

Dec. 15, 1911. relevant case or not. He did so, and your Lordships allowed the condescendence to be received, and remitted the case to the Sheriff for further procedure.

M'Laughlin v. Wemyss Coal Co., Limited.

Ld. President. Now, in one sense perhaps, that last interlocutor was not strictly in accord with the terms of the provisions upon this matter, but, at the same time, I think it was an interlocutor which your Lordships were well entitled to pronounce, and which you would always repeat. Probably the strict interlocutor would be to remit the case to the Sheriff with the declaration that he should allow a condescendence, and to tell him further that if the condescendence that was proffered was the same condescendence that was proffered to us, he would be bound to entertain it and find that it disclosed a relevant case. I think it would be rather straining matters to find that we have got to go *per ambages* to such a result, and it is much more simple to allow the condescendence to be received here and remit the record already made. It is precisely analogous to what has been done again and again in appeals from the Sheriff Courts, and sometimes in reclaiming notes from Lords Ordinary.

Now, your Lordships allowed the appellant the expenses of the appeal, and although there was an argument upon the question whether the respondents should fairly be subjected to the expenses of the double appearance that had been rendered necessary, your Lordships did not hold that any distinction should be made upon that matter, and therefore I have no doubt that the interlocutor covers the double appearance. But the objection that has now been taken on behalf of the respondents is as to one portion of the expenses, viz., the expenses in connection with the preparation of the condescendence which your Lordships allowed to be received. There is no question, of course, as to the item, but the outcome of the objection is this. This condescendence was framed here under the auspices of both junior and senior counsel. I do not wonder that that was done, because obviously it required, to say the least of it, a good deal of skill to construct a relevant case, and I do not wonder that two builders were thought necessary; but the result of it is that this part of the account comes to £9, 10s. 8d. Well, now, why had that condescendence to be built in the Court of Session? Obviously because it had not been built already in the Sheriff Court. It is quite true, as we are told, that the Sheriff had not allowed a condescendence to be lodged, but the initial mistake was that relevancy was not sufficiently disclosed in the initial writ. After all, the initial writ is meant to begin the proceeding, and there is no reason why you should not put a perfectly relevant claim in the initial writ. If the initial writ had contained a claim to the same effect as this condescendence, then we are bound to suppose that the case would have been held to be relevant from the beginning. Therefore I do not think the respondents ought to pay the expenses of framing the condescendence, and all the more for this reason, that the appellant has got without objection the fees for both his counsel for both appearances in this Court. There is the original fee on the first discussion of the case for both senior and junior counsel, and there is the other fee, the continuing fee, which was rendered necessary by parties being brought together again. So that on this matter I think that the appellant is quite well off, and that the respondents should not be asked to pay the expenses

of this condescendence the very necessity of which came from the feeble- Dec. 15, 1911.
ness of the initial writ. It is a very special case, and I do not think it will
occur again, and I do not wonder for one moment at the Auditor doing as M'Laughlin v.
he did. But I do not think that it would be just to allow that item. Wemyss Coal
Co., Limited.

Well, the other objection, which is of a more general character, is this. Ld. President.
The actual interlocutor runs thus:—"Find the appellant entitled to the
expenses of the appeal." Now, the Auditor, having had his attention
called to a certain case of *M'Govern v. Cooper & Co.*,¹ as commented on in
a case of the *London and Edinburgh Shipping Co. v. Brown*,² felt himself
bound to disallow the expenses of getting a stated case prepared. There
are certain necessary expenses in connection with that. Notably there is
the necessity of paying £1, 10s. under the table of fees to the Sheriff-clerk
when he hands the appellant the stated case. The history of the matter
seems to be that in *M'Govern's* case¹ the respondent, who had been found
entitled to expenses, had charged in his account of expenses for a series of
attendances at the Sheriff-clerk's office, which represented a sort of anxiety
on his part to see that the stated case was being properly drawn, and the
Court held, and, I think, quite rightly held, that it was never intended
that the respondent's agent should be continually running to the Sheriff-
clerk's office—I think there were thirteen items in that case—and charge
that against the opposite party. And your Lordships will notice that in
that case he was not there to get the special case. That was the busi-
ness, naturally, of the appellant. Accordingly, the Court disallowed the
expenses. The question came up again, and was discussed in the case of
London and Edinburgh Shipping Company v. Brown.² Certain expenses
in connection with the adjustment of the case were objected to, and their
Lordships' attention having been drawn to *M'Govern's* case,¹ their view was
that the expenses should be allowed to a modified extent, and they drew a
distinction between the interlocutor in the case before them, which ran
"the expenses of the stated case," and the interlocutor in the case of
M'Govern,¹ which ran "the expenses of the appeal," and upon that distinc-
tion they discriminated between the cases. If I may say so with respect, I
think that was a well-meant intention of saving the decision of the other
Division, and that really there is no distinction between the two forms of
interlocutor. I cannot imagine how there could be, because after all the
only way of appeal is by stated case, and whether you call it "expenses
of the appeal" or "expenses of the stated case" or "expenses of the
stated case on appeal," all these expressions seem to me to come to the
same thing. Nay more, I cannot imagine a case in which it would
be proper to give the appellant the expenses of the appeal (neces-
sarily, of course, on the hypothesis that he had been successful), and
yet to disallow the actual outlay which he had to make, in the shape of a
fee to the Sheriff-clerk, in order to get the case stated on which he was
successful. I cannot imagine a set of circumstances in which that could
be right. Of course if I thought I was going against the judgment of
the Second Division I would not have pronounced this judgment without
consulting them; but I am perfectly certain that I am not going against

¹ 4 F. 249.² 7 F. 488.

Dec. 15, 1911. the real meaning of the Second Division, because in the subsequent case of *M'Laughlin v. Dempster v. Baird & Company, Limited*,¹ Lord Stormonth-Darling, in delivering the judgment of the Court, says,—“We shall adopt the practice in *Brown's case*² to the extent of modifying the fee to be allowed to the appellant at three guineas, which includes the £1 paid to the Sheriff-clerk.” That is the rule which I propose your Lordships should follow here, and I think it is much the best plan to have a modified fee, and that, I understand, is actually the practice of the Auditor. Therefore, I think we should follow the practice in *Brown's case*² and sustain the objections so far, and instead of giving an unfixed amount give a fee of three guineas, which will include the £1, 10s. paid to the Sheriff-clerk. I have consulted the Auditor, and in cases in the future in respect of the increased fees under the 1907 Act, the fee to be allowed will be three guineas and a half. That I take to be the proper practice when a particular interlocutor bears to be, as I say, for the “expenses of the stated case,” or the “expenses of the appeal,” or the “expenses of the stated case on appeal.”

LORD KINNEAR and LORD MACKENZIE concurred.

THE COURT pronounced the following interlocutor:—“Having considered the note of objections for the appellant . . . to the Auditor's report on the appellant's account of expenses . . . along with the note of objections for the respondents to said report . . . (First) Sustain said objections for the appellant to the extent of allowing £3, 3s. of the sum of £3, 14s. 2d. taxed off by the Auditor, as set forth in said objections: (Second) Sustain said objections for the respondents, and disallow the sum of £9, 10s. 8d. allowed by the Auditor, as set forth in said objections.”

ERSKINE DODS & RHIND, S.S.C.—W. & J. BURNES, W.S.—Agents.

No. 43.

ANGUS M'LEAN, Appellant.—*Crabb Watt, K.C.—J. A. Christie.*

ALLAN LINE STEAMSHIP COMPANY, LIMITED, Respondents.—

Dec. 16, 1911.

Horne, K.C.—Carmont.

M'Lean v.
Allan Line
Steamship
Co., Limited.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), Second Schedule (9)—Recording of memorandum—Written agreement between parties—Terms of memorandum differing from terms of agreement.

Where an agreement in writing has been entered into between an employer and a workman with regard to compensation, it is the duty of the Sheriff (if objection is taken) to refuse to record a memorandum which is not in the precise terms of the written agreement. It is not part of his duty to construe the written agreement and then to determine whether the memorandum gives effect to it as so construed.

1st Division.
Sheriff of
Lanarkshire.

IN an application in the Sheriff Court of Lanarkshire at Glasgow for the recording of a memorandum of agreement under paragraph (9) of the Second Schedule to the Workmen's Compensation Act, 1906, the Sheriff-substitute (Fyfe) refused to record it, and at the request of the workman, stated a case for appeal.

¹ 1908 S. C. 722, at p. 731.

² 7 F. 488.

The case set forth :—

Dec. 16, 1911.

" The following facts were admitted :—

" 1. The appellant, whilst in the respondents' employment as a seaman, on board their s.s. 'Hibernian,' on 7th March 1911, sustained injury by accident arising out of and in the course of his employment, and he was thereby totally incapacitated from following his occupation.

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" 2. The amount of compensation payable to appellant under the Workmen's Compensation Act was agreed upon at 13s. 9d. per week, and that is still being paid.

" 3. On 17th August the appellant signed a stamped document in the following terms :—First Payment.—'Received this 17th day of August 1911 from the Shipping Federation, Limited, on behalf of the owners of the s.s. "Hibernian," the sum of Two pounds one shilling and threepence, being weekly compensation at the rate of 13s. 9d. per week from 25/7/11 to 15/8/11 inclusive, under the Workmen's Compensation Act, 1906, under which Act I elect to claim for personal injury, by accident, sustained by me on or about the 7th day of March 1911. This weekly payment is to be continued during my total disablement resulting from the accident, in accordance with the provisions of the above-mentioned Act; the amount of any payment due during partial disablement to be settled hereafter. (Signed) ANGUS M'LEAN, Seaman, 110 Houston Street, Glasgow. (Witness) J. A. Ditchburn. Stamp sixpence.'

" 4. On 21st August 1911 the appellant lodged with the Sheriff-clerk a memorandum to be recorded in terms of the Workmen's Compensation Act, in the following terms :—'The claimant claimed compensation from the respondents in respect of personal injuries sustained by him on 7th March 1911, while in the employment of the respondents, and on board s.s. "Hibernian," at Greenock, the claimant having sustained dislocation of the right shoulder, and having been totally incapacitated from following his occupation from said date in consequence. The question in dispute, which was as to the amount of compensation payable to the claimant, was determined by agreement. The agreement was made on the sixteenth day of August 1911, and was, as follows, viz. :—That the respondents should pay compensation to the claimant from the date of the accident, at the rate of thirteen shillings and ninepence sterling per week, to continue during the claimant's incapacity for work, or until such time as the same shall be ended, diminished, or redeemed, in accordance with the provisions of the said Act.'

" 5. The Sheriff-clerk, in terms of Section XI. (1) of the Act of Sederunt of 26th June 1907, on said 21st August 1911 sent a copy of said memorandum of agreement in a registered letter to the respondents, containing a request that he might be informed on or before 28th August 1911 whether the memorandum and agreement set forth therein were genuine or were objected to. On 23rd August 1911, The Shipping Federation, Limited, on behalf of the respondents, sent to the said Sheriff-clerk a letter objecting to said memorandum being recorded, on the ground that it did not accurately set forth the agreement made with the appellant. The Sheriff-clerk thereupon intimated to the appellant that the recording of the memorandum had been objected to, and that the same would not be recorded without a special warrant from the Sheriff. In terms of Section XII. of said Act of Sederunt, the memorandum thereupon fell to be dealt with as if it were an application to the Sheriff for settlement by arbitration

Dec. 16, 1911. of the questions raised by the objection to the recording of the memorandum. On 11th October 1911, after having heard parties' procurators, I found that on the 17th August 1911, the document above referred to had been signed by the appellant, Angus M'Lean, and that that document constituted a formal agreement between the appellant and the respondents, expressed in terms different to those set forth in the memorandum sought to be recorded. I therefore found that said application to record a memorandum of agreement was unnecessary and incompetent, and I dismissed the application, and found no expenses due to or by either party."

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The question of law for the opinion of the Court was:—"Did the fact that on 17th August 1911 the appellant had signed the said document, render his application to record an alleged agreement of 16th August in different terms incompetent?"

The case was heard before the First Division (without Lord Johnston) on 16th December 1911.

Argued for the appellant;—The document signed on 17th August did not render incompetent the recording of this memorandum because (except for an error, which the appellant was prepared to correct, as to the date from which compensation was payable) the only difference between the two documents was a mere difference of expression. The closing sentence of the memorandum (which was the only part objected to) really set forth the correct interpretation of the agreement. Further, if the memorandum was recorded in its present form the respondents would suffer no prejudice, for if total incapacity ceased the remedy of suspension was not open to them,—their only remedy was an application for review,¹ and in such an application it would make no difference whether the memorandum was in its present form or in the precise terms of the agreement. If, however, the Court were to hold that the recording of the memorandum in its present form was incompetent, the appellant desired to record a memorandum in the actual terms of the agreement.

Argued for the respondents;—The agreement between the parties here having been reduced to writing, the Sheriff was right in refusing to record a memorandum which differed in its terms from the written agreement.² The difference here was material for (apart from the error in date) the memorandum bore that compensation was agreed to be paid till it was "ended, diminished, or redeemed," under the Act, whereas the written agreement was only for payment during "total disablement." The effect of recording the memorandum in its present terms would be that, if total disablement ceased, the respondents would have to continue paying until they had got an order in a process of review ending or diminishing the compensation, and even though that order dated back to the time of presenting the application, it was obvious that the sums paid meanwhile would be unrecoverable. Whereas, if the memorandum were recorded in the actual terms of the agreement, the respondents, as soon as total disablement ceased, could stop paying, and if charged for payment, could suspend the charge.³

¹ Lochgelly Iron and Coal Co. v. Sinclair, 1909 S. C. 922; Archibald Finnie & Son v. Fulton, 1909 S. C. 938.

² Shore v. S.S. Hyrcania, (1911) 4 Butterworth, 207; Lunt v. Sutton Heath and Lea Green Collieries, (1911) 4 Butterworth, 219.

³ Wilsons and Clyde Coal Co. v. Cairnduff, 1911 S. C. 647.

LORD PRESIDENT.—This stated case conceals in an extraordinary manner Dec. 16, 1911. the real point which was argued before your Lordships, but as the matter is now clearly before the Court, I do not think that it is necessary to send the case back.

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The matter arises in this way. The appellant, who is a seaman, met with an accident on board the ship "Hibernian," belonging to the respondents. He does not seem to have been paid compensation at first because, I suppose, he was on board the ship and got his wages and nothing more was necessary. But on 17th August 1911—that is to say, about five months after the accident—he signed an agreement. [His Lordship then recited the terms of the agreement and the terms of the proposed memorandum, and continued]—Now, that memorandum the Sheriff refused to record, and the present appeal is as to whether he was bound to record it. In the discussion before your Lordships the appellant admitted that the words in the memorandum "from the date of the accident" were a slip, and he is quite willing to alter them by putting in "from 25th July 1911"; and if that were the only matter the respondents would not, as I understand, object.

But the real point of discussion between them lies in the words that are put in the agreement as to payment to be continued during total disablement. I ought to say, first of all, that although the so-called agreement is a document unilateral in its terms, it is not disputed by the respondents that it constitutes an agreement, that is to say that it was accepted by them as such. Now, the real dispute is upon the words that occur after the provision as to payment during total disablement, namely, the words "the amount of any payment due during partial disablement to be settled hereafter." In the document as signed the words are as I have read them, whereas in the memorandum as proposed to be recorded those words are replaced by the words "or until such time as the same shall be ended, diminished, or redeemed, in accordance with the provisions of the said Act." The appellant maintains that those words in the memorandum are simply a more accurate and proper way of expressing what the words in the written agreement bore. The respondents, on the other hand, say, No; and in particular they maintain that it will make an important practical difference to them, because they say that the result of recording the memorandum as proposed will be that if the seaman partially recovers, they will be bound to pay if charged until they can get the payment reviewed in a process of review, and that, albeit that eventually decree in that process of review will draw back to the term of presenting the petition, yet nevertheless they may find themselves in this unpleasant position, that during the time the case has taken to decide they have had to pay the full sum, and that sum they will never get back; whereas if the agreement was recorded in the precise terms in which it was written they could not be charged to pay during the period after they had alleged that total incapacity had ceased—or rather, to put it more accurately, that if a charge were presented against them they would be able to suspend it—and therefore would not be in the position of having to pay money that they eventually would not be able to get back.

Now, I do not think, although we have had a discussion on the question, that we need decide at present whether the one set of words is exactly the same as the other or is not. The only thing we can decide to-day is, What

Dec. 16, 1911. is the Sheriff's duty when a memorandum is produced to him for the purpose of being recorded, and the genuineness of it is disputed? With regard to this matter, the Sheriff is not really acting as arbitrator at all; he is acting in a semi-ministerial capacity. I say a semi-ministerial capacity, because he has to decide upon the matter of genuineness if that is controverted, and he has to exercise a judicial function in deciding that. But I think it would never do if we said that, in the case of written agreements, on a memorandum being tendered it was open to the Sheriff, who is really only acting here for the Sheriff-clerk, to consider, as a question of construction, whether the thing to be recorded was or was not the same as the thing which had originally been signed. In other words, I think it comes to this, that where an agreement which has been come to between the parties is admittedly in writing, the Sheriff must record that agreement as it stands and nothing else. It is otherwise if the agreement has been come to verbally and is then disputed: the Sheriff has in that case to decide on a proof what the true verbal agreement was. But where the agreement is professedly in writing, I think his duty begins and ends in recording that agreement and that agreement only.

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Ld. President.

Accordingly, in this case I think the Sheriff rightly refused to record the memorandum as proffered. Therefore I think that in order to avoid further procedure, as it is stated at the Bar that the appellant is now content to have the agreement recorded in the exact words in which it was signed, we should find that the Sheriff-substitute was right in refusing to record the memorandum proffered, and remit the case to him to proceed with the recording of the memorandum in the words of the document signed upon 17th August 1911.

LORD KINNEAR.—I quite agree with your Lordship. I think that the Sheriff-clerk, under the direction of the Sheriff, has an administrative duty imposed upon him to record a memorandum of an agreement actually made between the workman and the employers, and if there be a question as to the genuineness of that agreement his functions are confined to the determination of that particular point, subject to certain other questions for which the statute provides. But the question of the true legal construction and effect of an agreement proposed to him is not one of the questions he is authorised to decide. He has no jurisdiction to decide that, but only to say whether he is satisfied that it is, in point of fact, an agreement between the parties.

Now, the agreement which he was asked to record is in certain terms, and its genuineness depends upon the conformity of these terms with a written document in the shape of a receipt signed by the workman and accepted by the employers which purports to set forth what the parties have agreed upon, and which accordingly is produced as the basis on which the application is made. Either party is quite entitled to say that, in so far as it departs from the express terms of this document, the agreement proposed is not what he has consented to. It either expresses what both parties have agreed to, or it does not; and unless the objection to its terms is merely frivolous it seems to me perfectly obvious that one party can have no right to insist, against the opposition of the other, on the registration of

a document which undeniably varies from the actual terms agreed upon. Dec. 18, 1911. The variation may or may not be material. But the parties are at variance as to the true meaning and effect of certain words of the document, and I do not think that the Sheriff-clerk or Sheriff has power to determine that question or to do anything but the exact ministerial act which the Sheriff-clerk is appointed to perform.

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Co., Limited.
Lord Kinnear.

I agree with your Lordship, therefore, that the appellant is not entitled to have the memorandum which he proposes recorded, because it is not the exact agreement which was made between the parties.

LORD MACKENZIE.—I agree with your Lordships. I do not think it was part of the duty of the Sheriff in this case first of all to construe the written document, and then, after arriving at an opinion as to the true meaning of that document according to his view, to record a memorandum of agreement giving effect to that construction. I think his duty, and his only duty, was to record the memorandum of agreement in the terms which were actually agreed to by the parties.

THE COURT pronounced an interlocutor in the following terms:—

“Find that the Sheriff-substitute was right in refusing to record the memorandum of agreement lodged in the application by the appellant: Find it unnecessary to answer the question of law as stated in the case: Further, in respect that appellant now states at the Bar that he desires to have the printed agreement signed by him on 17th August 1911 recorded as an agreement under the Workmen's Compensation Act, 1906, recall the determination of the Sheriff-substitute as arbitrator appealed against, and remit to him to proceed as accords . . .”

E. ROLLAND M'NAB, S.S.C.—J. & J. ROSS, W.S.—Agents.

DAVID EDWARD AND ANOTHER (James M'Gregor's Trustees), First Parties (Respondents).—*J. R. Dickson.*

No. 44.

MRS ALICE JEFFS OR M'GREGOR OR KIMBELL, Second Party (Objector).—*J. G. Jameson.*

Dec. 19, 1911.

Expenses—Taxation as between party and party—Trust—Expenses of trustees. M'Gregor's Trustees v. Kimbell.

A special case, which was presented to determine questions regarding the disposal of a particular portion of a trust-estate and to which the trustees were parties, stated that it had been agreed that “the taxed expenses of the several parties” should be paid out of the fund in dispute. The Court, in disposing of the case, found “the whole parties to the special case entitled to their expenses as the same may be taxed by the Auditor,” out of the fund in dispute.

Held that under this finding the trustees' account of expenses fell to be taxed as between party and party, and not as between agent and client.

(SEQUEL to *M'Gregor's Trustees v. Kimbell*, 1911 S. C. 1196).

2D DIVISION.

On 14th July 1910 David Edward and another (James M'Gregor's testamentary trustees) (*first parties*), Mrs Alice Jeffs or M'Gregor or Kimbell, the testator's widow (*second party*), and others presented a

Dec. 19, 1911.

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Kimbell.

special case for the determination of questions regarding the disposal of surplus accumulations of the income of the trust-estate, which were in the hands of the first parties and which were claimed by the second party and by others.

The case stated:—"It has been agreed that the taxed expenses of the several parties to this case shall be paid out of the surplus accumulated funds referred to, so far as still in the hands of the first parties, subject to the sanction of the Court."

On 14th July 1911 the Court pronounced an interlocutor which, after disposing of the questions in the case, contained this finding:—"Find the whole parties to the special case entitled to their expenses as the same may be taxed by the Auditor—to whom remit—out of the surplus accumulated funds in the hands of the first parties."¹

The Auditor having taxed the trustees' account of expenses as between agent and client, Mrs Kimbell lodged a note of objections to the Auditor's report, in which she maintained that the trustees' account should be taxed as between party and party.

Parties were heard before the Second Division (without Lord Dundas) on 19th December 1911.

Argued for the objector;—An interlocutor awarding expenses without qualification gave expenses as between party and party, and they could be taxed on no other scale.² This rule applied even when, by making a timeous motion, one of the parties might have obtained expenses as between agent and client.³ In the present case the agreement between the parties was that only judicial expenses should be taken out of the fund in dispute. This entailed no hardship on the trustees, as it did not affect their right to charge their extrajudicial expenses against the general trust-estate.

Argued for the respondents;—No weight should be given to the objector's contention that the trustees might recover their extrajudicial expenses from the general trust-estate, for that would lead to the inequitable result of charging a share of the expenses of this litigation against parties who had no interest in the matter in dispute. The law was that trustees who became justifiably involved in litigation in the course of their administration of the trust-estate were absolutely entitled to be kept *indemnes*, and if they obtained an award of expenses, these must be taxed as between agent and client, for no other scale was applicable,⁴ and an express finding that they were to be taxed on this scale was not required.⁵

LORD JUSTICE-CLERK.—The last observation alone, by counsel for the respondents, requires to be dealt with, namely, that where trustees appear as trustees, and there is a remit to the Auditor to tax the account incurred by them, the taxation must in general be as between agent and client. That may be perfectly right in the ordinary case, because it is not disputed that trustees are entitled to be indemnified against expense incurred in the administration of the estate under their charge. But we have here a peculiar case dealing with a particular fund in the hands of the trustees.

¹ Reported 1911 S. C. 1196.

² Fletcher's Trustees v. Fletcher, (1888) 15 R. 862.

³ Magistrates of Aberchirder v. Banff District Committee, (1906) 8 F. 571.

⁴ Merrilees v. Leckie's Trustees, 1908 S. C. 576.

⁵ Davidson's Trustee v. Simmons, (1896) 23 R. 1117.

The interlocutor, which proceeds on an agreement by the parties to the Dec. 19, 1911. special case, finds all the parties "entitled to their expenses as the same may be taxed by the Auditor—to whom remit—out of the surplus accumulated funds in the hands of the first parties." In these circumstances it very plainly appears that Mr Jameson's client would be subjected to absolute injustice if the first parties are to get their expenses as between agent and client out of the accumulated funds in question, for that would involve payment of a very large sum out of the half of the funds to which Mr Jameson's client has been found entitled. On the whole matter, therefore, I think that the first parties' account should be again remitted to the Auditor with instructions to tax it as between party and party.

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Kimbell.

Lord Justice-
Clerk.

LORD SALVESEN.—I entirely agree. I think the finding as to expenses, which the Court pronounced, and which proceeded on the agreement as to expenses by the parties to the special case, must be construed as a direction to the Auditor to tax the accounts of the parties, including that of the trustees, as between party and party. I am not disposed to say anything which will prevent the trustees from recovering their extrajudicial expenses out of the rest of the estate under their charge. That question, however, is not before us now.

LORD GUTHRIE.—I agree. The trustees are among the parties to the special case, and are, therefore, parties to the agreement as to expenses. Had they chosen, they might have refused to enter into the agreement, with the result that their whole expenses, judicial and extrajudicial, would have been charged against the general trust-estate. But there was nothing to prevent them agreeing to charge their judicial expenses against the accumulated funds and their extrajudicial expenses against the general trust-estate; and I think that is the effect of the agreement as to expenses to which they were parties.

THE COURT sustained the objections, remitted the account to the Auditor to tax as between party and party, and found the objector entitled to the expenses of the discussion on the objections, modified to £2, 2s.

MORTON, SMART, MACDONALD, & PROSSER, W.S.—WISHART & SANDERSON, W.S.—
Agents.

THOMAS M'MILLAN, Pursuer.—*M'Clure, K.C.—J. A. T. Robertson.*
BARCLAY, CURLE, & COMPANY, LIMITED, Defenders.—*Moncrieff—*
Gilchrist.

No. 45.

Dec. 20, 1911.

Reparation—Master and Servant—Common Law—Employers Liability
Act, 1880 (43 and 44 Vict. cap. 42)—Casual danger—Danger emerging in
course of work.

M'Millan v.
Barclay,
Curle, & Co.,
Limited.

A father brought an action of damages at common law and alternatively under the Employers Liability Act, in respect of his son's death, against a firm of shipbuilders in whose employment his son was killed. He averred that his son was employed on the deck of a vessel in course of construction to pick up from the deck and throw over the side the parings of red-hot rivets which fell from riveters who were working above; that in the performance of this duty

Dec. 20, 1911.

**M'Millan v.
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Limited.**

he had to run quickly from place to place ; and that in so doing he slipped, fell from the deck (which was unfenced), and was killed. He further averred that the footing on the deck was uncertain from the nature of the materials of which it was constructed, and that on the occasion in question it had been rendered slippery by a recent shower of rain ; that a reasonable and usual precaution for the safety of workmen was to erect a temporary fence at a place of this kind ; and that the defenders and their foreman had known of the danger to which the workmen were exposed and had negligently failed to take this precaution.

The Court *dismissed* the action as laid at common law as irrelevant, *holding* that the pursuer's record disclosed no failure of duty on the part of the employers, inasmuch as the danger averred was not a permanent danger but was one emerging in the course of the work, which fell to be dealt with by the foreman and knowledge of which could not be imputed to the employers ; but *allowed* an issue under the Employers Liability Act, in respect of the averment that the temporary fencing of such a place was a usual precaution which had been negligently omitted by the foreman.

1ST DIVISION.
Sheriff of
Lanarkshire.

IN September 1911 Thomas M'Millan, a rigger at Whiteinch, brought an action in the Sheriff Court of Lanarkshire at Glasgow against Barclay, Curle, & Company, Limited, shipbuilders there, in which he claimed damages at common law, and alternatively under the Employers Liability Act, 1880, in respect of the death of his son, Thomas M'Millan junior, who was killed while in the employment of the defenders.

The pursuer averred :—(Cond. 2) “ On or about the 5th day of July 1911, and for some time previous thereto, the said deceased Thomas M'Millan junior was in the employment of the defenders at the construction of a vessel in their shipbuilding yard at Whiteinch. He was engaged as a rivet boy, and on the said 5th July he was working in that capacity on the promenade deck of said vessel. The said deck was composed of teak, and the seams thereof were filled in with pitch, and it was the duty of the deceased to watch the riveters who were engaged on the boat deck about eight feet above, and to pick up and throw over the side of the vessel by means of two small sticks used like tongs the red-hot parings of the rivets thrown down by them upon the promenade deck. These red-hot parings were thrown down over the deck in all directions, and it was necessary for the deceased in performing his work to keep a sharp look-out on the riveters to see that none of the parings fell upon himself, and to watch where they did fall. He had to run quickly from place to place as they fell and pick them up before they set fire to the pitch on the deck or marked the teak wood. While so employed he worked under the orders and supervision of John Graham, a foreman in defenders' employment, whose sole or principal duty was that of superintendence, and who was not ordinarily engaged in manual labour.” (Cond. 3) “ About 11 o'clock A.M. on said 5th July 1911 the pursuer was engaged at the said work ; when running to pick up a red-hot paring he slipped on the deck of said vessel and, falling over the side thereof, a distance of 55 feet or thereby, was instantaneously killed. The said deck was in a slippery condition. The pitch had become hard, and rendered footing uncertain, and the teak wood had become slippery in consequence of a rainfall that morning. Teak wood when wet always becomes slippery and uncertain to walk on. At the place where the deceased fell over there was no fencing of any

kind at the edge of the deck, and nothing to prevent one who slipped on the deck from going over the side." (Cond. 4) "The death of the said deceased Thomas M'Millan junior was due to the fault and negligence of the defenders. It was their duty to take all usual, reasonable, and necessary precautions for the safety of the workmen in their employment. They knew or ought to have known that the hard pitch at the seams of the said deck made the footing uncertain, and that teak wood when wet is especially liable to become slippery. They ought, when they employed a boy like the deceased to work on the said deck, at work which necessitated his running quickly from one part of the deck to another, while taking care to avoid falling particles of red-hot rivets, to have taken precautions against his falling over the side of the deck through a stumble or slip thereon. This precaution was rendered more necessary on account of the height of the said deck from the ground. Such precautions could easily have been taken at the time the said accident happened. The stanchions, through which the rails of the said promenade deck were to be put, were in position, and ropes could easily have been fastened to them in such a way as to prevent any accident. Such a precaution is a reasonable one to take, and is usually taken in similar circumstances. The defenders, however, failed to take that or any other precaution, and left a space of several feet at the edge of the said deck without any fencing or other protection, and the accident to the deceased resulted from this failure. After the accident they erected a wooden fence at the said place." (Cond. 5) "Alternatively, the said accident was due to the fault of the defenders' superintendent, the said John Graham, for whom the defenders are responsible, in respect that he failed in the duty of superintendence entrusted to him. He was in charge of the work on the day and at the time in question, and it was his duty to take all necessary and reasonable precautions for the safety of the pursuer's said son. He ought to have erected a fence or railing along the side of said ship at the part thereof where the pursuer's said son was working. The said John Graham knew that pursuer's said son was employed on said promenade deck, and that the said teak wood deck became specially slippery after a shower of rain such as had fallen that morning, and he also knew that the side of said ship at the part thereof where the pursuer's said son was working was unfenced and unprotected. He knew, or ought to have known, that the state of the deck constituted a great danger to anyone engaged as the deceased was, in running quickly from one part to another. He could easily have erected a fence by means of a rope fastened to the iron stanchion which was in position along the edge of the deck. He failed, however, to take this or any other precautions for the safety of pursuer's said son, and this failure caused the said accident."

The defenders pleaded, *inter alia*, that the pursuer's averments were irrelevant.

The Sheriff-substitute (Craigie) allowed a proof and, on the requisition of the pursuer, the case was remitted to the Court of Session.

The pursuer having proposed issues in the ordinary form on the alternative conclusions, the case was heard before the First Division (consisting of the Lord President, Lord Dundas, and Lord Johnston) on 20th December 1911, when the defenders objected to issues being allowed.

Argued for the defenders;—The pursuer had stated no relevant

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Dec. 20, 1911. *M'Millan v. Barclay, Curle, & Co., Limited.* case either at common law or under the statute. (1) As regards the case at common law, he must aver either that the defenders had not employed a competent staff, or that they had not provided their foreman with sufficient materials, or that the system was defective. It was only on the latter ground that liability could be suggested in the present case, and the averments did not disclose a defective system. To make this complaint relevant there should be an averment that it was necessary to erect a temporary fencing from the moment that workmen were first employed on the unfinished deck.¹ It was clear from the averments that the immediate cause of the accident was the slippery condition of the deck resulting from the recent shower of rain. This was a casual danger arising in the course of the work, which fell to be dealt with as it arose, and knowledge of which could not be attributed to the employers. (2) As regards the case under the Act, the mere averment of a duty on the part of the defenders and their servants to fence was not in itself sufficient to found liability; the pursuer must aver facts and circumstances inferring a danger. A workman was not entitled to expect to find on an unfinished ship the measure of protection that would be provided on a finished vessel.² The averments only disclosed a case such as had been proved in the case of *Burns v. D. & W. Henderson*,³ where the Court found that there was no liability. If it was proper to allow the deck to be unfenced before the rain came on, the latter occurrence did not alter the legal aspect of the question.

Argued for the pursuer;—(The Court intimated that they required argument only on the question of liability at common law.) The pursuer had relevantly averred neglect by the defenders to take the reasonable and necessary precaution of fencing what was a dangerous place. The danger averred was not temporary or accidental, it was one, as the defenders well knew, to which men working on the deck of a vessel which had no bulwark must necessarily be exposed.⁴ That danger must always exist where ships were being built, and the fact that it had been aggravated by the shower of rain did not affect the defenders' liability.

LORD PRESIDENT.—It is clear that there is here no relevant averment of liability at common law. There is no averment of a defective system, there is no averment that the defenders failed to employ a competent foreman, or that they stinted their foreman in proper materials required for the performance of his duties. All that is said is that the boy, running about the deck which was wet and slippery and not sufficiently protected by a bulwark, slipped and fell over the edge. It is said that nothing had been erected in the nature of a temporary fencing. If it was the want of a fence that caused the accident, that was not a defective system; it was a matter which was under the control of the head workman. It is quite true that the employer is bound to provide for the safety of his workmen and, if the employer fails to provide some piece of machinery or structure which

¹ *Harper v. James Dunlop & Co., Limited*, (1902) 5 F. 208; *Thomson v. Baird & Co., Limited*, (1903) 6 F. 142.

² *Forsyth v. Ramage & Ferguson*, (1890) 18 R. 21.

³ (1905) 7 F. 697.

⁴ *Smith v. Baker & Sons*, [1891] A. C. 325; *Wallace v. Culter Paper Mills*, (1892) 19 R. 915.

is necessary to protect them against what is a permanent danger, then he is liable because he is held to have known of that danger. But he cannot be supposed to know of what may be called a casual danger emerging in the course of the work, such as that to which the boy in the present case was exposed. All he can do to protect his men against such a danger is to provide a competent foreman. There is no averment that the employer in the present case failed to provide a competent foreman, and therefore there is no fault averred at common law.

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 Ld. President.

On the other hand, I think a relevant case has been stated under the Employers Liability Act, because it is said that the employers' foreman, John Graham, knew of the danger, should have erected a temporary fence to protect the workmen, and failed to do so. The pursuer may be able to prove, as he avers, that there is a general custom to fence a place of this kind. On that point it would not be proper for the Court to say anything. Unless the pursuer is able to prove that there is such a general custom and that the failure to put up a temporary fence at this place was negligence, he will fail in his action. But he may be able to prove this, in which event he will be entitled to succeed.

I therefore think we should allow the issue under the Employers Liability Act.

LORD DUNDAS and LORD JOHNSTON concurred.

THE COURT dismissed the action as laid at common law, and allowed an issue under the Employers Liability Act.

INGLIS, ORR, & BRUCE, W.S.—HARRY H. MACBEAN, W.S.—Agents.

AMELIA TAYLOR HORSBURGH, Pursuer (Respondent).—*G. Watt, K.C.*— No. 46.
MacRobert—W. L. Mitchell.

JOHN THOMSON'S TRUSTEES AND OTHERS, Defenders (Reclaimers).— Dec. 20, 1911.
M'Clure, K.C.—C. H. Brown.

MRS ISABELLA THOMSON OR CAMPBELL, Defender (Reclaimer).—*Macquisten.*
Horsburgh v. Thomson's Trustees.

Fraud—Facility and circumvention—Testament—Reduction—Sufficiency of averments of impetration.

In an action for the reduction of certain testamentary writings, executed during the latter years of a testator who died at the age of ninety-three, by which the children of a deceased daughter were excluded in favour of the testator's surviving children, the pursuer (an excluded grandchild) averred that the testator during the latter years of his life was in a weak and facile condition, and that one of his surviving daughters, B, taking advantage of that condition, induced him to make the testamentary dispositions complained of. The pursuer further averred that B lived alone with the testator during the latter years of his life, and undertook the management of his affairs, of which he himself was mentally and physically incapable; that during this period she obtained sums of money from him by threats, and more than once appropriated moneys without his leave for her own use; and that she prevented him from seeing his grandchildren. The pursuer, however, did not aver any specific facts regarding the impetration of the deeds, and the defenders

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objected that there was nothing in the pursuer's averments which could relevantly connect B with the alleged impetration.

Held that the bare averment of impetration when read along with the averments as to the surrounding facts and circumstances disclosed a relevant case of fraud and circumvention against B; and issues *allowed*.

1st DIVISION. ON 24th July 1911 Amelia Taylor Horsburgh brought an action against the testamentary trustees of her late grandfather, John Thomson, and against his three surviving children, concluding for reduction of certain testamentary writings of the deceased.

The testator died at the age of ninety-three on 30th March 1911, survived by his son, John Thomson, and by two daughters, Mrs Isabella Thomson or Campbell (Bella) and Mrs Jane Thomson or Watson (Jeanie), the defenders. He was predeceased by a daughter, Mrs Jessie Thomson or Horsburgh, the pursuer's mother, who died on 14th May 1900.

By his last will and testament, dated 25th January 1896, the testator provided that the liferent of his estate should be given to his wife (who was then alive, but who predeceased him on 21st October 1899), and that on her death the estate, with certain exceptions, should be divided into "four equal parts, 1st to John, 2 Jessie, 3rd Bella, 4 Jeanie, *in the event of any of them dying their share to be divided to their children.*" The words printed in italics bore to be deleted.

Reduction was sought (1) of the deletion of the words "in the event of any of them dying their share to be divided to their children," occurring in the clause above quoted, and of a marginal addition thereto in these terms:—"I withdraw this. JOHN THOMSON"; and (2) of two codicils, dated 19th January 1901 and 1st October 1907 respectively, and a third codicil (undated) which was in these terms:—"Bella is get (*sic*) the ground in the Western Cemetery."

The pursuer averred, *inter alia*, that the defender Mrs Campbell, after her husband's death in 1900, made her permanent home with the testator, and that from that date the only occupants of his house in Dundee were himself, Mrs Campbell, and a maid.

She further averred:—(Cond. 3) " . . . In the year 1899, shortly before Mrs Thomson's death, and when Mrs Horsburgh was also seriously ill and little hopes entertained of her ultimate recovery, Mr Thomson sent for her to come into Dundee to see him. Mrs Horsburgh went to the house at 11 Nethergate, Dundee, as desired, and saw her parents. Her father, Mr Thomson, on that occasion acquainted her with the terms of the said will and testament of 1896, and requested her not to worry about money matters as he had made it all right for her children. . . ." (Cond. 4) "After Mrs Horsburgh's death her husband and her children continued on friendly terms with Mr John Thomson. Mr Horsburgh, who was nominated an executor in the will and testament of 1896, called for him once a fortnight, as had been his custom for years, and the pursuer and her brothers and sisters also paid him visits at frequent intervals. It soon became noticeable to them, however, that there was a change in Mrs Campbell's attitude towards them, and this became still more apparent after Mr Horsburgh's death in 1905. When the pursuer or any of her brothers or sisters called they were not shown as formerly into their grandfather's presence, but were put into an ante

room to await Mrs Campbell. They had great difficulty in seeing their grandfather at all, and on their expressing a wish to do so were always put off by some excuse made by Mrs Campbell, who excluded them from seeing their grandfather. Their grandfather, who formerly sat in a front room, was kept by Mrs Campbell in a small back room, and during the last four or five years prior to his death the pursuer was only able to see him on two occasions, although she called very frequently to ask for him. It was evident to the pursuer and her brothers and sisters that Mrs Campbell did not want them to call at their grandfather's home, and that Mrs Campbell was endeavouring to estrange the affection in which their grandfather had held them and to cause him to forget them altogether. Neither Mrs Campbell nor Mrs Watson took any interest in the pursuer or her brothers or sisters." (Cond. 5) "The late Mr John Thomson was, at his wife's death, over eighty years of age, and thereafter changed very rapidly in his mental capacity. He became taciturn and reserved, and could only keep up a conversation with difficulty. About or shortly after this time his memory began to be defective, and he could not grasp the meaning of things. His mental condition became gradually worse, owing to advancing age and senile decay, and before Mr Horsburgh's death in 1905 it was obvious that he was quite unable to attend to any business affairs. From 1905 onwards the symptoms became worse, he was quite unable to read, and he could not distinguish the different coins of the realm, he had frequent attacks of heart seizure, but when he recovered he could not recollect that he had been ill. He was dazed and stupid. He was unable to talk with intelligence on any subject, and he took no interest in his own affairs. The enfeebled physical and mental condition of the said John Thomson was well known to the defenders, who both verbally and in writing expressed the opinion that he was no longer capable of managing his own affairs. He had no friends, having outlived his contemporaries, and he spent the last four or five years of his life sitting gazing into the fire in the back room. The pursuer believes and avers that from the year 1900 until the date of his death the said John Thomson was mentally incapable of disposing of his estate, or of giving intelligent directions for its disposal, and that the deeds sought to be reduced are thus not the deeds of the deceased, and that he was not mentally capable of making the deletion in question, *which was as aftermentioned made on or about 1st October 1907.** Even assuming that deceased was mentally capable of executing the said deeds and making said deletion, which is denied, he was at the dates in question weak and facile in mind, and easily imposed upon, and the defender Mrs Campbell, as before and aftermentioned, taking advantage of his said weakness and facility, procured the said documents from him to his lesion. Denied that the said John Thomson wrote said codicil after legal advice from his law-agents. The defenders are called upon to name the law-agent alleged to have been consulted. Denied that the said deletion was prior in date to any extent to said codicil of 1st October 1907." (Cond. 6) "After Mrs Thomson's death Mrs Campbell obtained a great influence over the said John Thomson. She assumed the management of his affairs, and intromitted with the rents of his property.

* The words in italics were added by way of amendment in the Inner House.

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She demanded various sums at different times as remuneration for additional trouble in nursing him during his frequent heart attacks and obtained these sums by threatening to go away and leave him to strangers. He was pliable in her hands, and was unable to resist any suggestion she made, and she prevented him seeing his other relatives, or at any rate the pursuer and her brothers and sisters. On several occasions Mrs Campbell applied for her own use, without her father's knowledge, sums of money belonging to him. Mrs Watson, who was aware of Mrs Campbell's actings, was given a portion of these monies to ensure her silence. The deceased, in his younger days, was particularly careful of money, indeed miserly, but for years before his death, and in particular at and prior to the date of the deeds sought to be reduced, he was quite unable to look after money or appreciate its value. Mrs Campbell in particular taking advantage of the said John Thomson's facility, got into her possession the money which the said John Thomson had deposited with the Dundee Savings Bank or other Dundee bank, and applied it for her own purposes. She also, without his knowledge or consent, collected and applied to her own use a sum of money due to him by the tenants of his Melville House property. The said John Thomson, during the last five or six years of his life, owing to old age, weakness, and facility, was in a condition to be influenced by anyone who desired to take advantage of his facility, and the pursuer avers that Mrs Campbell, taking advantage of the deceased's weakness and facility, on or about 1st October 1907, induced him to delete from his last will and testament the said clause in favour of the children of any predeceasing parent, and to execute the said pretended withdrawal, and the said pretended codicil in favour of the defenders Mrs Campbell, Mrs Watson, and Mr John Thomson, when he was in such a condition physically and mentally as not to be able to resist Mrs Campbell's influence and the pressure which she brought to bear on the deceased to make the foresaid deletion and to execute the deeds under reduction. The said Mrs Watson and Mrs Campbell are and have been on terms of great intimacy for some years, although formerly they were otherwise, and it is averred that they decided to have the pursuer and her brothers and sisters disinherited, being influenced through greed and a desire to hurt the pursuer and her brothers and sisters, towards whom they had conceived an ill-will. The pursuer further avers that the pretended codicil of 19th January 1901, and the pretended codicil dealing with the ground in the Western Cemetery, were similarly procured by the said Mrs Campbell at a time when the said John Thomson was incapable of appreciating their import and effect, or executing them, and in any event when he was weak and facile and easily imposed upon and circumvented by Mrs Campbell. In these circumstances the deletion and withdrawal in said last will and testament, and the said three pretended codicils, all under reduction, were impetrated from the deceased by the defender Mrs Campbell by fraud or circumvention when he was weak and facile, and this action has accordingly been rendered necessary."

The pursuer pleaded;—(1) The said pretended deletion and withdrawal in said last will and testament and the said three pretended codicils not being the deeds of the deceased John Thomson, decree of reduction should be pronounced as craved. (2) The said pretended deletion and withdrawal, and the said three pretended codicils having been impetrated from the deceased John Thomson by the defender

Mrs Campbell by fraud or circumvention, when the said deceased was weak and facile and easily imposed on, the pursuer is entitled to decree of reduction as craved.

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Separate defences were lodged for Mrs Campbell and for the other defenders. In her defences Mrs Campbell pleaded, *inter alia*;—(2) The pursuer's averments of facility and circumvention are irrelevant and wanting in specification, and ought not to be remitted to probation.

On 7th December 1911 the Lord Ordinary (Ormidale) repelled, *inter alia*, the plea for Mrs Campbell above quoted, and approved of issues for the trial of the cause. By this interlocutor the Lord Ordinary allowed six issues, the first three of which were as to whether the writings in question were not the deeds of the testator, and the last three were whether they had been obtained by fraud and circumvention.*

* "OPINION.—In my judgment the averments contained in cond. 5 are clearly relevant to infer that the deceased Mr Thomson was not of sound disposing mind at the dates of the writings which are sought to be reduced.

"With regard to the questions raised by issues 4, 5, and 6 [being those upon the plea of facility, fraud, and circumvention], it was not disputed by defenders' counsel that weakness and facility were relevantly averred, and I think it must be taken from all that is said about her and her relations to her father that the defender Mrs Campbell had very great influence with and over her father. That fact of itself does not raise any presumption against the fair dealing of Mrs Campbell. It was only natural that she should have such influence and that he should repose very great confidence in her, and it was quite proper, if not necessary in the circumstances, that she should take into her own hands the entire management of the household affairs. But it is averred—I give the substance of the averment—that she abused the confidence of her father and that she appropriated to her own use, more than once, sums of money which she had no right to take, and that she bribed her sister to hold her tongue with regard to these delinquencies. The averments may be absolutely untrue, but I am bound at this stage of the proceedings to assume the contrary, and the incidents referred to must be taken as instructing at once the inability of the deceased to protect himself against his daughter, and of the readiness of the daughter, when she had a purpose to serve, to take advantage of her father's weakened state of health.

"It was maintained, however, by the defenders that there was nothing said on record to connect any instance of Mrs Campbell's alleged abuse of her father's trust in her with the impetration of the writings sought to be reduced. There is much force in this contention, and it is, I think, literally correct, but at the same time I should, in my opinion, be reading the record too strictly if I were to give effect to it. The averments of impetration in cond. 5 and cond. 6, though expressed in general terms, are just the accustomed averments made in cases like the present, and they must not be dissociated from the setting in which they are found. Regarding and reading them in the light of the other averments in the record, I am bound on the authority of the cases cited at the Bar—*inter alia*, *Rooney*, 22 R. 761; *Williams v. Philip*, 15 S. L. T. 396—to hold that there is sufficient matter to found an issue of facility and circumvention. There is an averment of motive, and the statements as to what Mr Thomson said to the pursuer's mother about not worrying about money matters as he had provided for her children, and the denial by Mrs Campbell to his grandchildren of access to their grandfather's room, go some way to meet what seems to me otherwise a well-founded argument of the defenders on the terms of the writings themselves.

"As regards the absence of any specific averment of the arts and wiles

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The defenders reclaimed, and the case was heard before the First Division (consisting of the Lord President, Lord Dundas, and Lord Johnston) on 20th December 1911.

Argued for the reclaimers ;—The reclaimers challenged the allowance of the issues of fraud and circumvention on the ground that there were no averments on record which were relevant to connect Mrs Campbell with the impetration of the writings in question. The averment in article 6 was in words of style only, and was lacking in specification. If the pursuer did not aver facts and circumstances regarding the manner and occasion of the alleged impetration, she must, at least, aver undue influence acquired and an unnatural deed resulting.¹ The test in such a case was whether the deed was such that only persuasion working on a facile mind could have brought it about. No undue influence was to be deduced from the fact that this widowed daughter lived with and took entire charge of her aged father during his declining years—a relationship that was natural and normal. In the circumstances the averments did not show an undue favouring of Mrs Campbell (whose own issue would have been excluded had she predeceased), much less that the testator's provisions were unnatural. It was not unnatural for a grandparent to exclude grandchildren for the benefit of his own children. Apart from the bald averment of impetration what was said against Mrs Campbell amounted, at the highest, to this, that she had abused the position in which she was placed by her father to the extent of not allowing his grandchildren to see him. The cases cited by the Lord Ordinary² were distinguishable. In both of these there were specific averments of the circumstances of the impetration that were wanting here.

Counsel for the respondent were not called upon to reply.

LORD PRESIDENT.—I have no doubt that the Lord Ordinary is right, indeed I think the whole of the reclaimers' argument was only made possible by the confusion of two questions, the question of what is a relevant averment and the question of what the pursuer must prove in order to succeed in the action.

I do not know what the pursuer could have averred beyond saying that the testator was in a weak and facile state of mind. She must prove that before she goes any further, and if she does not prove that her case goes. Having proved that, she must proceed to show that some particular person impetrated the deed. She has stated that this was done by Mrs

practised by the defender, the case of *Clunie*, 17 D. 15, warrants the view that precise details of the mode of circumvention are not required. Much must of course depend on the circumstances of each particular case. Here it may be noted that the writings are all holograph of the deceased, and the assistance of an agent was not therefore required for their execution, and the *locus* of the impetration was the deceased's room from which he was unable to move. On the whole matter it seems to me that it would not be safe to dispose of the question of facility and circumvention without inquiry, and I see no reason for not following the usual course and sending the case to a jury. I shall therefore approve of the issues proposed by the pursuer."

¹ *Clunie v. Stirling*, (1854) 17 D. 15 ; *M'Kechnie v. M'Kechnie's Trustees*, 1908 S. C. 93.

² *Rooney v. Cormack*, (1895) 22 R. 761 ; *Williams v. Philip*, (1907) 15 S. L. T. 396.

Campbell, and I do not see what more she could be expected to aver. A Dec. 20, 1911.
 great point has been made by the defenders that anyone could make such a statement. That is quite true, but such a statement would only carry a pursuer the length of a proof and no further. Horsburgh v. Thomson's Trustees.

After all, I do not think that it can be said, in fairness to the pursuer, Ld. President. that her averments are so bald as they were argued to be, because you cannot dissociate the statement in cond. 6 from what I may call its setting as set forth in cond. 5. I wish to say very little on this point, and I am far from saying that that setting would necessarily lead to a conclusion that is inimical to the defenders. It is just one of those settings which it is for a jury to consider, and to say whether it does or does not give rise to the imputed suspicions.

I think this is a case that may perfectly well be tried under the recognised issues that have been allowed here.

LORD DUNDAS and LORD JOHNSTON concurred.

THE COURT adhered.

COWAN & STEWART, S.S.C.—BUCHAN & BUCHAN, S.S.C.—ALEX. MORISON & Co., W.S.—
 Agents.

JOHN SWAN AND ANOTHER (Matthew Swan's Trustees), First Parties.—*J. M. Hunter.*

No. 47.

ROBERT SWAN AND OTHERS, Second, Fourth, Sixth, and Eighth Parties.—*MacRobert.*

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DAVID BEGG AND OTHERS, Third, Fifth, Seventh, and Ninth Parties.—*Chree—H. P. Macmillan.*

Swan's Trustees v. Swan.

Succession—Vesting—Payment at the age of twenty-five after expiry of life-rent—Declaration referring vesting to "period of payment"—Accretion—Children "then surviving" and their issue—Issue of predeceasing children.

A testator by his settlement directed his trustees to divide his estate into shares and to hold the shares for his children, and their respective spouses, in life-rent, and for their respective children in fee. It was declared that the shares of any of his children dying without leaving issue should accrete "to my other children then surviving in life-rent and to their respective issue in fee"; that the shares should not be paid to any of the heirs until they attained the age of twenty-five; and that the fee should not vest until "the period of payment" arrived.

Held (1) that no right in a share of the estate, whether original or accreting, vested in a grandchild until he attained the age of twenty-five and the life-rents of his parents terminated; and (2) that under the clause of accretion the share of one of the testator's children who died without issue passed to the other children alive at her death in life-rent, and to their issue in fee, to the exclusion of the issue of children then dead.

Process—Special Case—Competency—Insane party—Curator ad litem—Curator bonis.

Where the curator *ad litem* to one of the parties to a special case represented to the Court that the party was insane, and submitted the question whether a curator bonis should not be appointed, the Court found it unnecessary to appoint a curator bonis, and, on the curator *ad litem* lodging a minute adopting the case on behalf of his ward, allowed the case to proceed.

Dec. 21, 1911. **MATTHEW SWAN**, baker, Paisley, died in 1890 leaving a trust-disposition and settlement and codicil thereto, by which he conveyed his whole estate to trustees.

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Swan.

2D DIVISION.

By this trust-disposition and settlement he conferred upon his wife the liferent of his whole estate, and provided as follows:—"I direct my trustees to divide the residue of my estate, heritable and moveable, into seven [which was changed by the codicil to 'eight'] equal shares, and (first) to invest and hold one share thereof for the liferent use allenary of my son Robert Swan, and thereafter for the liferent use allenary of any wife he may marry, but that so long only as she remains his widow, and to his children equally share and share alike in fee; (second)—[Here followed six purposes in which a share was conferred on each of his other children (except his son Matthew) and their respective spouses in liferent, and on their issue in fee, in the same terms as in the above purpose. By the codicil a share in the same terms was given to Matthew, his wife, and his children.]—and I hereby provide and declare that in the event of any of my said sons and daughters who are beneficiaries under these presents dying without leaving lawful issue, the fee of their shares shall fall and accresce to my other children then surviving in liferent, and to their respective issue in fee, providing and declaring also that the fee of my estates shall not be paid to any of the fiars until they attain the age of twenty-five years, but my trustees may apply the annual income arising from any fiar's share after the liferents thereof are satisfied for the maintenance and education of any such fiar until they arrive at that age; and further, providing and declaring that the fee of my estates shall not vest in any of my beneficiaries until the period of payment has arrived."

The testator was survived by his wife, who died in 1910. He had the following eight children:—

Maggie (Mrs Robert M'Kechnie)	}	who both predeceased the testator, leaving issue;
Jeanie (Mrs Begg)		
Agnes (Mrs John M'Kechnie),		who survived the testator, but died before 1909, leaving issue;
Jessie, who also survived the testator and died unmarried in 1909; and		
Robert,	}	who were all alive at the date of this case, and had issue.
Mary (Mrs Young)		
John,		
Matthew,		

Maggie's husband predeceased Jessie; the husbands of Jeanie and Agnes were alive at the date of the case.

Questions having arisen as to the construction of the trust-disposition and settlement and codicil, a special case was presented for the opinion and judgment of the Court. The *first parties* to the case were the testamentary trustees; the *second parties* were the testator's children who survived his daughter Jessie (Robert, Mary, John, and Matthew), their children, and the grandchildren of Mary; the *third parties* were the surviving husbands and descendants of the three deceased daughters Maggie, Jeanie, and Agnes; the *fourth parties* were the heirs of the testator's daughter Jessie; the *fifth parties* were the whole children and grandchildren, who were under the age of twenty-five, of the testator's children; the *sixth parties* were the surviving children of the testator's children Robert, Mary, John, and Matthew, and the children of deceased children of Mary;

the *seventh parties* were the issue of the testator's deceased children Dec. 21, 1911.
Agnes and Jeanie; the *eighth parties* were the immediate issue of the testator's children Robert, Mary, John, and Matthew, as at Jessie's death, and the children of such immediate issue as predeceased Jessie; and the *ninth parties* were David Begg, the husband of the testator's deceased daughter Jeanie, and his two children. Swan's Trustees v. Swan.

It was stated in the case that David Begg was willing to discharge the liferent of any share falling to him in liferent and to his children in fee in favour of these children, who were all over twenty-five years of age.

The second parties maintained that the share of residue destined to Jessie Swan in liferent accresced to the immediate children of the testator who survived her in liferent and to their issue in fee, to the exclusion of the surviving issue of children who predeceased her. The third parties maintained that as Jessie Swan never was a beneficiary under the trust-disposition and settlement, in respect that she predeceased the period when any bequest in her favour took effect, the provision as to accretion was inapplicable to her share, and that the whole residue fell to be divided into seven shares, or alternatively that the said Jessie Swan's share had not been disposed of, and fell to be distributed as intestate succession of the testator.

The first parties maintained that on a sound construction of the testamentary writings no beneficiary thereunder took a vested interest in any share of the estate, whether original or accrescing, until all liferents affecting such share had expired, and until such beneficiary attained the age of twenty-five. The fifth parties maintained that vesting was not postponed until the beneficiaries respectively attained the age of twenty-five. The sixth parties maintained that vesting of the respective shares was not postponed until the death of liferenters of the said shares, who were children of the testator. The seventh parties maintained that vesting of their respective shares was not postponed until the expiry of the liferents of their fathers, who were husbands of the testator's deceased daughters. The eighth parties maintained that the vesting clause in the trust-disposition and settlement did not apply to accrescing shares. The ninth parties maintained that, as Mrs Begg was dead and her children were over twenty-five years of age, their shares had vested, and that, on their father discharging his liferent, the first parties were bound to pay to the children the fee of the share falling to them. The first parties maintained that these shares had not vested; that vesting could not be accelerated by discharging the liferent; and that they were not therefore entitled to make this payment.

The questions of law in the case were, *inter alia*, as follows:—“(1) Does the whole residue fall to be divided into seven shares, to be held and applied in terms of the trust-disposition and settlement and codicil? or, (2) Does the share of the residue, originally destined for Miss Jessie Swan in liferent, fall to be divided amongst the immediate children of the testator who were in life at Jessie Swan's death in liferent and their issue in fee, so as to exclude the surviving issue of any child of the testator who predeceased the said Jessie Swan? or, (3) Does said share fall to be distributed as intestate succession of the testator? (4) Is vesting in the issue of the testator's children postponed until (a) they respectively attain the age of twenty-five years; (b) the death of their respective parents, who are liferenters and who are children of the testator; (c) the death of all

Dec. 21, 1911. *Swan's Trustees v. Swan.* liferenters of their respective shares, whether children of the testator or not, or until which of said events? (9) Does the answer to the previous question apply to accrescing as well as to original shares? (10) Are the issue of the testator's deceased child, Jeanie Swan or Begg, in respect that they have attained the age of twenty-five years, entitled to immediate payment of their shares in the event of their father discharging his liferent?"

The case having been sent to the Short Roll, a note was thereafter presented to the Lord Justice-Clerk by the first parties stating that Jeanie M'Intyre Begg (one of the parties of the third, fourth, seventh, and ninth parts) was insane and confined in an asylum. The note further stated that she had not been cognosced and had no curator bonis, and craved his Lordship to appoint a curator *ad litem* to her. The Court appointed Mr Boase, advocate, to be curator *ad litem* to her.

The curator *ad litem* thereafter lodged a minute in which he drew the attention of the Court to the fact that, so far as he could ascertain, a curator *ad litem* had never been appointed to an insane party to a special case. He referred to the undernoted cases.¹

The case was heard before the Second Division on 6th December 1911.

At the hearing counsel for the first, third, fifth, seventh, and ninth parties submitted, with regard to the point raised by the curator *ad litem*, that it was not necessary that a curator bonis should be appointed. The curator *ad litem* was an officer of Court, and would sufficiently protect the interests of the party. In the circumstances of the present case a curator bonis could not appropriately be appointed. Apart from her interest in her grandfather's estate, Jeanie Begg had no property; and it depended on the issue of this case whether she would have any property which would fall to be administered for her. The proper guardian of her interest, therefore, was a curator *ad litem* and not a curator bonis. *Park v. Park*² was really overruled by *Ross v. Tennant's Trustees*.³ *Crum Ewing's Trustees v. Bayly's Trustees*,⁴ *Scott v. Scott*,⁵ and *Rossie v. Rossie*⁶ were also referred to.

The Court (without pronouncing any interlocutor) intimated that, while it was proper that this point should be brought to their notice, they did not consider it to be necessary that a curator bonis should be appointed; and allowed the case to proceed.

The curator *ad litem* then lodged a minute approving of, and adopting, the special case.

Argued for the first parties;—(On questions 8-10)—Vesting was suspended in the case of each fiar until the liferents attaching to the share of the estate in which he was interested had expired and until also he attained the age of twenty-five. This was the clear effect of the declaration as to vesting in the settlement. In that clause "vest" meant vest in point of interest, and could not be construed as refer-

¹ Christie, (1873) 1 R. 237; Ross v. Tennant's Trustees, (1877) 5 R. 182; Wallace, (1830) 9 S. 40; Mitchell v. Whitelock, (1864) 3 Macph. 229; Walker v. Jones, (1867) 5 Macph. 358; Anderson's Trustees v. Skinner, (1871) 8 S. L. R. 325; Mackenzie, (1845) 7 D. 283; Rossie v. Rossie, (1899) 6 S. L. T. 357.

² (1876) 3 R. 850.

³ 1908 S. C. 1124.

⁴ 5 R. 182.

⁵ 6 S. L. T. 357.

⁶ 1910 S. C. 994.

ring to possession of the share, and, as there was nothing in the Dec. 21, 1911. frame of the settlement inconsistent with the declaration, there was no ground for refusing effect to it. Accordingly the declaration was ^{Swan's} Trustees v. decisive against vesting before the time at which payment could be ^{Swan.} made.¹ There was nothing to limit the application of the declaration to the original shares, and, therefore, it applied to accreting shares as well. If vesting was suspended, there could be no acceleration of payment, and, accordingly, the tenth question must be answered in the negative.

Argued for the third, fifth, seventh, and ninth parties;—(*On questions 8-10*)—Apart from the declaration in the concluding clause of the bequest, there was nothing to postpone vesting. There was no destination-over or survivorship clause, and no trust purpose which necessitated postponement of vesting. But the declaration was said to suspend vesting. As to this, it was to be observed that the declaration provided that vesting was not to take place till the "period of payment"; and as the words constituting the bequests bore no reference to payment, and the only portion of the settlement which mentioned payment was the clause providing that the shares were not to be paid until the beneficiaries attained the age of twenty-five, it followed that the "period of payment" must be construed as meaning the time at which a beneficiary reached that age. It was highly improbable that the testator intended that vesting should be suspended during the lifetime not only of his child, but of that child's spouse.² In *M'Ewan's Trustees v. Macdonald's Trustees*³ the decision was based on the special terms of the will there before the Court. Question 8 (a) should be answered in the affirmative; question 9 did not affect these beneficiaries; and the answer to question 10 depended on the answer to question 8. (*On question 2*)—This question should be answered in the negative. On a sound construction of the accretion clause the words "then surviving" applied only to the testator's children as liferenters. The accreting share was to be liferented by the surviving children; but the fee was to go to the issue of "my other children," i.e., the issue of the whole of the testator's children. To hold that under the clause the issue of predeceasing children were excluded would be to attribute to the testator a capricious and unnatural intention.

Argued for the second, fourth, sixth, and eighth parties;—(*On question 2*)—The natural construction of the accretion clause was that the surviving children were to enjoy liferents, and the issue of these surviving children were to take the fee.⁴ There was no ground for construing "surviving" as meaning "other." Question 2, therefore, should be answered in the affirmative.

At advising on 21st December 1911, the opinion of the Court (consisting of the Lord Justice-Clerk, Lord Dundas, and Lord Skerrington) was delivered by

LORD SKERRINGTON.—This is a special case, in which the parties inte-

¹ *Carruthers' Trustees v. Eales*, (1894) 21 R. 492, *per* Lord Kyllachy, at p. 494.

² *Chalmers' Trustees*, (1882) 9 R. 743; *M'Kay's Trustees v. Gray*, (1903) 5 F. 1086.

³ (1908) 46 S. L. R. 31.

⁴ *Richardson v. Macdougall*, (1868) 6 Macph. (H. L.) 18, at p. 23.

Dec. 21, 1911. rested ask the Court to answer ten questions relative to the construction of the trust-disposition and settlement and codicil of the deceased Matthew Swan. The interpretation of these two writings does not present any serious difficulty, but some of the ten questions above referred to are so framed that I have found it a little difficult to answer them.

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Lord
Skerrington.

The material facts and dates are as follows :—The testator died on 23rd November 1890. His widow, upon whom he conferred a universal liferent, died on 2nd May 1910. He had eight children, two of whom (daughters) predeceased him leaving issue. Of the six remaining children four are still alive ; one (a daughter) predeceased her mother, leaving issue, while another daughter, Jessie, died unmarried and intestate in 1909—thus also predeceasing her mother. The scheme of the will is as follows :—[His Lordship referred to certain provisions with regard to heritable properties.] By the last purpose he directed his trustees to divide the residue of his estate, heritable and moveable, into seven (by the codicil, eight) equal shares, and to invest and hold one share for the liferent use allenary of each child, and thereafter of such child's husband or wife, and for his or her children in fee.

The first query in the special case falls to be answered in the negative. The second query refers to the share of residue which the trustees were directed to invest and hold for the liferent use allenary of the testator's daughter Jessie and her children in fee. Seeing that Jessie died unmarried the direction applies that the fee of her share "shall fall and accresce to my other children then surviving in liferent and to their respective issue in fee." The question to be determined is whether this clause makes it a condition that no grandchild of the testator shall take any interest in the fee of Jessie's share unless the parent of such grandchild (being a child of the testator) was alive at the date of Jessie's death. Such a provision may be capricious and unreasonable, but I see no doubt as to the meaning of the words used by the testator. It is, of course, possible to read the expression "their respective issue" as meaning the issue of the testator's "other children," whether these latter were or were not alive at the time of Jessie's death. A Court of construction is not, however, entitled to reject the plain and primary meaning of a testator's words merely in order to avoid a result which may appear to be capricious and unreasonable. The answer to any such contention is to be found in the opinion of Lord Kinnear in *Ward v. Lang*,¹ a case which, though very similar to the present one, was not cited at the debate. The House of Lords case of *Richardson and Others v. Macdougall and Others*² was cited at the debate, and supports the view that the clause should be construed according to its literal and grammatical meaning. I am therefore of opinion that the second query should be answered in the affirmative.—[His Lordship then dealt with certain questions arising on the special terms of the settlement, with which this report is not concerned.]

The eighth query raises the question as to the date when the bequests contained in the will vest in the testator's grandchildren. The testator declared, towards the end of his will, that "the fee of my estates shall not

¹ (1893) 20 R. 949.

² 6 Macph. (H. L.) 18.

vest in any of my beneficiaries until the period of payment has arrived." Dec. 21, 1911. Seeing that the testator's widow enjoyed the liferent of his whole undivided estate, and that, as regards the eight shares of residue, liferents were created in favour of the testator's children and their spouses, the period of payment could not arrive until (to quote the language of the will), all these liferents of the respective shares had been satisfied. But the testator further expressly directed that the fee of his estate should "not be paid to any of the fiars until they attain the age of twenty-five years." Accordingly, the period of payment of each share of residue is postponed as regards each beneficiary until he has attained the age of twenty-five years, and until all the liferents of the respective shares have come to their natural termination. It was argued, with what seems to me to be perverse ingenuity, that the phrase "period of payment" does not mean what it says, but that the date when each fiar attains the age of twenty-five is the "period of payment" within the meaning of this will, although admittedly the issue of the testator's children had no right to demand payment until all the liferents of the respective shares had expired, and although they could not accelerate payment by procuring a renunciation of the liferents forming a burden on their respective shares. The argument of the learned counsel proceeded upon an assumption which is absolutely erroneous, viz. :—that the testator directed payment to be made upon the respective beneficiaries attaining the age of twenty-five ; whereas he merely declared that payment should not be made until they attained that age. Counsel also cited the Second Division case of *M'Kay's Trustees v. Gray*,¹ but I cannot regard that decision as an authority, seeing that no argument was (so far as appears from the report) offered in favour of what seems to me to have been the natural meaning of the will. The Judges were asked to elect between the views that vesting took place at the beneficiary's majority, or alternatively, at the death of the widow. It does not appear to have been argued that the period of payment could not arrive without the concurrence of both events. In a later case—*M'Ewan's Trustees v. Macdonald's Trustees*²—the same Division decided that the period of payment, and consequently of vesting, did not arrive until the death of the surviving spouse. It was unnecessary to decide whether vesting was still further postponed. There is a later decision of the same Division—*Gray's Trustees v. Gray*³—which was not cited at the debate, in which the "period of payment" was held to depend upon the concurrence of both events, viz., the lapse of the widow's liferent and the majority of the beneficiary. I have dealt with these authorities as being more or less in point ; but, after all, the present case, like all others of its kind, must be decided upon the best construction one can put upon the language of the particular instrument under consideration. So viewing the matter I think that the proper answer to the eighth query is that vesting was postponed until the occurrence of all the events therein mentioned. The ninth query must be answered in the affirmative, and the tenth in the negative.

THE COURT answered the second and ninth questions of law in the affirmative ; the first, third, and tenth questions in the

¹ 5 F. 1086.

² 46 S. L. R. 31.

³ 1907 S. C. 54.

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negative; and found in answer to the eighth question that vesting was postponed until the whole of the events therein mentioned had taken place.

PRINGLE & CLAY, W.S.—FYFE, IRELAND, & Co., W.S.—PETER MACNAUGHTON, S.S.C.
—Agents.

No. 48.

Dec. 21, 1911.

Simpson's
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Taylor.

MRS CATHERINE P. FORBES OR SIMPSON AND OTHERS (George Simpson's Testamentary Trustees), AND OTHERS, First, Second, Fifth, and Sixth Parties.—*Blackburn, K.C.—Lord Kinross.*

MRS CATHERINE M. F. SIMPSON OR TAYLOR AND OTHERS,
Third Parties.—*J. R. Christie—Chree.*

FREDERICK GEORGE SIMPSON, Fourth Party.—*J. Macdonald.*

Marriage-Contract—Antenuptial contract—Provisions in lieu of legitim—Power to revoke—Reserved power—Repugnancy.

A father by his marriage-contract settled on the children of the marriage or of any future marriage, equally or as he might appoint, the whole estate (subject to an annuity and certain liferents) then belonging to him or which might belong to him at his death, in satisfaction of their legitim, but reserved power to revoke or vary the provisions in their favour.

Held that this reservation was not repugnant to the other provisions of the deed but was valid and effectual, and that the reserved power had been duly exercised by the father in his testamentary settlement, by which (after providing for certain annuities and a legacy) he bequeathed his whole estate to the children of the marriage in liferent and to their issue in fee.

Fowler's Trustees v. Fowler, (1898) 25 R. 1034, *followed*.

Opinion reserved as to the validity of the clause excluding legitim, if the reserved power had been exercised so as to disinherit any of the children.

2D DIVISION.

GEORGE SIMPSON, wine and spirit merchant, Edinburgh, died on 11th November 1896, survived by his wife and five children.

By his antenuptial marriage-contract, executed in 1862, Mr Simpson bound himself and his heirs and executors to pay to his widow an annuity of £50 a year, so long as she remained his widow, and assigned to her for her liferent use allanarly the whole furniture belonging to him at his death; and undertook to dispoine a heritable subject to his sister Mary in liferent allanarly. The deed then provided:—"And for a provision to the children of the said George Simpson, he, under burden of his own liferent, hereby dispoines, assigns, conveys, and makes over from him, his heirs and successors, to and in favour of the child or children to be procreated of the said intended marriage, and of any other marriage which he, the said George Simpson, may contract, but that always in the terms, upon the conditions, and under the burdens and reservations hereinafter expressed, all and whole the whole heritable and moveable estate, other than that now settled or to be settled on his sister Mary as aforesaid, now belonging or that shall pertain and belong to him, the said George Simpson, at the time of his death, including his whole household furniture and other plenishing, which furniture and plenishing is to be liferented by his widow as aforesaid; together with the vouchers and instructions and writs and evidents thereof: Reserving to the said George Simpson power at any time during his life, and even on

deathbed, to increase the provisions in favour of his widow, and to allocate and distribute the residue of his said whole means and estate among his said whole children in such proportions or shares, and under such conditions as he shall think proper"; and failing such allocation, the provision was to be divided equally among his children and the issue of predeceasing children. It was declared that the provisions in favour of the widow were to be in full satisfaction of her legal rights, and that the provisions in favour of the children "shall be and are to be accepted of by them as in full satisfaction of all bairns' part of gear, legitim, portion natural, executry, and every other thing which they could ask, claim, or demand by and through the decease of the said George Simpson their father."

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The intended wife, on the other hand, disposed to her children and their heirs the whole estate to which she should succeed through the death of her mother; and it was provided that execution for implementation of the provisions in favour of the wife and children should pass at the instance of certain persons. Mr Simpson appointed these persons to be his sole executors, and conferred on them sundry powers regarding the management of the estate. Following upon these clauses, and preceding the clause of consent to registration of the deed and the testing-clause, there occurred the following clause:—"And the said George Simpson reserves his own liferent and power to revoke, alter, or vary these presents in so far as regards the provisions to his children as aforesaid: And he dispenses with the delivery hereof."

On 1st March 1892 Mr Simpson executed a trust-disposition and settlement by which he conveyed his whole estate to trustees. By this settlement he directed his trustees to implement the marriage-contract provisions in favour of his wife, and, in addition, to pay her an annuity of £350 so long as she remained his widow and to allow her the liferent use of his dwelling-house. After provisions for the payment of the income of a sum of £1000 to his sister-in-law and for the conveyance of certain heritable subjects to his second son, he directed his trustees to hold the residue of his estate for his children in liferent and their issue in fee. The settlement also contained this declaration:—"Declaring that in consequence of my estate having very materially increased since the date of my marriage, it is my desire and intention that the foregoing provisions in favour of my said children shall come in place of and supersede the provisions conferred on them under the foresaid antenuptial contract of marriage, . . . and that the provisions hereinbefore mentioned shall be in full of all they can ask or claim by or through my decease." It was further provided that in the event of any of the children successfully challenging this deed, that child's share was to be restricted to £1000, the balance of the share accreting to the other children.

A question having arisen on Mr Simpson's death as to his power to revoke the provisions to the children in the marriage-contract, a special case was presented on 2nd March 1911, to which the trustees under his trust-disposition and settlement were the *first parties*; his widow the *second party*; his three daughters the *third parties*; his only son surviving at the date of the case the *fourth party*; his sister-in-law the *fifth party*; and his grandchildren the *sixth parties*.

The questions of law were, *inter alia*:—" (1) Was the reservation by George Simpson of power to revoke, alter, or vary the provisions to his children in the marriage-contract a valid and effectual reserva-

Dec. 21, 1911. **Simpson's Trustees v. Taylor.** tion by him? (2) If the first question is answered in the affirmative, was the power to revoke, alter, or vary validly exercised by the trust-disposition and settlement?"

The case was heard before the Second Division on 28th and 29th November 1911.

Argued for the first, second, fifth, and sixth parties;—In the marriage-contract Mr Simpson explicitly reserved the power to revoke the children's provisions. That reservation was valid and effectual,¹ and the reserved power had been exercised in the trust-disposition and settlement. There was no ground for maintaining that the reservation was repugnant to the nature of a marriage-contract. As to the discharge of legitim in the marriage-contract, it was still an open question whether the discharge of legitim might not be effectual even if no substitutionary provision were made for the children.² But the weight of authority was in favour of the view that, even in such circumstances, the discharge would be valid.³ The clause of reservation could not be construed as limited to giving effect to the power to increase the widow's annuity and to apportion the children's shares. That was not its natural meaning, and was quite inconsistent with the use of the word "revoke."

Argued for the third and fourth parties;—The power of revocation reserved in the marriage-contract, if it were to be construed in the manner contended for by the other parties, was repugnant to the nature of the deed in which it appeared. The deed professed to belong to a class of contracts of which the characteristic feature was their irrevocability. The provision in question was presumably contractual, for provisions to wives and children were always presumed to be contractual, and legitim was carefully discharged. A discharge of legitim was not, however, effectual unless a substitutionary provision were assured to the children⁴; and the explicit declaration that legitim was excluded would go for nothing if the contract were held to be revocable by the father. The fact that the children of a second marriage were admitted to participate in the provision in the marriage-contract in no way detracted from the contractual nature of that deed,⁵ for the marriage-contract did no more than explicitly confer on the father a power in regard to his second family which he would have had at common law.⁶ If the other parties' construction of the clause of revocation were sound, then all the careful contractual provisions of the marriage-contract would be nullified. But *benedicta est expositio quando res redimitur a destructione*; and if there was any possible construction which would tend to support the contract, that construction ought to be adopted.⁷ Now, the clause in question contained in the first place a reservation of the father's liferent. That was a repetition of an earlier provision in

¹ Fowler's Trustees v. Fowler, (1898) 25 R. 1034.

² Earl of Kintore v. Countess-Dowager of Kintore, (1884) 11 R. 1013, *aff.* 13 R. (H. L.) 93.

³ Maitland v. Maitland, (1843) 6 D. 244, *per* Lord Mackenzie, at p. 247; M'Laren on Wills and Succession (3rd ed.), 136.

⁴ Earl of Kintore v. Countess-Dowager of Kintore, 11 R. 1013, *per* Lord Fraser, at p. 1025.

⁵ Mackie v. Gloag's Trustees, (1884) 11 R. (H. L.) 10.

⁶ Haldane v. Hutchison, (1885) 13 R. 179.

⁷ Leake on Contracts (6th ed.), 149; Furnivall v. Coombes, (1843) 12 L. J. (C. P.) 265.

the deed. It was possible and probable then that the power to Dec. 21, 1911.
 "revoke, alter, or vary" the provisions to the children might also be
 repetitive. And in the earlier part of the deed there was a provision ^{Simpson's}
 which satisfied these words, viz., the power to the father to increase ^{Trustees v.}
 the wife's annuity—which would *pro tanto* be a revocation or altera-
 tion of the children's provisions—and the power to apportion their
 shares among the children. Finally, the words "as aforesaid" at the
 end of the clause were to be construed as qualifying the verbs in the
 clause; and, so construed, it became plain that no power which was
 not given in the earlier part of the contract was thereby reserved. The
 case of *Fowler's Trustees*¹ did not apply here, for there the power which
 led to the revocation was one of the trust purposes under the contract.

At advising on 21st December 1911,—

LORD DUNDAS.—The late George Simpson, wine and spirit merchant, died on 11th November 1896, leaving a trust-disposition and settlement, dated in 1892. In 1862 he had entered into an antenuptial contract of marriage with Miss Catherine Forbes, by whom, and by five children of their marriage, he was survived. By that contract, after binding himself and his heirs and executors to pay an annuity to his wife, if she survived him, and to settle a small heritable subject upon his sister in liferent, Mr Simpson, for a provision to his children, under burden of his own liferent, disposed and conveyed from him, his heirs and successors, to and in favour of the children to be procreated of the marriage, and of any other marriage he might contract, but always in the terms, upon the conditions, and under the burdens and reservations thereafter expressed, the whole heritable and moveable estate (with the unimportant exception of the property to be settled upon his sister) then belonging to him, or which should belong to him at the time of his death, reserving power to himself to allocate and distribute the residue of his whole means and estate among his said whole children, in such proportions or shares, and under such conditions, as he should think proper; and it was stipulated that the provisions in favour of his children should be, and were to be, accepted by them as in full satisfaction of all bairns' part of gear, legitim, portion natural, executry, and every other thing they could claim or demand by and through his decease. There is no need to discuss—though a good deal was said about it in the argument at our Bar—whether, as matter of general policy, it is wise and prudent, or the reverse, for a contracting party to tie up irrevocably, on the occasion of his marriage, his whole present and future fortune and estate. The thing is not uncommonly done, and is certainly not illegal, nor (if proper phraseology is used) ineffectual. By the contract under consideration the intending wife, for the causes above summarised and on the other part, made certain provisions; and it was agreed that execution for implement of the provisions in favour of her and the children should pass at the instance of persons named, who were also appointed to be Mr Simpson's sole executors. Various powers of an ordinary character were then conferred on these persons; and at the very end of the document there occurred this singular clause, "And the said George Simpson reserves his own liferent and power

¹ 25 R. 1034.

Dec. 21, 1911. to revoke, alter, or vary these presents in so far as regards the provisions to his children as aforesaid."

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Taylor.

Lord Dundas.

The main question for our decision is whether Mr Simpson's estate was irrevocably destined by the marriage-contract as a provision for his children, or whether, looking to the terms of the clause just quoted, he is entitled to alter that provision by a subsequent testamentary settlement. It was contended by counsel for some of the parties to the case that a power to revoke, alter, or vary the provision made for the children in the antenuptial contract of marriage was wholly invalid, and must be held *pro non scripto*, as repugnant to the nature of the contract. The clause is certainly a very unusual one to find place in a marriage-contract; and it occurs oddly as regards sequence and collocation; but I am not prepared to treat it in the way suggested. Its language is not, to my mind, at all ambiguous, and I cannot accept the argument that it was intended merely as a superfluous echo or repetition of the power to allocate and distribute, already reserved by Mr Simpson. We cannot, I think, deny all legal effect to the clause. The case of *Fowler's Trustees*,¹ to which we were referred, seems to support this view; for literal effect was there given to a clause in an antenuptial contract of marriage which provided that the trustees should be bound at any time during the subsistence of the marriage to pay over to the lady, on her written demand, the whole or any portion of the trust funds conveyed by her to them; although the legal rights of the children (as counsel informed us from a perusal of the session papers) bore to be expressly discharged in respect of the provision to them by the contract of the ultimate fee of the said trust funds.

If my conclusion on this point is correct, there seems to be no difficulty in regard to the next question, viz., whether Mr Simpson intended to exercise, and did effectually exercise by his trust-settlement, the power reserved to him by the clause in his marriage-contract above quoted. The settlement begins with a universal conveyance to trustees of the truster's whole means and estate. The sixth purpose, which I need not quote, deals with the residue, and in brief, amounts to a direction to the trustees to hold it for payment of the revenue equally to and among his children in liferent alimentary, and the fee to their issue; but with power to make certain advances out of capital to his daughters on marriage, and to his sons for setting them up in business, or otherwise for their advantage. The truster declared "that in consequence of my estate having very materially increased since the date of my marriage, it is my desire and intention that the foregoing provisions in favour of my said children shall come in place of and supersede the provisions conferred on them under the foresaid antenuptial contract of marriage between me and the said Mrs Catherine Paterson Forbes or Simpson, and that the provisions hereinbefore mentioned shall be in full of all they can ask or claim by or through my decease"; and he went on to provide that, in the event of any of his said children successfully challenging the trust-settlement, then, and in that event, in virtue of the powers reserved to him under the marriage-contract, he allocated and restricted the share or shares of such child or children in his estate to the

¹ 25 R. 1034.

sum of £1000 each, in full of all that they or their issue should be entitled to demand by or through his decease, with corresponding benefit, by way of accretion, to the acquiescing children and their issue. It seems to me to be clear that Mr Simpson intended by his settlement to exercise the power reserved by his marriage-contract to alter or vary the provisions thereby made for his children, and that he has legally and effectually done so. It is unnecessary to consider or decide whether any child or children could have asserted a valid claim to legal rights, notwithstanding the discharge of these by the marriage-contract, if Mr Simpson had by his testamentary settlement totally disinherited one or more of them, or reduced their provision to an amount which the Court considered merely illusory. No such question arises here, and I express no opinion upon the matter.

For the reasons stated, I think we ought to answer the first and second questions in the case in the affirmative. In that view, the remaining questions are superseded, and need not be answered. The third question is only put to us in the event of the first question being answered in the negative; and counsel explained to us that the fourth and fifth questions would arise for decision only if we were to answer the second question in the negative.

LORD SALVESEN.—The leading question in this case arises under the antenuptial contract of marriage entered into between George Simpson and the lady who became his wife and is now his widow. The contract itself is, in its main provisions, not unlike many contracts which were in use to be made at that time, but which, I am glad to think, are not so common now. By this deed Mr Simpson bound himself to provide a free annuity of £50 sterling to his widow, and also assigned to her for her liferent use the furniture and plenishings which might belong to him at his death. To his children he assigned and made over, but under the burdens and reservations thereafter expressed, his whole heritable and moveable estate. The only express reservations were that he should have power at any time during his life, and even on deathbed, to increase the provisions in favour of his widow, and right to apportion his estate amongst his children as he should think proper. In respect of these obligations Mrs Simpson and her children discharged their legal rights. The lady, on the other hand, disposed such property as she might succeed to through the death of her mother to her children, and failing children to her own sister in liferent.

Had these been the only provisions in the antenuptial contract there would have been no difficulty in its interpretation. In consideration of an annuity which was in no way secured and which, although suitable enough in the then circumstances of the husband, might have no relation to the estate which he left at his death, Mrs Simpson discharged absolutely her legal rights as his widow; while the children discharged their legal rights in respect of a provision which gave them no security against their father's misfortunes, and enabled him, if he left estate, to apportion the whole to one or more of them, leaving the others entirely unprovided for. Although, as I have said, such clauses were not uncommon in antenuptial contracts, they really served no object except the somewhat illegitimate one of enabling the husband to exercise such caprice in the division of his estate as would

Dec. 21, 1911. be impossible under our common law. The validity of such a discharge of
Simpson's legitim, when contained in an antenuptial contract, has been too long settled
Trustees v. to be now challenged; but I cannot say that the so-called principle upon
Taylor. which the Courts have proceeded, "that the children cannot object to that
Lord Salvesen. contract by which they were brought into existence,"¹ commends itself to
my mind. That intending spouses should be able by an antenuptial contract to exclude their children, or some of them, from their legal rights of succession—which they could not do by any other deed, whether executed before or after their birth—is, in my opinion, contrary to sound legal principle; and I cannot but regret that the rule was ever established.

From the point of view of the intending husband such a contract is not less objectionable. It is quite settled law that a provision of the whole means and estate of which he might die possessed to his children deprives him of his testamentary capacity properly so called. If he has tied himself by such a contract he cannot give legacies to any persons or institutions whom he may desire to favour. If his children, or some of them, prove to be incapable of managing their affairs so that they cannot safely be entrusted with money, he cannot restrict them to a liferent. If he leaves only one insane child, that child must inherit the fee of his whole estate. He cannot even bequeath legacies to his grandchildren.² On the other hand, he retains the power of settling practically the whole of his estate on one or more children, leaving the others unprovided for.

These observations have a very direct bearing on the construction of the unusual clause appearing towards the end of the antenuptial contract in question. The clause is expressed as follows:—"And the said George Simpson reserves his own liferent and power to revoke, alter, or vary these presents in so far as regards the provisions to his children as aforesaid." It was argued for the third and fourth parties, who represent the children, that this clause was a mere repetition of the powers which Mr Simpson had expressly reserved, namely, a power to increase his widow's annuity; and so (it was said) in effect to revoke, to the extent to which that power might be exercised, the provisions in favour of his children and the power of apportionment amongst them. I cannot so read the clause. It is true that, so far as concerns his own liferent, that had already been reserved in different language; but I see no reason for limiting the operation of the clause according to its plain meaning on the footing that it cannot have meant what it expressed. How this clause came to be inserted in the marriage-contract is of course purely matter of conjecture; but it seems to me far more likely that Mr Simpson declined to deprive himself of all testamentary capacity than that it was the result merely of bungled conveyancing. At all events, the clause is there and must receive effect according to its terms; for I think it is impossible to read in the words "as aforesaid" before "these presents," as the third parties desire us to do, and so to deprive it of all effect.

The next argument which was submitted to us on behalf of the same parties, and which seems to have been the only one present to their minds when this special case was framed, was that "the reservation of power to

¹ Maitland v. Maitland, 6 D. 244, per Lord Mackenzie, at p. 247.

² Gillon's Trustees v. Gillon, (1890) 17 R. 435.

revoke, alter, or vary the provisions in favour of the children in the Dec. 21, 1911. marriage-contract was invalid, and must be held *pro non scripto*, as being Simpson's repugnant to the contract by which the children's right to legitim is Trustees v. expressly discharged." No authority was cited in favour of this proposi- Taylor. tion. It may be that if the power had been so exercised as to deprive the Lord Salvesen. children of all right in their father's succession, the discharge of legitim contained in the contract would not have been effectual. It is still an open question whether legal rights of children in their parent's succession can be discharged by an antenuptial contract between the parents unless some provision is made in their favour, although, if the reason for the rule in the ordinary case is correctly stated in the passage I have quoted from Lord Mackenzie, no such distinction would be tenable. We are not, however, concerned with a case of that kind here, as Mr Simpson made generous provisions for his children, although he also thought fit to leave his sister-in-law an alimentary liferent of £1000. The antenuptial contract would have been a perfectly valid deed though it had contained no provisions in favour of children, and, as framed in this case, it would have operated as a valid testament so long as it was not revoked or altered. Indeed, there are other clauses in the deed which seem to show that Mr Simpson's true intention was merely to regulate his succession and not to come under any contractual obligations to his future wife as to its disposal. Thus the clause by which the whole estate is conveyed to the children is conceived in favour, not only of the children to be procreated of the intended marriage, but also of the children of any other marriage which George Simpson might contract; and there is also an obligation in favour of his own sister with regard to part of his heritable estate which was certainly not contractual. We are, however, not left without guidance as to the law, for in the case of *Fowler's Trustees*¹ it was decided that a clause in a marriage-contract which had the effect of rendering it entirely nugatory was not invalid. That case was much stronger than the present, for it gave the wife an absolute power to recall or annul the trust at pleasure, while the clause in the present case is limited in its operation to the provisions in favour of the children. I have therefore come to the conclusion that we must answer the first and second questions in the affirmative. The other questions, which proceed on the assumption of our taking an opposite view, are, of course, superseded.

The LORD JUSTICE-CLERK concurred.

THE COURT answered the first and second questions of law in the affirmative.

PEARSON, ROBERTSON, & FINLAY, W.S.—MACKAY & HAY, W.S.—GORDON, FALCONER, & FAIRWEATHER, W.S.—A. W. LOWE, Solicitor—Agents.

¹ 25 R. 1034.

No. 49.

ARCHIBALD KIRKPATRICK, Appellant.—*Sol.-Gen. Hunter—
J. A. T. Robertson.*Dec. 21, 1911. LOCAL AUTHORITY OF THE BURGH OF MAXWELLTOWN, Respondents.—
*H. P. Macmillan.*Kirkpatrick v.
Town-Council
of Maxwell-
town.*Public Health—Housing, Town Planning, &c., Act, 1909 (9 Edw. VII. cap. 44), secs. 15 and 17—Closing order—Dwelling-house—Tenement—
“Dangerous or injurious to health”—Procedure—Form of order—Warning to owner.*

A local authority, acting under section 17 (2) of the Housing, Town Planning, &c., Act, 1909, issued, upon a representation by their medical officer, a closing order with regard to a tenement of dwelling-houses, as being, in the words of the statute, a “dwelling-house . . . in a state so dangerous or injurious to health as to be unfit for human habitation.” *Held* (1) that a tenement of dwelling-houses was a “dwelling-house” in the sense of the Act, and that a closing order was competently issued with regard to a whole tenement generally; (2) that a closing order was competently issued without specifying as between two alternatives, whether the house was “dangerous” or “injurious to health,” these not being alternative grounds for an order, but the second being exegetical of the first; (3) that, the closing order being in a statutory form which did not require a statement of the grounds upon which it was issued, non-disclosure of these grounds in the order did not render it inept; (4) that the closing order was competently issued without previous exercise by the local authority of their statutory powers under section 15 to require remedial works, and without affording to the owner of the house an opportunity of being heard.

Opinion, per curiam, that there was occasion for further consideration by the Local Government Board of the form prescribed by them for closing orders, so as to require local authorities to specify more particularly the defects occasioning the necessity for such an order.

Sheriff—Appeal against closing order under Housing, Town Planning, &c., Act, 1909 (9 Edw. VII. cap. 44), sec. 39 (1) (a)—Refusal of Sheriff to order condescendence and answers—Act of Sederunt, 4th November 1910—Public Health.

An appeal having been taken to the Sheriff from a closing order issued by a local authority under the Housing, Town Planning, &c., Act, 1909, upon a report by their Medical Officer of Health which was communicated to the owner of the house to be closed, the Sheriff refused to order a condescendence and answers, and allowed the appellant a proof.

Held that such an appeal is a summary application and not a summary cause, and accordingly that the Sheriff is judge of the procedure to be followed; and that, as the owner had sufficient notice in the report of the Medical Officer of the case he had to meet, the Sheriff had acted rightly in refusing to order a condescendence.

Process—Sheriff—Order to state a case under the Housing, Town Planning, &c., Act, 1909 (9 Edw. VII. cap. 44), sec. 39—Procedure—Public Health.

In an appeal to the Sheriff under the Housing, Town Planning, &c., Act, 1909, against a closing order, the Sheriff, who had allowed a proof, refused to state a case for the opinion of the Court of Session. The appellant thereupon presented a note to the Court under sec. 39 of the Act for an order on the Sheriff to state a case, and appended a list of the questions of law which he desired to have stated.

The Court sustained the competency of the note; but, by consent of

parties, without ordering the Sheriff to state a case, answered the questions of law in the note, and remitted to the Sheriff to give effect to these answers.

Dec. 21, 1911.

Kirkpatrick v.
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of Maxwell-
town.

A NOTE was presented by Archibald Kirkpatrick, 5 Terregles Street, Maxwelltown, in which the Court was craved to direct the Sheriff-substitute of Dumfries and Galloway, at Kirkcudbright, to state a case for the opinion of the Court in an appeal by Kirkpatrick against a closing order, dated 24th May 1911, issued by the Local Authority of the Burgh of Maxwelltown under the Housing, Town Planning, &c., Act, 1909.*

Sheriff of
Dumfries and
Galloway.

The note stated as follows:—

"The said Archibald Kirkpatrick is the owner of the heritable property situated at 40 and 41 Glasgow Street, Maxwelltown. This property is a tenement consisting of two one-room and kitchen houses on the ground floor, one one-room and kitchen and one two-room and kitchen houses on the upper floor, and, in the roof, there are two attic rooms.

"On 24th May 1911 the Local Authority of the Burgh of Maxwelltown, purporting to proceed in pursuance of subsection (2) of section 17 of the Housing, Town Planning, &c., Act, 1909, made an order prohibiting the use of the dwelling-houses, Nos. 40 and 41 Glasgow Street aforesaid, for human habitation, until, in their judgment, they are rendered fit for that purpose. Copies of this closing order, and of the relative representation of the medical officer of health, and report by the sanitary inspector are appended hereto.†

* The Housing, Town Planning, &c., Act, 1909 (9 Edw. VII. cap. 44), provides, by sec. 15, that a local authority may give notice to a landlord requiring him to execute specified remedial works to render a house fit for habitation; and further enacts:—

Sec. 17 (1) "It shall be the duty of every local authority" to make an inspection of their district "to ascertain whether any dwelling-house therein is in a state so dangerous or injurious to health as to be unfit for human habitation" (2) "If, on the representation of the medical officer of health, or of any other officer of the authority, or other information given, any dwelling-house appears to them to be in such a state, it shall be their duty to make an order prohibiting the use of the dwelling-house for human habitation (in this Act referred to as a closing order) until in the judgment of the local authority the dwelling-house is rendered fit for that purpose." (3) (As applied to Scotland by sec. 53 (14) of the Act) "Notice of a closing order shall be forthwith served on every owner of the dwelling-house in respect of which it is made, and any owner aggrieved by the order may appeal to the Sheriff by giving notice of appeal to the Sheriff within fourteen days after the order is served upon him."

Sec. 39 (As applied to Scotland) (1) (a) " . . . The Sheriff may at any stage of the proceedings on appeal, and shall, if so directed by the Court of Session, state in the form of a special case for the opinion of the Court any question of law arising in the course of the appeal."

The proceedings as to appeals in Scotland are regulated by Act of Sederunt, 4th November 1910, which directs that appeals under the Act "shall be by initial writ under the Sheriff Courts (Scotland) Act, 1907," and that "the proceedings thereon shall be as laid down in that statute."

† The closing order and other documents referred to were in the following terms:—

CLOSING ORDER.

"Whereas under subsection (2) of section 17 of the Housing, Town

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" Notice of this closing order was duly served upon the said Archibald Kirkpatrick.

" By subsection (3) of section 17 of the above Act, as applied to Scotland by section 53, subsection (14), thereof, the said Archibald Kirkpatrick, if aggrieved by said order is entitled to appeal to the Sheriff. The proceedings in Scotland are regulated by Act of Sederunt of date 4th November 1910, which directs that such appeal shall be commenced by an initial writ under the Sheriff Courts (Scotland) Act, 1907, 'and the proceedings thereon shall be as laid down in that statute.'

" The said Archibald Kirkpatrick, being aggrieved by said closing order, appealed to the Sheriff in the prescribed manner. On 5th June 1911 he presented in the Sheriff Court of Dumfries and Galloway at Kirkcudbright an initial writ craving the Court to recall the order complained of. . . .

Planning, &c., Act, 1909, it is the duty of the Local Authority if, on the representation of the medical officer of health, or of any other officer of the Local Authority, or other information given, any dwelling-house appears to the Local Authority to be in a state so dangerous or injurious to health as to be unfit for human habitation, to make a closing order,—that is to say, an order prohibiting the use of the dwelling-house for human habitation until in the judgment of the Local Authority the dwelling-house is rendered fit for that purpose :

" And whereas it appears to the Local Authority of the Burgh of Maxwelltown, on the representation of the medical officer of health, that the above-mentioned dwelling-houses are in a state so dangerous or injurious to health as to be unfit for human habitation :

" Now therefore we, the said Local Authority of the Burgh of Maxwelltown, in pursuance of subsection (2) of section 17 of the Housing, Town Planning, &c., Act, 1909, do, by this our order, prohibit the use of the said dwelling-houses for human habitation until, in our judgment, they are rendered fit for that purpose.

" Dated this Twenty-fourth day of May Nineteen hundred and eleven.

" ALEX. DOBIE,

" Clerk of the Local Authority of the Burgh of Maxwelltown."

REPRESENTATION OF MEDICAL OFFICER.

" I herewith, in accordance with the provisions of the Housing of the Working Classes Act, 1890, sec. 30, and of the Housing and Town Planning Act, 1909, sec. 17, represent to the Town-Council of the Burgh of Maxwelltown as Local Authority of the said Burgh, that the tenement of four dwelling-houses at 40 and 41 Glasgow Street, within the said burgh . . . are in a state so dangerous to health as to be unfit for human habitation.

" I have examined these houses in company with the sanitary inspector, and have requested him to send a detailed report, which accompanies this representation.

J. MAXWELL ROSS."

REPORT BY SANITARY INSPECTOR.

" To the Local Authority of the Burgh of Maxwelltown.

" Gentlemen,—I beg to bring under your notice a property situated at Nos. 40 and 41 Glasgow Street . . . which, in my opinion, is in such a state as to render it unfit for human habitation, and dangerous or injurious to the health of the inmates.

" The buildings are of stone and lime, the roof being rendered and slated ; it contains 3 houses with two apartments each, and one of three apartments, also unused garrets. . . .

" In all the houses there is damp, due to ground damp, defective construction, defective roof, and roof-water pipes. None of the walls are lathed, some parts are boarded or lined with wood, and in each house they are

" On 9th June 1911 parties were heard by the Sheriff-substitute. Dec. 21, 1911. At this diet the said Archibald Kirkpatrick pled (1) that the cause should be tried on condescendence and answers, and that an order should be pronounced ordaining such to be lodged ; (2) that all the requirements of the Local Authority for the repair or improvement of the property in question prior to the making of the closing order had been fully implemented by him, that no notice had been received by him of any defects requiring to be remedied, and that in these circumstances the making of the closing order was nimious and oppressive ; (3) that the Local Authority have power to require the execution of such works as they shall specify by notice as being necessary to make houses, such as those in question, in all respects reasonably fit for human habitation, under and in terms of the provisions of section 15 of the said Act of 1909, and that the powers of the Local Authority under the last-mentioned section fell to be exercised before the powers conferred by section 17 of the said Act were put in force ; (4) that the said closing order was inept in respect it specified no grounds for the making thereof, gave the said Archibald Kirkpatrick no opportunity of being heard before the making thereof, and specified no defects which he might have an opportunity of remedying ; (5) that the statutory grounds upon which a closing order may proceed, viz., that a dwelling-house ' is in a state so dangerous or injurious to health as to be unfit for human habitation ' (section 17), are separate grounds, and that the closing order is inept in respect it fails to specify upon which alternative state of facts it is made ; (6) that the expression ' dwelling-house ' in section 17 of the said Act of 1909, does not mean and include a whole tenement of four dwelling-houses ; and (7) that the closing order is inept in respect that it applies to a whole tenement."

By interlocutor, dated 13th June 1911, the Sheriff-substitute (Napier), without ordering a condescendence and answers, allowed the appellant " a proof of the following statement, namely, that the dwelling-houses, Nos. 40 and 41 Glasgow Street, Maxwelltown, are not in a state so dangerous or injurious to health as to be unfit for human habitation, and the defenders a conjunct probation."

On 20th June 1911 the appellant lodged a minute requesting the

broken and out of repair. The ceilings are low, about 7 feet 8 inches, and they are out of repair and dirty. The floors are out of repair, also the windows, none of which are hung.

" The garrets are unoccupied and are full of debris, chaff, limestones, and other dirt of various kinds, and the roof is very much out of repair, rain-water coming through, roof light without glass in one half.

" The floors of the entrance passage and the stair landing are out of repair, the sides and roof of the common passage and stair are out of repair, and very dirty.

" The water supply is in the passage for the two down-stair houses, and half way up the stair for the upstairs houses ; both taps have old metal sinks under them, both are out of repair, the one in the passage being a wreck.

" One water-closet accommodates all the inmates, it is badly situated (the tenants having to come out on to the street and through a close, No. 41, in order to reach it), of defective construction, and has no proper floor ; the accommodation is insufficient.

" There is no paving of the back-yard, and no drainage, the water lies thereon, and in wet weather it is a mud hole ; there are three old cellars at the back in a tumble-down and dangerous state."

Dec. 21, 1911. Sheriff-substitute to state a case for the opinion of the Court of Session upon questions of law formulated in the minute. The respondents lodged answers to the minute, and on 30th June the Sheriff-substitute, after hearing parties, refused the appellant's motion to state a case.*

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The questions of law formulated in the minute for the appellant were as follows:—“(1) Was it competent for the Sheriff-substitute to refuse the motion of the appellant for an order to be made for condescendence and answers to be lodged, and treat the appeal as a summary cause under Rule 41 of the First Schedule of the Sheriff Courts (Scotland) Act, 1907, regulating procedure, instead of allowing the cause to be proceeded with according to Rule 42 of said Schedule? . . . (3) Was it competent for the respondents to issue a closing order under section 17 (2) of the Housing, &c., Act, 1909, on the representation of their medical officer, as produced in process, and without exercising or exhausting their powers under section 15 of that Act? (4) Was the closing order inept in respect that it failed to disclose with sufficient specification the grounds for making it? (5) Were the respondents entitled to issue a closing order without giving the appellant an opportunity of being heard? (6) Are the statutory grounds (a) that a building is in a dangerous condition, and (b) that a building is in such a condition as to be injurious to health, separate grounds upon which a closing order may be granted under section 17 (2)? (7) Is it competent to grant a closing order upon these grounds, stated alternatively, especially when the representation of the medical officer is, as in the present case, that the dwelling-houses ‘are in a state so dangerous to health as to be unfit for human habitation’? (8) Does the expression ‘dwelling-house’ in section 17 of the 1909 Act mean and include a whole tenement comprising four dwelling-houses? (9) Was the closing order therefore inept in respect that it applied to a whole tenement?”

The respondents lodged answers to the present note, in which they submitted the following observations on the proposed questions:—“(1) This is a question of procedure under the Sheriff Courts (Scotland) Act, 1907, on which it is not competent for the Sheriff-substitute to state a case. (3 and 5) These are questions which, on the terms of the statute, do not admit of reasonable doubt. (4) This question is foreclosed in respect that the closing order follows the form prescribed by the order of the Local Government Board for Scotland, of date 11th November 1910. (6, 7, 8) These are general abstract questions as to the meaning of an Act of Parliament which are not in competent form. Moreover, as regards questions 6 and 7, these are foreclosed by the said order of the Local Government Board for Scotland, while question 8, on the terms of the statute and in particular sections 17 (4) and 18 (2) thereof, does not admit of reasonable doubt. (9) This question is merely corollary to question 8.”

“The respondents, however, in the event of the Court being of opinion that the Sheriff-substitute should be directed to state a case on all or any of the questions submitted by the appellant, are willing, with a view to saving time and expense, to consent to the Court

* In his note the Sheriff-substitute held that the stating of a special case was a matter within his discretion, and that, as in his view the order had been regularly made, and the only question was one of fact as to the condition of the houses, this was not an occasion for stating a case.

disposing of all or any of the said questions on the present note and Dec. 21, 1911. answers as on a special case stated by the Sheriff-substitute, seeing that the whole material facts and documents are now before the Court." Kirkpatrick v. Town-Council of Maxwell-town.

The case was heard before the First Division on 21st October 1911.

Argued for the appellant;—The closing order was inept inasmuch as it did not specify the ground upon which it was issued, but merely referred to alternative grounds, viz., that the dwelling-houses were dangerous or were injurious to health. Moreover, the remedial powers of the Local Authority, under section 15 of the Act, should have been exhausted, and the appellant should have had an opportunity of being heard before the drastic measure of issuing a closing order was resorted to. In any case, a closing order was not intended by the Act to be issued generally with reference to a tenement of dwelling-houses; it was necessary to issue a separate order for each particular dwelling-house that fell to be closed. If a proof were allowed, it ought to be upon a condescendence and answers. The Sheriff-substitute should be ordained to state a case, unless the questions of law appended to the present note were dealt with by the Court.

Argued for the respondents;—The words "dangerous or injurious to health" did not present alternative grounds for the issue of the closing order, but correctly described, in the language of the Act, a condition which might be described either as dangerous to health or injurious to health. The Act did not deal with houses in a "dangerous" condition structurally; these were dealt with by other statutory provisions.¹ The closing order was in the form prescribed by the Local Government Board, as required by section 41 of the Act; therefore no exception could be taken to any lack of specific statement therein of the grounds upon which it was issued. The Act required a closing order to be served (section 17 (3)) on "every owner of the dwelling-house" forthwith, and notice of an operative order to be served (section 17 (4)) on "every occupying tenant of the dwelling-house." Thus, from the language of the Act a tenement of dwelling-houses was clearly within the meaning of the word "dwelling-house." Prior to the issue of a closing order no steps were required by the Act to be taken for the purpose of having a house made fit for habitation. There was no necessity for the exercise of the remedial powers under section 15, nor for allowing the owner to be heard, prior to the issue of such an order, because anyone aggrieved had his remedy in an appeal to the Sheriff, and the order did not become operative until the appeal was disposed of. The appeal was a summary application to be disposed of by the Sheriff with or without a condescendence and answers as he thought fit.² The details given in the report of the sanitary inspector in the present case disclosed quite clearly the facts upon which parties were to go to proof, and made a condescendence and answers unnecessary.

At advising on 21st December 1911,—

LORD PRESIDENT.—This is a note from the Sheriff Court at the instance

¹ *E.g.*, Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), sec. 191.

² Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. cap. 51), First Schedule, Rule 41.

Dec. 21, 1911. of Archibald Kirkpatrick, coal-agent, Maxwelltown, against the Local Authority of the Burgh of Maxwelltown, and asks us to ordain the Sheriff-Town-Council substitute to state a case for the opinion of the Court.

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town.

—
Ld. President.

The matter arises under the provisions of the Housing and Town Planning Act, 1909, section 17, which deals with the duty of the Local Authority to close any dwelling-house which is unfit for habitation. I need not read the section to your Lordships, except to call attention to this, that that section puts a duty of initiative upon the Local Authority to inspect their district with a view to ascertaining whether any dwelling-house therein is "in a state so dangerous or injurious to health as to be unfit for human habitation." Then it tells them, if they so find it, that it is their duty to make a closing order, and the closing order is then made. Then an appeal to the Sheriff is given and regulated by sections 17 (3) and 39, as altered by the section which applies the Act to Scotland.

The closing order was made in this case, and an appeal was taken to the Sheriff. Now, the Act of Parliament provides by section 39 (as applied to Scotland),—"Provided that the Sheriff may at any stage of the proceedings on appeal, and shall, if so directed by the Court of Session, state in the form of a special case for the opinion of the Court any question of law arising in the course of the appeal." The Sheriff here was asked to state a case for the opinion of the Court, and he refused to state it for a reason which he gave. The present application has therefore been made to the Court to direct the Sheriff to state a case.

No doubt, strictly speaking, the only order we are entitled to make is an order upon the Sheriff to state a case; but as in cases familiar to your Lordships arising under the Workmen's Compensation Act, we have always been in use, if the whole matters are really before us, with the consent of parties, ourselves to determine the question at issue. We were asked to do that here, and I therefore propose that your Lordships should deal with the merits of the case.

Now, the various points that are raised are brought out in a minute for the appellant which he lodged in the process below, and in which he asked the Sheriff-substitute to state a case. The learned Sheriff-substitute held that that was not necessary, and appended a note to his interlocutor, in which he gave his views as to the points on which he was asked to state a case. It is convenient to take the various questions of law as they are put in the minute for the appellant, which your Lordships will find on page 10 of the note. The first question that was asked is this: "Was it competent for the Sheriff-substitute to refuse the motion of the appellant for an order to be made for condescendence and answers to be lodged, and treat the appeal as a summary cause under Rule 41 of the First Schedule of the Sheriff Courts (Scotland) Act, 1907, regulating procedure, instead of allowing the cause to be proceeded with according to Rule 42 of said Schedule?" As your Lordships know, there was a provision in the statute authorising this Court to frame rules for the carrying out of the procedure under this Act, and accordingly an Act of Sederunt was passed. The only part of it which deals with this matter is a simple provision that in proceedings under these appeals initiation of the proceedings shall be by initial writ, and that thereafter they shall be conducted as laid down by the Sheriff Courts Act.

Now, there is no question that the initiation of the matter having been by Dec. 21, 1911. initial writ, it became not a summary cause but a summary application, and I think the result of that is that the Sheriff was entirely judge of his own procedure. It would have been perfectly competent for him to order condescendence and answers, but I think of that he was the best judge; and I have no doubt in this case he acted perfectly wisely, because we are told that the Local Authority produced and referred to a detailed report by their medical officer which showed the grounds upon which the houses were condemned. Now that detailed report, in the view of the Sheriff—and I think it was a right view—really gave the appellant all that he could have got if a condescendence had been lodged; and accordingly I think, as the case was being conducted as a summary application, the appellant had sufficient notice to enable him, if he still wished to do so, to maintain that the house was not in an insanitary condition. Of course one quite sees that in a case of this sort it would always be fair that a person whose house was to be closed should be told in what respect it was insanitary; but here I think he was told quite clearly by the production of this report. In answer to the first question, therefore, I am of opinion that it was competent for the Sheriff-substitute to refuse the motion for condescendence and answers to be lodged.

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Town-Council
of Maxwell-
town.

Ld. President.

The second question is not really a question at all, and I do not need to take any notice of it.

The third question is: "Was it competent for the respondents to issue a closing order under section 17 (2) of the Housing, &c., Act, 1909, on the representation of their medical officer, as produced in process, and without exercising or exhausting their powers under section 15 of that Act?" I think it clearly was competent. The powers under section 15 are quite separate from the powers under section 17, and the Local Authority not only may act under section 17, but, as I have already pointed out, they have a duty to do so under that section, if they find that the specified state of affairs exists.

The fourth question is: "Was the closing order inept in respect that it failed to disclose with sufficient specification the grounds for making it?" Now, the closing order is precisely in the form that is issued in Form No. 5 by the Local Government Board for Scotland. By section 41 of the Act it is provided: "The Local Government Board may by order prescribe the form of any notice, advertisement, or other document, to be used in connection with the powers and duties of a local authority or of the board under the Housing Acts, and the forms so prescribed, or forms as near thereto as circumstances admit, shall be used in all cases to which those forms are applicable." Now, the Local Government Board issued forms of which this No. 5 is one, and that is the form that the Local Authority used. In these circumstances it seems to me impossible to hold that the closing order is inept in respect that it did not disclose so-and-so and so-and-so.

But upon this matter I think your Lordships are rather of opinion that it would be well if the Local Government Board considered whether they might not to a certain extent amend the form with that in view. The form that they use is this: "And whereas it appears to the [description of the local authority] on the ['representation of the medical officer of health' or

Dec. 21, 1911. 'representation of the' (*specify the officer*) or 'on information given' (*specify the nature and effect*)." Now, that really is an echo of subsection (2) of Kirkpatrick v. Town-Council section 17, which is dealing with these closing orders, and which says this: of Maxwell-town. "If, on the representation of the medical officer of health or of any other

Ld. President.

officer of the authority, or other information given, any dwelling-house appears to them to be in such a state, it shall be their duty to make an order prohibiting the use of the dwelling-house for human habitation." And therefore I do not at all wonder that the form is in the words I have read. But your Lordships will notice that whereas the addition "specify the nature and effect" is added to the alternative "information given," there is no addition made when the representation is the representation of the medical officer of health or some other officer of the local authority. One can understand why there should be a certain distinction made there, because the medical officer of health or other officer of the Local Authority is a recognised official, whereas "information given" may be information given by *quivis ex populo*. If you are going to tell an owner that his house is going to be shut up, and that the person who condemns it is a local officer, the owner can ask him for particulars, and say, "Is there anything I can do?" and so on. On the other hand, if you say it is on the information of John Smith, and say no more, that really leaves the owner in doubt as to whether it may not be a piece of pure spite on the part of a neighbour not worthy of attention, and therefore it is necessary that there should be more specification in the nature of the complaint when it is made by an outsider than when it is made by an officer. But we think it is as well that in serving the order there should be some reference added as to what the grounds of defect of the houses consist in. If the order is made in purely bald terms and nothing else is said, the moment an owner objects in an appeal, he is entitled to force from the Local Authority a specification of the grounds on which his house has been closed. It seems rather unnecessary that a man should have to go through the form of appealing in order to elicit the grounds on which his house has been condemned. I have no doubt that the Local Government Board will make such slight alterations in their Form No. 5 as will remove this difficulty for the future.

In the present case we think there was absolutely no injustice done, because, as I have already mentioned, the detailed report of the medical officer was communicated to the owner; and therefore we do not think this case calls for any interference.

The next question is: "Were the respondents entitled to issue a closing order without giving the appellant an opportunity of being heard?" As a matter of law, I think it is quite clear that they were, because the Act of Parliament says nothing about the owner being heard. It puts the responsibility upon the Local Authority, and upon the Local Authority alone. I am quite clear upon this, that Local Authorities may be trusted, before making a closing order, to go to the owner and through one of their officers to speak to him; but strictly on a question of law, I think there is no reason why they should not issue a closing order without any such preliminary warning.

The sixth question is: "Are the statutory grounds (a) that a building is in a dangerous condition, and (b) that a building is in such a condition as

to be injurious to health, separate grounds upon which a closing order may be granted?" I am clearly of opinion that they are not separate grounds. I think the second ground is merely exegetical of the first. This Act is not dealing with what you may call structural danger at all. That is dealt with under the Burgh Police Act, and there is not a trace in this Act of the Local Authority having anything to do with structural danger. I think that is quite clear from the Act itself, because if you take subsection (7) of section 17 it says this: "A room habitually used as a sleeping place, the surface of the floor of which is more than three feet below the surface of the part of the street adjoining or nearest to the room, shall for the purposes of this section be deemed to be a dwelling-house so dangerous or injurious to health as to be unfit for human habitation." That shows, therefore, that the expression is held as applying to sanitary conditions, and sanitary conditions alone.

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Ld. President.

That really disposes of the next question, because if these two grounds of objection are the same there is no necessity to state under which alternative a closing order is to be issued, because there is no alternative.

The eighth question is: "Does the expression 'dwelling-house' in section 17 of the 1909 Act mean and include a whole tenement comprising four dwelling-houses?" Upon this matter we were referred to a judgment of Sheriff-substitute Fyfe in a case¹ which is coming next in your Lordships' advisings, but which case is in such a position that we shall not be able to give an opinion on the subject. I only mention this because I wish it to be understood that the matter has been carefully considered. I am of opinion that the expression "dwelling-house" may include a whole tenement, even although that tenement comprises four dwelling-houses. The whole question is one simply of identification. If a closing order names Nos. 58 and 59 of such-and-such a street, that means the whole block of dwelling-houses that are known as Nos. 58 and 59. There is no question that if Nos. 58 and 59 are broken up into a set of flats, in such a closing order you take it upon yourselves to say that each and every dwelling in that tenement is unfit for human habitation and ought to be closed; and if it were the fact that one of them was in a good state, that closing order on appeal would be held to be a bad closing order, because it would close something that ought not to be closed. But to say that a closing order is, on the face of it, bad because it closes Nos. 58 and 59 *en bloc*, is to say something for which there is no warrant in the statute at all. In the Glasgow case¹ there were over forty houses in the tenement which was closed, but that did not necessitate a separate closing order for each.

I agree with what was said in one of the English cases, that, first of all, decisions under one statute are not to be used in helping you with another; and secondly, that, unless there is something to a contrary effect in the statute, you are to take "dwelling-house" in the ordinary acceptation of the word. Of course you may have a dwelling-house within a dwelling-house, and I do not doubt that a closing order can competently close one dwelling-house within a tenement, if it says so, and I think the whole matter is one of identification. I think that is quite clear from the section I have read about a room three

¹ *Vide* next report.

Dec. 21, 1911. feet below the surface of the street. I do not know how you would particularly describe a dwelling-house in a tenement in Glasgow ; are you to say, Kirkpatrick v. Town-Council of Maxwelltown. “ No. 39 Gallowgate, three stairs up, second room to the back ” ? But it is not necessary for us to give any opinion on that. That is, after all, a detail of administration with which we are not here concerned. But if the Authority is of opinion that the whole tenement is bad, I do not see why it should not say so by using the ordinary words by which a tenement is designated—“ Nos. 58 and 59 so-and-so.” Even if you look at a directory that is the way a tenement is described. I am therefore of opinion on this matter also that the closing order was not inept on any such view.

Ld. President.

I think I have now gone through the whole matters. I do not think it is necessary to do anything more than simply to send back the case to the Sheriff with this expression of opinion, because I have no doubt he will be guided by the opinion we have expressed, and therefore I do not think it is necessary to order him to go through the idle form of stating a case. The application for a case here is obviously in time, because the Sheriff has only pronounced an order for proof, and has not finally disposed of the case.

LORD KINNEAR concurred.

LORD JOHNSTON.—I also agree, but as I hold a strong view upon the sufficiency of the specification of the grounds in this closing order, I would like to say a few words on that subject. The closing order states simply that whereas it has appeared to the Local Authority that certain dwelling-houses are in a state so dangerous or injurious to health as to be unfit for human habitation—“ now therefore, we, the said Local Authority of the Burgh of Maxwelltown, in pursuance of subsection (2) of section 17 of the Housing, Town Planning, &c., Act, 1909, do by this our order, prohibit the use of the said dwelling-houses for human habitation until in our judgment they are rendered fit for that purpose.” It appears to me to be most unfair to the owner of property that he should have a bald notice of that description thrown at his head, without any indication of what fault the Local Authority are finding, leaving him to ascertain for himself and to make improvements or modifications which, it may be quite possible, are not those that the Local Authority want. Of course, any reasonable authority would give along with the closing order an indication of what they want, and no better indication could be given than the report of the sanitary inspector on which they are here proceeding. Why I take the opportunity of referring to this matter is that in another case that has been before us not only was that report not communicated along with the closing order, but when applied for it was refused. Accordingly, it does seem to me that something is wanted to require the Local Authority to communicate to the owner information as to what they really find fault with. This may possibly involve an alteration in the form, but even without such alteration I think it is a reasonable thing that the Local Authority should give the owner complete specification of the defects complained of, because otherwise the owner is compelled, in order to force from the Local Authority what in some cases they have apparently not chosen to give, to go through the unnecessarily expensive proceeding of applying to the Court, as has been done here. This ought to be avoided.

On the next point which your Lordship referred to, namely, whether the expressions "dangerous or injurious to health" are truly alternative, I was of opinion, at the time the case was discussed, that they were alternative. But on examining the Housing of the Working Classes Act, 1890 (53 and 54 Vict. cap. 70), to which the Act of 1909 is intimately related, I find that the same expression is used in the class of sections beginning with section 30, and in that Act there is no possible question that the expressions are not alternative, but merely cumulative, and I am therefore satisfied that the same intention was in the minds of the Legislature in dealing with the matter under this Act of 1909. I have nothing further to add.

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LORD MACKENZIE.—I concur. The question upon which I had difficulty was under the fourth head, whether the closing order was inept in respect of failure to disclose with sufficient specification the grounds for making it. That difficulty, however, has been resolved, so far as the decision of this case rests, by the reference to section 41 of the Act, which shows that the responsibility for the form of the order is with the Local Government Board; and the Local Government Board have prescribed a particular form which was followed in the present case. I entirely concur with the observations which have been made as to the desirability of the Local Government Board considering whether it would not be fair to give such notice to the person, against whom the closing order may be made, as would inform him of the specific grounds on which it was made, in cases where the order is made on the representation of the medical officer as well as in cases where it is made on other information.

If a man who is indicted for trial is charged with having committed a statutory offence, it is not sufficient merely to echo the words of the statute; he is entitled to specification as to the way in which he has broken the law. I think in the case of the drastic remedies under these sections the owner of property is entitled to similar consideration. What has just been said with regard to the proper construction to be put upon the word "dwelling-house" under the eighth head of the minute for the appellant makes specification all the more necessary, because the order may deal not with one dwelling-house, but with a great number. I think that emphasises the necessity of specific notice being given as to the way in which the statute has been contravened.

THE COURT pronounced an interlocutor in the following terms:

—"Sustain the competency of the note: Of consent of parties, answer the questions of law set forth in the minute for the appellant, No. 16 of process, as follows:—Questions Nos. 1, 3, 5, and 7 in the affirmative; Nos. 4 and 6, also Nos. 8 and 9 read together as one question, in the negative: Find it unnecessary to answer question No. 2: With these answers remit to the Sheriff-substitute to proceed as accords, and find it unnecessary to deal further with the crave of the note."

SCOTT & GLOVER, W.S.—**BEVERIDGE, SUTHERLAND, & SMITH, S.S.C.**—Agents.

No. 50.

PETER JOHNSTON AND OTHERS (Robert Johnston's Trustees),
Appellants.—*Sandeman, K.C.—D. M. Wilson.*

Dec. 21, 1911.

SPECIAL COMMITTEE OF THE CORPORATION OF GLASGOW, Respondents.
—*Clyde, K.C.—M. P. Fraser.*

Johnston's
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Process—Sheriff—Housing, Town Planning, &c., Act, 1909 (9 Edw. VII. cap. 44), sec. 39 (1) (a)—Closing Order—Statement of special case for opinion of Court of Session—Competency of stating case after judgment pronounced by the Sheriff—Public Health.

The Housing, Town Planning, &c., Act, 1909, allows any person aggrieved by a closing order to appeal to the Sheriff, and enacts (sec. 39) that the Sheriff may "at any stage of the proceedings on appeal" state a special case on a question of law for the opinion of the Court.

Held that such a case must be stated during the progress of the appeal, and cannot be stated after the Sheriff has given judgment.

Steele v. M'Intosh Brothers, (1879) 7 R. 192, *followed*.

1ST DIVISION.
Sheriff of
Lanarkshire.

ON 6th October 1910 a Special Committee of the Corporation of Glasgow, acting as the Local Authority under the Housing of the Working Classes Acts, 1890 to 1909, issued a closing order under section 17 of the Housing, Town Planning, &c., Act, 1909,* prohibiting the use for human habitation of a dwelling-house at 77 Stewart Street, Glasgow, of which Robert Johnston's trustees were the proprietors.

An appeal against this order having been taken to the Sheriff-substitute in terms of section 17 (3) * of that Act, the Sheriff-substitute (Fyfe), after hearing parties, pronounced an interlocutor on 5th January 1911 quashing the order.

Thereafter at the request of the Local Authority the Sheriff-substitute stated a special case on certain questions of law for the opinion and judgment of the Court under section 39 of the Act.*

The case set forth:—"1. This is a 'special case' asked for under section 39 of the Housing, Town Planning, &c., Act, 1909.

"2. In that statute there are no process directions at all as regards the form of such a 'special case.'

"3. Nor are there any directions in the Act of Sederunt of 4th November 1910, which merely directs that the procedure in an appeal under the 1909 statute shall be as laid down in the Sheriff Courts Act, 1907; but, as a 'special case' is not known in Sheriff Court practice, there are, of course, no directions in the Sheriff Court Act, nor in the procedure rules, as regards the form of a special case.

"4. The appellants (Johnston's trustees) maintain that, as I have pronounced final judgment in the appeal process, it is not now competent to state a special case at all under section 39 of the statute. I have reserved this question of competency.

"5. In Scotland the appeal against a closing order is not to an administrative body but to a judicial tribunal (the Sheriff Court). Accordingly, under the Act of Sederunt, the appeal to the Sheriff takes the form of an initial writ under the Sheriff Courts Act, 1907, and the proceedings are to be as laid down in that statute. It therefore becomes the duty of the Sheriff, in accordance with ordinary procedure in the Sheriff Court, to follow forth the process to the end without interruption.

* Quoted *supra*, p. 289.

"6. As an appeal against a closing order is a summary application, as defined by section 3 (*p*) of the Sheriff Courts Act, 1907, it appeared to me to be my imperative duty, under section 50 of that Act, to hear the parties; and to give judgment in writing *deciding* all questions (including questions of law) arising in the appeal proceedings. . . .

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"13. In the appeal process, as directed by the Act of Sederunt of 4th November 1910, and section 50 of the Sheriff Courts (Scotland) Act, 1907, I heard parties, and thereafter gave judgment in writing by interlocutor and note of 5th January 1911.

"14. The respondents (the Local Authority) thereupon lodged the minute printed in the appendix hereto, craving a special case.

"15. The appellants (Johnston's trustees), after I had heard parties on the Local Authority's minute, lodged the minute printed in the appendix hereto.* The Local Authority objected to the competency of that minute, and I also reserved that question.

"16. The questions of law upon which the Special Committee of the Glasgow Corporation desire the opinion of the Court of Session are:—[His Lordship stated these questions, and also those set forth in the minute for Johnston's trustees; and continued]—

"18. All these questions of law arose in the course of the appeal proceedings.

"This 'special case' is stated by me in terms of the Housing, Town Planning, &c., Act, 1909, section 39, proviso (*a*), under reservation of all objections of competency."

The case was heard before the First Division on 24th October 1911.

Argued for the appellants;—It was incompetent to present a special case after the Sheriff had disposed of the appeal by pronouncing judgment, for the terms of section 39 only permitted such a case to be presented "at any stage of the proceedings on appeal," and not after the proceedings had terminated.¹ This was really an attempt to submit the judgment of the Sheriff to review contrary to the intention of the statute. The jurisdiction with regard to appeals against closing orders conferred by the statute on the Sheriff was a new jurisdiction, and if a further appeal to the Court of Session had been intended it would have been expressly provided for.

Argued for the respondents;—The Sheriff was permitted to state a case on any question of law arising in the course of the proceedings, and that necessarily involved stating a case after the close of the proceedings; for the questions of law involved in the decision might only then emerge for the first time, and parties could not be expected to state *ab ante* all questions that could possibly arise. If the Sheriff's decision was found to be wrong, the opinion of the Court could be stated in such a way that the Sheriff could give effect to it by varying his decision upon the closing order, such an order and a decision upon it not being in the position of a judgment beyond recall.

* The minute, which bore to be presented under reservation of the appellants' objections to the competency of the proceedings, craved the Sheriff, in the event of his stating a special case, to include in it certain questions for the appellants.

¹ 9 Edw. VII. cap. 44, sec. 39; *Steele v. M'Intosh Brothers*, (1879) 7 R. 192; *In re Knight and Tabernacle Permanent Building Society*, [1892] 2 Q. B. 613.

Dec. 21, 1911. At advising on 21st December 1911,—

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LORD PRESIDENT.—In this case a closing order was made by the Local Authority of Glasgow under the Housing and Town Planning Act, 1909. An appeal was taken from that closing order to the Sheriff-substitute in terms of the section of the Act to which I shall refer. Upon that appeal, after certain procedure, the learned Sheriff-substitute issued a judgment which, after various sets of findings, finishes with this :—"Therefore quashes the said closing order." That having been done, a minute was lodged for the Special Committee of the Corporation, in which, referring to the judgment which I have just mentioned, the respondents respectfully craved the Sheriff-substitute to state, in the form of a stated case for the opinion of the First Division of the Court of Session, certain questions of law. To that a minute was put in for the other side in which, under reservation of all pleas as to the competency of the appeal and the form thereof, they ask him to add other questions. And accordingly the Sheriff-substitute did state a special case.

Upon the special case appearing here the competency was at once objected to by the appellants in the Court below—that is to say, the parties against whom the closing order had originally been pronounced—and your Lordships heard counsel on that matter, and did not go into the merits until we should have disposed of the question of the competency.

I am clearly of opinion that the special case here is incompetent, because it is too late.

The section of the Act which deals with closing orders is the 17th. I need not go through it again, because we have just been going through it in the case we have last disposed of¹; but it provides that a local authority on their own initiative shall cause inspections to be made of their district, and if any dwelling-houses are dangerous to health it becomes their duty to issue a closing order. The closing order is to be forthwith served upon the owner, and if the owner is aggrieved by the order he may appeal to the Local Government Board, by giving notice of appeal. The Local Government Board is, by the application section 53, subsection (14), translated into Sheriff in Scotland. Now, that is the appeal given, and the only appeal given. There is no appeal from the Local Government Board or Sheriff to anyone else. But section 39 deals with the procedure under the appeal which is given to the Local Government Board, or in Scotland the Sheriff. Now, that section, as applied to Scotland by section 53, subsection (14), reads thus :—"The procedure on any appeal under this part of this Act, including costs, to the Sheriff shall be such as the Court of Session may by Act of Sederunt determine, and on any such appeal the Sheriff may make such order in the matter as he thinks equitable, and any order so made shall be binding and conclusive on all parties Provided that the Sheriff may at any stage of the proceedings on appeal, and shall, if so directed by the High Court," that is, the Court of Session, "state in the form of a special case for the opinion of the Court any question of law arising in the course of the appeal. . . ." That is the only

¹ Kirkpatrick v. Town-Council of Maxwelltown, *supra*, p. 288.

provision. Your Lordships will observe that it is not a provision for a Dec. 21, 1911. further appeal from the Sheriff, but it is a provision that in the course of the appeal to the Sheriff, the Sheriff may, if he likes, and shall, if directed by the Court of Session, state in the form of a special case a question of law for the opinion of the Court. "For the opinion of the Court" means that the Court will give the Sheriff their opinion on a question of law, and he would not be entitled to disregard it; but it must be given at a time when as yet he has not pronounced a judgment, because if you allow him to go on and pronounce a judgment, then stating a special case would not be giving an opinion for his guidance. He cannot recall his judgment, and there is no provision which allows us to recall it.

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There are many instances in other statutes of appeal given by way of stated case; the Workmen's Compensation Act is one of which we have daily examples. But in all those statutes there is a provision which gives the appeal. Here there is none. This law is not at all new law. I think it is absolutely decided by authority both in Scotland and in England. In Scotland it is covered by the case of *Steele v. M'Intosh Brothers*.¹ There it was a question under the Excise Act, 1827 (7 and 8 Geo. IV. cap. 53), and it was this. Section 84 of that statute contains the following proviso:—"Provided always, that it shall be lawful for such Commissioners of Appeal, and Justices of the Peace at such general Quarter Sessions respectively, as aforesaid, at their discretion, to state the facts of any case on which such appeal shall be made specially for the opinion and direction of the Court of Exchequer in England, Scotland, or Ireland, as the same shall have arisen therein respectively." Now, the Lord President in that case goes into this precise question with great particularity, and he points out exactly the distinction I have just pointed out, namely, that there are statutes in which appeal is given by stated case, but that there are others in which nothing is said as to appeal, but there is only provision for opinion. The statute before your Lordships belongs to the latter class, and only makes provision for the Sheriff obtaining the opinion of this Court, to aid him in forming his own final judgment. The words in the Excise Act of 1827 are not precisely the same as in the Housing and Town Planning Act, but the reasoning is precisely applicable. In the English case² the actual words are the same. It was an arbitration between Knight and the Tabernacle Permanent Building Society, and it arose out of the Arbitration Act, 1889 (52 and 53 Vict. cap. 49), where it is provided by section 19, that "any referee, arbitrator, or umpire may at any stage of the proceedings under a reference, and shall, if so directed by the Court or a Judge, state in the form of a special case for the opinion of the Court, any question of law arising in the course of the reference." There again the argument was precisely on the same lines, and the decision was precisely on the same lines, as in the Scotch case.

I think, therefore, both on principle and authority, this application is too late, is incompetent, and cannot be entertained.

¹ 7 R. 192.

² *In re Knight and Tabernacle Permanent Building Society*, [1892] 2 Q. B. 613.

Dec. 21, 1911. At advising on 21st December 1911,—

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Glasgow
Corporation.

LORD PRESIDENT.—In this case a closing order was made by the Local Authority of Glasgow under the Housing and Town Planning Act, 1909. An appeal was taken from that closing order to the Sheriff-substitute in terms of the section of the Act to which I shall refer. Upon that appeal, after certain procedure, the learned Sheriff-substitute issued a judgment which, after various sets of findings, finishes with this :—"Therefore quashes the said closing order." That having been done, a minute was lodged for the Special Committee of the Corporation, in which, referring to the judgment which I have just mentioned, the respondents respectfully craved the Sheriff-substitute to state, in the form of a stated case for the opinion of the First Division of the Court of Session, certain questions of law. To that a minute was put in for the other side in which, under reservation of all pleas as to the competency of the appeal and the form thereof, they ask him to add other questions. And accordingly the Sheriff-substitute did state a special case.

Upon the special case appearing here the competency was at once objected to by the appellants in the Court below—that is to say, the parties against whom the closing order had originally been pronounced—and your Lordships heard counsel on that matter, and did not go into the merits until we should have disposed of the question of the competency.

I am clearly of opinion that the special case here is incompetent, because it is too late.

The section of the Act which deals with closing orders is the 17th. I need not go through it again, because we have just been going through it in the case we have last disposed of¹; but it provides that a local authority on their own initiative shall cause inspections to be made of their district, and if any dwelling-houses are dangerous to health it becomes their duty to issue a closing order. The closing order is to be forthwith served upon the owner, and if the owner is aggrieved by the order he may appeal to the Local Government Board, by giving notice of appeal. The Local Government Board is, by the application section 53, subsection (14), translated into Sheriff in Scotland. Now, that is the appeal given, and the only appeal given. There is no appeal from the Local Government Board or Sheriff to anyone else. But section 39 deals with the procedure under the appeal which is given to the Local Government Board, or in Scotland the Sheriff. Now, that section, as applied to Scotland by section 53, subsection (14), reads thus :—"The procedure on any appeal under this part of this Act, including costs, to the Sheriff shall be such as the Court of Session may by Act of Sederunt determine, and on any such appeal the Sheriff may make such order in the matter as he thinks equitable, and any order so made shall be binding and conclusive on all parties Provided that the Sheriff may at any stage of the proceedings on appeal, and shall, if so directed by the High Court," that is, the Court of Session, "state in the form of a special case for the opinion of the Court any question of law arising in the course of the appeal. . . ." That is the only

¹ Kirkpatrick v. Town-Council of Maxwelltown, *supra*, p. 288.

provision. Your Lordships will observe that it is not a provision for a Dec. 21, 1911. further appeal from the Sheriff, but it is a provision that in the course of the appeal to the Sheriff, the Sheriff may, if he likes, and shall, if directed by the Court of Session, state in the form of a special case a question of law for the opinion of the Court. "For the opinion of the Court" means that the Court will give the Sheriff their opinion on a question of law, and he would not be entitled to disregard it; but it must be given at a time when as yet he has not pronounced a judgment, because if you allow him to go on and pronounce a judgment, then stating a special case would not be giving an opinion for his guidance. He cannot recall his judgment, and there is no provision which allows us to recall it.

Johnston's
Trustees v.
Glasgow
Corporation.

Ld. President.

There are many instances in other statutes of appeal given by way of stated case; the Workmen's Compensation Act is one of which we have daily examples. But in all those statutes there is a provision which gives the appeal. Here there is none. This law is not at all new law. I think it is absolutely decided by authority both in Scotland and in England. In Scotland it is covered by the case of *Steele v. M'Intosh Brothers*.¹ There it was a question under the Excise Act, 1827 (7 and 8 Geo. IV. cap. 53), and it was this. Section 84 of that statute contains the following proviso:—"Provided always, that it shall be lawful for such Commissioners of Appeal, and Justices of the Peace at such general Quarter Sessions respectively, as aforesaid, at their discretion, to state the facts of any case on which such appeal shall be made specially for the opinion and direction of the Court of Exchequer in England, Scotland, or Ireland, as the same shall have arisen therein respectively." Now, the Lord President in that case goes into this precise question with great particularity, and he points out exactly the distinction I have just pointed out, namely, that there are statutes in which appeal is given by stated case, but that there are others in which nothing is said as to appeal, but there is only provision for opinion. The statute before your Lordships belongs to the latter class, and only makes provision for the Sheriff obtaining the opinion of this Court, to aid him in forming his own final judgment. The words in the Excise Act of 1827 are not precisely the same as in the Housing and Town Planning Act, but the reasoning is precisely applicable. In the English case² the actual words are the same. It was an arbitration between Knight and the Tabernacle Permanent Building Society, and it arose out of the Arbitration Act, 1889 (52 and 53 Vict. cap. 49), where it is provided by section 19, that "any referee, arbitrator, or umpire may at any stage of the proceedings under a reference, and shall, if so directed by the Court or a Judge, state in the form of a special case for the opinion of the Court, any question of law arising in the course of the reference." There again the argument was precisely on the same lines, and the decision was precisely on the same lines, as in the Scotch case.

I think, therefore, both on principle and authority, this application is too late, is incompetent, and cannot be entertained.

¹ 7 R. 192.

² *In re Knight and Tabernacle Permanent Building Society*, [1892] 2 Q. B. 613.

Dec. 22, 1911. apply for a factor. In the case of *White v. Anderson*,¹ Lord Pearson had occasion to consider a similar question, but he decided it upon the terms of the trust-conveyance, which differed from those which we have here. He expresses no opinion on the point raised in this case, while admitting that the recent conveyancing treatises affirm that a clause framed as is the clause in Mr Wood's trust-conveyance would have the effect of carrying not merely the bare trust title but also the office of trustee to the heir of the last trustee. That this was presumably the intention of the testator in the present case may further be gathered from the fact that the heir-male of John Hastie, who was constituted trustee on his failure, was to be resident in Great Britain and *sui juris* at the time of John Hastie's death. I am accordingly of opinion that we should answer the third question in the affirmative and the fourth in the negative. [His Lordship then dealt with the question of vesting on which the case is not reported.]

Brown v.
Hastie.

Lord Salvesen.

THE COURT answered the third question of law in the affirmative, and the fourth in the negative.

J. & A. HASTIE, Solicitors—ROBERT STEWART, Solicitor—Agents.

No. 52.

Dec. 22, 1911.

Ammon v.
Tod.

ARTHUR FREDERICK AMMON, Pursuer (Respondent).
JAMES WALKER TOD, Defender (Appellant).—*Horne, K.C.*—*Hon. W. Watson.*

LINDSAY, MELDRUM, & OATTS, AND OTHERS, Minuters.—*Lippe*—*T. D. K. Murray.*

Agent and Client—Expenses—Agent-disburser—Action settled by parties pending appeal—Right of agent to be sisted in order to obtain decree for expenses.

In an action in the Sheriff Court the Sheriff pronounced decree against the defender and found him liable to the pursuer in the expenses of the action. While an appeal against this interlocutor was pending in the Court of Session the parties, without the knowledge of the pursuer's agents, came to a compromise, in terms of which the pursuer accepted a sum in full settlement of all his claims of principal and expenses in the action. The defender having moved the Court, in respect of this settlement, to assoilzie him from the conclusions of the action and to find no expenses due to or by either party, the pursuer's agents lodged a minute in which they craved to be sisted as parties to the action in order that decree might be pronounced against the defender in their favour as agents-disbursers for the expenses of the action.

Held by a Court of five Judges (*diss.* Lord Kinneir) that the agents were entitled to be sisted in terms of their minute.

1ST DIVISION,
with one
consulted
Judge.
Sheriff of
Lanarkshire.

IN January 1911 Arthur F. Ammon, an import and export merchant in Manchester, brought an action in the Sheriff Court of Lanarkshire at Glasgow, against James Walker Tod, an agent there, in which decree was pronounced against the defender. The defender appealed to the Court of Session, and while the appeal was pending before the Court Messrs Lindsay, Meldrum, & Oatts and others lodged a minute in which they craved to be sisted to the cause.

The circumstances of the case, and the procedure that had taken place, were thus narrated by Lord Johnston in his opinion:—

¹ 12 S. L. T. 493.

"The pursuer and respondent, Ammon, held an agency for the Positive Lock Washer Company of Newark, New Jersey, U.S.A., as sole export agent for the sale of their Positive Lock Washer, excepting in the United States and Canada. The defender and appellant Tod was in the respondent's service in Manchester, which was the headquarters of his business, and as at 1st June 1906 the respondent engaged him to represent him in Scotland. This engagement continued from year to year, and at 1st February 1909 was current until 1st June of that year. The respondent alleges, the Sheriff-substitute has found, and the Sheriff has affirmed, that behind the back of the respondent the appellant, in the end of 1908, went to America, and there succeeded in filching from him the agency which he held from the American company, and which on 1st February 1909 was withdrawn from the respondent and transferred to the appellant. Concurrently, on 30th January 1909 the appellant intimated to the respondent that he would from that date cease to represent him in Scotland, and terminated their current agreement, which had still four months to run.

"It is not to be wondered at that litigation between the parties immediately ensued. At once the respondent raised against the appellant an action in the Sheriff Court at Glasgow for interdict, accounting, and damages. In this action the Sheriff (Millar) on appeal on 17th March 1910, fully agreeing with his substitute (Fyfe) on the facts, though varying his interlocutor on the point of damages, found it unnecessary, owing to efflux of time, to grant interdict, but decerned against the appellant for £68 in the accounting, and for £100 in name of damages, with expenses.

"Though the merits of the case have not been gone into before us, it is a factor which I cannot exclude from view that both Sheriffs found against the appellant in matter of fact by interlocutors which exhausted the cause in their Court.

"On the 30th March 1910 the defender appealed to this Division, and on 12th May of that year the case was sent to the roll. While the case was in the roll awaiting hearing the appellant came to a settlement with the respondent without the knowledge or consent of Messrs Lindsay, Meldrum, & Oatts, writers, Glasgow, and Messrs Erskine Dods & Rhind, S.S.C., Edinburgh, who had represented the respondent in Glasgow and Edinburgh respectively. This settlement was not apparently reduced to writing, but its terms are evidenced by those of a receipt dated Manchester 3rd February 1911, granted by the respondent to the appellant, in which the former acknowledged having received from the latter 'the sum of seventy pounds sterling in full settlement of all claims of principal and expenses which I have in the action at my instance at present pending in the Court of Session, Edinburgh, against the said James Walker Tod, and I hereby discharge him of all such claims under said action.'

"In these circumstances, and before the case came on for hearing, the appellant lodged a note craving the Court, in respect of the discharge above referred to, to recall the interlocutor appealed against, to assoilzie him from the conclusions of the action, and to find no expenses due to or by either party. This was quite consistent with the terms of the discharge, and in other circumstances the Court would have nothing to do but to interpose authority to the settlement and grant the crave of the appellant.

"But this application was met by the respondent's agents lodging a

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Dec. 22, 1911. minute craving that they might be sisted as parties to the action as agents-disbursers, 'in order that a decree may be pronounced against the appellant and defender in their favour as agents-disbursers for the expenses of the action as between agent and client.' This minute was answered by the appellant, and on the face of the minute and answers the question was sharply raised whether the settlement which had taken place on the 3rd February 1911 was not made by the appellant in knowledge of the respondent's insolvency and in fraud of his agents' rights?"

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Counsel were first heard on the minute and answers before the First Division (consisting of the Lord President, Lord Johnston, and Lord Skerrington) on 1st and 2nd March 1911, and on 17th March the case was ordered to be reheard before a Court of five Judges.

The case was reheard before the Lord President, Lord Kinneir, Lord Johnston, Lord Skerrington, and Lord Mackenzie on 19th May 1911.

Argued for the minuters;—It was law well settled by a series of decisions that where an action was compromised without the consent of the agent that agent might be sisted as a party in order to obtain decree for his expenses in three separate cases, viz.—(1) where expenses had actually been found due; (2) where expenses followed as a necessary consequence from an interlocutor that had been pronounced; and (3) where the parties had entered into a compromise for the purpose of defeating the agent's claim.¹ The first of these conditions was present here, and it was not necessary that the interlocutor pronounced should be final in the sense that it was not open to review.² No variation on the rule of law above stated had been introduced by the decisions in *Murray v. Kyd*³ and *Macqueen v. Hay*.⁴ The ground of decision in both of these cases was that conspiracy had not been relevantly averred, but in neither case was there a finding for expenses. In the former case expenses had been expressly reserved, and the latter had only reached the stage where issues were being adjusted. It was true that certain dicta of Lord Justice-Clerk Hope in the former case and of Lord Wood in the latter indicated that in the opinion of these learned Judges the interlocutor disposing of the case must be final, in the sense that it was not open to review; but these dicta were merely *obiter*, they went beyond the authority of the decided cases, and were not consistent with the law as recognised in subsequent cases.⁵ In these circumstances it was not necessary to go into the question of fraud and show that the third condition was present. But, assuming such necessity, it was clear from the minute and answers that the compromise here was collusive, because it had been entered into, without regard to the agents' claims, at a time when the pursuer was insolvent. In no event could the parties now be heard on the merits, as these were disposed of by the settlement.

¹ *M'Lean v. Auchinvole*, (1824) 3 S. 190, following on *Hamilton v. Bryson*, June 17, 1813, F. C.; *Rox v. Stewart*, July 3, 1818, F. C. (*vide* also session papers therein); and *Sloss & Gemmell v. Kennedy*, (1823) 2 S. 344. The principle was subsequently approved in *Cheyne v. Cheyne*, (1832) 10 S. 202; *Fergusson v. Richardson*, (1826) 4 S. 814; *Macgregor & Barclay v. Martin*, (1867) 5 Macph. 583; *Cornwall v. Walker*, (1871) 8 S. L. R. 442; and *Crawford v. Smith*, (1900) 8 S. L. T. 249.

² *Rox v. Stewart*, July 3, 1818, F. C.

³ (1852) 14 D. 501.

⁴ (1854) 17 D. 107.

⁵ *Cornwall v. Walker*, 8 S. L. R. 442; *Crawford v. Smith*, 8 S. L. T. 249.

Argued for the appellant;—Such an application as the present Dec. 22, 1911.
should not be granted in a case where there was no interlocutor finally Ammon v.
Tod.
disposing of the merits (finality being interpreted in the sense of its not being open to review), unless the agent could show that there was an element of fraud in the settlement.¹ In all the more recent cases that had been cited for the minuters the interlocutors had been final in the sense of immunity from review. In the earlier cases there was a tendency to put the agent in a more favourable position than that which he occupied under more recent decisions. The interlocutor in the present case did not finally dispose of the merits: it was actually under appeal when the settlement was arrived at. Nor did the settlement amount to any admission by the defender that the decision was right upon the merits, and that the decree would necessarily have become final. Therefore it was open to the agents to succeed only on showing that there was fraud or collusion in this settlement; and their right in that event was not, as was claimed here, to be sisted and to obtain decree *de plano*, but merely to carry on the case in order to justify the Sheriff's decree if they could, and to show that a finding for expenses would have followed as a necessary consequence. In any case the agents must, in the first instance, prove the fraud which they averred. On principle it was against public policy to place a client in the hands of his agent by allowing the latter to throw obstacles in the way of an independent settlement.

At advising on 22nd December 1911,—

LORD JOHNSTON.—[After the narrative quoted *supra*—]I do not think that it is necessary to go into the averments on this matter [*i.e.*, that the settlement was made in knowledge of the respondent's insolvency and in fraud of his agents' rights], which could not be accepted without proof, in disposing of the question before us. Nor, in my opinion, is that question affected by the allegation sought to be introduced after the last discussion, to the effect that the respondent was at any rate now in fairly affluent circumstances and able to meet his agents' claims.

That question seems to me to be simply this: Are the agents entitled to be sisted to move for decree for expenses in their names as agents-disbursers, and if they are, in what situation are they to stand? Are they entitled to decree *de plano* in respect that the litigation as between the principal parties has been brought to an end by a settlement, which was made without their consent and which ignores their claims? Or can the appellant insist that they shall take the place of the respondent as if there had been no settlement with him, and undertake the onus of supporting on the merits the Sheriff's interlocutor against his appeal, on which, as against the agents, he proposes to stand, though he departs from it as against the client? The onus would probably not be a very heavy one, and not inconceivably the appellant's contention might end in a considerably increased claim by the agents against him. But the agents are entitled to resist, on matter of principle, the idea that they are bound to undertake any such onus.

I have come without hesitation to the conclusion that they are not so bound. It would be an almost grotesque situation, that the Court should be

¹ Bell's Com., M'Laren's ed., vol. ii., pp. 35 and 38; Murray v. Kyd, 14 D. 501; Macqueen v. Hay, 17 D. 107.

Dec. 22, 1911. obliged—for *ex hypothesi* there would be no obstacle—to give effect to the minute for the appellant and assoilzie him from the conclusions of the action, and yet have to allow the action to proceed on the merits, with the agents as contradictors, in order to dispose of a question of expenses merely. Such a course would be against the whole tradition and practice of the Court.

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Ld. Johnston.

It appears to me, therefore, that either the agents are not entitled to be sisted at all as agents-disbursers, after a settlement has been made between the principal parties to include expenses, or that they are entitled to be sisted and to obtain decree *de plano* for their expenses against their client's opponent, without having to carry on the litigation on the merits in order to vindicate their claim to expenses.

The leading case on the subject is *Hamilton v. Bryson*.¹ In this action damages had been found due, but remained to be assessed, and consequently there was no finding for expenses. The parties settled behind the agent's back for a sum to cover damages and expenses, and the agent took similar steps to those taken here. Notwithstanding the settlement, the Court decreed for expenses "to the effect that decret may go out for the amount of the expenses sustained in name of the agent." As the present appellant's contention is, so far as I understand it, based entirely on this, that by the appeal taken by him the case is still in dependence, I take the opportunity in passing to point out that *Hamilton's* case¹ was also not only in dependence in the Outer House, but was still subject to being reclaimed to the Inner House. In giving judgment Lord Meadowbank points out that up to that date the agent's equitable remedy had only been allowed in cases in which the clients were abiding by the ordinary course of judicial procedure, and an operative decree was going out in favour of one or the other in common course, and that the case before the Court was undoubtedly an extension of such equitable remedy to a case where the parties were departing from the ordinary course of judicial procedure, and settling the case between themselves, so as to avoid the necessity of any operative decree issuing. Lord Meadowbank, in extending the equitable right to the agent in the case before him, sought to place that right on the principle of implied lien. Lord Bannatyne, on the other hand, attributed it to the principle of *jus quæsitum* to the agent, which his employer could not discharge or disappoint. But I humbly doubt whether the rule can be referred to any particular principle of law. I think that it is enough to say that it is a rule of practice introduced on grounds both of equity and expediency. The important thing is that the equitable right was sustained by the Court at the stage which the case had reached, though individual Judges reserved their opinion as to whether at any stage of the case the agent could prevent a settlement which would result in disappointing his claim.

In *Rox v. Stewart*² *Hamilton's* case¹ was simply followed, but in *M'Lean v. Auchinvole*³ the rule was made more precise. It was "held that there were three cases in which an agent was entitled to insist in the process, to the effect of getting decree for the expenses in his own name: (1) Where expenses had actually been found due; (2) where they

¹ June 17, 1813, F. C.

² July 3, 1818, F. C.

³ 3 S. 190.

followed as a necessary consequence from the interlocutor previously pronounced; and (3) where the parties had entered into a compromise for the purpose of defeating his claim." The second case figured shows, I think, that the rule is an equitable and expedient one merely, and that it can hardly be reduced to a definite governing principle of law. It is expedient that a litigant, possibly of slender means, should be able to get his case taken up by an agent, and it is equitable that the agent should be able to look to a return for his risk and labour with some security. But there is a counter consideration. It is not expedient to encourage litigation or to prevent the timeous adjustment of differences, or equitable to give the agent such security for his remuneration unless his efforts have reached a point at which they may fairly be said to have materially influenced the result of the adversary's surrender. Hence the rider on the more general proposition that when expenses have not actually been found due, at least they must have followed as a necessary consequence of what had actually been done.

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Tod.

Ld. Johnston.

The next case was *Fergusson v. Richardson*.¹ The circumstances are intricate, but the decision certainly carries the application of the rule quite as far as is sought here.

Subsequent cases have, I think, involved questions merely of the application of the rule of *M'Lean's* case.² Thus in *Murray v. Kidd*³ the agent was not allowed to sist himself because, though an interlocutor had been pronounced repelling the defences, expenses had been specially reserved. Without further litigation it could not be determined what the result in the matter of expenses would be. The case is, however, important, for whereas in the previous cases there was no hint of the agent being sisted that he might go on with the litigation in order to gain a judgment on the merits and so obtain a finding for expenses, but only of his being sisted to move for expenses in his own name, it was assumed that the former would have been necessary, and this was the reason why the agent's motion was refused. For the reason why expenses were reserved was that, though the defences were repelled, this only led to an accounting, and the real merits of the case lay in the accounting. But the Lord Justice-Clerk (Hope), whose opinion evinces marked hostility to the rule, states what I think is the key to the decision of the present question, viz:—"The rule being fixed, it becomes a matter for stipulation in the compromise, when the parties know of the rule."

But there is one other case of importance, *Cornwall v. Walker*,⁴ where Lord President Inglis takes the opportunity of correcting the expression used in *M'Lean's* case,² viz., "followed as a necessary consequence." His Lordship says that a finding of expenses "never is a necessary result or consequence—it is always in the discretion of the Court, and depends more or less upon how the litigation has been carried on. The true rule is that the agent is entitled to sist himself and prosecute the case to obtain a finding of expenses in his favour, when such a finding of expenses is the legitimate consequence of what has been already done."

Such being the state of the authorities, I admit without hesitation that

¹ 4 S. 814.² 3 S. 190.³ 14 D. 501.⁴ 8 S. L. R. 442.

Dec. 22, 1911. were this case in the position that further litigation was necessary in order to reach a point at which it could be said that an award of expenses would legitimately follow, the agents could not be heard to ask to sist themselves in order to carry the litigation to that point. But that is not the position here. The litigation has been carried to a point at which not only would an award of expenses legitimately follow, but it has actually been pronounced. That an appeal or a reclaiming note has been lodged does not alter that fact. The parties to the action enter on a compromise in the knowledge that an interlocutor finding on the merits and awarding expenses is standing. They compromise in order to get rid of both in favour of their own private arrangement, and in doing so they make it impossible that the action should go on to decide the merits of the appeal or reclaiming note. It would be against the whole *catena* of decisions, which has created and defined the agent's equitable right, that they should be so allowed thus to cut the ground from below his feet, where by his exertions he has brought the litigation to a point at which the rights of parties have been judicially, though it may be not finally, ascertained.

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Tod.

Ld. Johnston.

The true doctrine, in my opinion, is, that when litigants approach a compromise, the party who finds himself obliged to buy a discharge from claims must be held to know his opponent's agent's right, and must be held to contract with his opponent subject to that right. The limitation of that right admits of no continued litigation on the merits. Nor can a re-opening of the case on the merits with the agent be allowed in order to avoid his claim for expenses, when it has been closed with the client.

LORD KINNEAR.—I regret that I am unable to agree with the opinion just delivered, and the more so because I understand that your Lordships concur in it. But as I am unable to assent to the judgment proposed, I think it necessary to state my grounds, although I shall do so as shortly as possible.

I am inclined to agree with Lord Johnston that the authorities, so far as they go, are in favour of the view which he proposes that your Lordships should take ; but then I agree with him also in thinking that there is no principle of law to be extracted from those authorities which ought to determine the right now in dispute. I think these cases might be followed if it were not necessary to go any further than the decisions have already gone. But since there is, as I hold, and I think Lord Johnston holds also, no principle to support the decisions, I cannot see any reason why we should follow out those decisions to a logical consequence beyond what is definitely fixed.

Looking at the question as it is now raised, I of course concede, what is perfectly familiar doctrine, that when one of two parties to a cause has obtained a decree for expenses his agent is entitled to be sisted in order that he may obtain the decree in his own name. In the ordinary case there is no necessity for sisting as matter of practice, because counsel for the successful party moving for decree of expenses moves at the same time that the decree should go out in name of the agent-disburser and not in that of the client himself, and that is allowed as a matter of course. But that can only happen when it is already fixed and determined, not only that the

party has a right to expenses, but that he has a right to the operative decree Dec. 22, 1911. for enforcing payment of these expenses; and therefore that practice does ^{Ammon v.} not appear to give the agent a right to come in to the exclusion of his client ^{Tod.} so long as it is still uncertain whether there is an absolute right to expenses ^{Lord Kinnear.} vested in his client or not.

I venture to say that there is no principle to support the claim now made, but I by no means say that there is no principle in law to support the agent's claim to recover the expenses in his own name in the ordinary case, and I think it is admitted on all hands that he is entitled to his decree, because that is a right which arises, not as against his client's opponent, but as against his client himself, upon the contract of agency. I agree with a remark which Lord Johnston made, that it is not exactly what has been called the agent's hypothec; it is not a right of retention (which I think a somewhat more apt expression in the language of our law). It is not a right of retention, because there is nothing actually in the agent's hands which he would be otherwise required to make over to his client; but it is a right arising out of the contract of agency, which has been pushed further than retention, to give him an effective security upon moneys which it is assumed belong to his client. It must arise out of the contract of agency if it be a right at all, and it must therefore be a right against the client, because the agent has no contractual relation whatever with his client's opponents. Therefore it seems to me to be clear that the condition of the agent's right to obtain decree against his client's opponent for a payment of money must be that the client has a fixed and absolute right to compel such payment. The agent may be entitled to enforce the claim for his own benefit because he has an effective security over a fund which he has recovered for his client in performance of his contract of agency. But the security cannot attach until it is fixed that the fund belongs to the client.

The client's right here depends upon a judgment of the Sheriff Court, which is brought before this Court by appeal, and we cannot assume that the judgment is right without hearing the appeal on its merits. We are told that the merits are no longer before us, because the parties who are *domini litis* have agreed upon a compromise, and that would be a perfectly satisfactory result, if the compromise were to receive effect. But the agent says he is entitled to disregard the compromise without allowing the question which it settled to be re-opened. I could have understood his position, although I think there is no sound principle to support it, if he had maintained that the compromise should be set aside altogether, and claimed to take his client's place as *dominus litis* and to carry on the litigation for his own benefit. But what he proposes is that your Lordships should affirm the judgment appealed against without hearing the appeal, so that decree should go out against the defender for the whole amount found due, notwithstanding that he has already paid a sum which his opponent has agreed to accept as sufficient. This appears to me an extravagant stretch of any right of security which can possibly arise out of the contract of agency. But it is said to be out of the question to allow the whole action upon the merits to be tried at the instance of the agent in order that the question of expenses might be settled so as to give him a

Dec. 22, 1911. security which he has not yet got. Lord Johnston has said that your Lordships reject that idea, and I agree that that is out of the question. But it is equally out of the question that your Lordships should assume that the judgment under appeal is good without having heard the appellant upon the merits of his appeal. I concede that it is extremely likely that two consecutive judgments by the learned Sheriffs below may be right, but the Court of Appeal is not entitled to affirm them, any more than to reverse them, without hearing parties. I am not, therefore, prepared to hold against the appellant that the judgment is good, unless he consents to his appeal being dismissed, in which case there would be no difficulty. But his consent to the dismissal of the appeal is dependent upon the compromise receiving effect; and that is the reverse of a consent to the decree now proposed.

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Lord Kinnear.

I confess that I am not sorry that my opinion on this subject can have no practical weight in the case, because I concede that there are authorities against it. I think the principle is against the authorities, and therefore I must express my dissent.

LORD MACKENZIE.—I agree with Lord Johnston, and I do so for the reason that I think the matter is settled by the authorities.

LORD SKERRINGTON.—I agree with Lord Johnston.

LORD PRESIDENT.—Were the question open I confess I should agree with Lord Kinnear; but I look on the matter as absolutely settled by authority, and I cannot bring myself to the view that in doing what we propose to do to-day we are going any further than the case of *Cheyne v. Cheyne*.¹ I do not wish to go over the ground again, but I think the progress of the authorities may be very shortly stated. I take first the case of *M'Lean & Macdonald v. Auchinvole*.² That resulted in the expression of three propositions, that is to say, that an agent was entitled to insist on getting decree in his own name for expenses—first, where expenses had actually been found due; second, where expenses would have followed as a necessary consequence from the interlocutor pronounced; and third, where the parties had entered into a compromise for the purpose of defeating his claim,—the third case being where the process had not gone the length of expenses being found due. These three propositions the Court laid down in what was a carefully considered judgment.

The next stage was reached in the case of *Murray v. Kyd*,³ and the immediately succeeding case of *Macqueen v. Hay*,⁴ and there is no doubt that the Lord Justice-Clerk Hope to a great extent went back on *M'Lean's* case.² Now, if the authorities had remained in that state I should have thought the question to be open, but I think the end came when the effect of both of these sets of cases was considered by this Division of the Court in the case of *Cornwall v. Walker*,⁵ and I think that case was a considered judgment to the effect that the Court would abide by the view of *M'Lean's* case.² Lord President Inglis begins his judgment by saying that in cases

¹ 10 S. 202.

⁴ 17 D. 107.

² 3 S. 109.

³ 14 D. 501.

⁵ 8 S. L. R. 422.

where expenses have been found due before the compromise there is no difficulty whatever; so, putting aside the question whether a certain interlocutor takes along with it as a necessary consequence a finding of expenses—a question which does not arise here—that seems to me to settle the matter, but for the point that has been raised by Lord Kinnear.

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Ld. President.

Lord Kinnear thinks that we are going further than we have gone before, because the interlocutor in this case is not final in the sense of not having yet become immune by the lapse of time against some process of review. I am unable to take this view, because I consider the point to have been already decided in the series of cases of which *M'Lean's*¹ was the first. There are two senses of the word "final." This case is here on an interlocutor which is final in the sense that it is final on the merits, but is not final in the sense of review. In the cases to which I have just referred there is no question that the interlocutors were final in the first sense, that is to say, on the merits. If that is so, I think it settles the question, for I cannot conceive of the main question that is before us arising after an interlocutor has been pronounced that is final in the second sense; there is then nothing to compromise. If a person has an interlocutor deciding a case on the merits, and then allows the appealing days or reclaiming days to run out, he has no *quid pro quo*, and in all of these cases there must, of necessity, be a *quid pro quo*. As long as appeal is open one party may say, "True it is that you have got your judgment in the Court below, but I am going to take you to the Court above, and you may lose what you have got," and the other party may then say that he will compromise. In the other case there is nothing to compromise with.

If the matter had been open I think one might, on principle, come to a perfectly different result, because I think it is very difficult to see why an agent should get anything more than what is his client's money, and expenses that have been decerned for do not become the client's money until the other party has surrendered them. But as the matter is not open I agree with your Lordships.

THE COURT pronounced this interlocutor:—"Sist the minuters Lindsay, Meldrum, & Oatts as parties to the cause, to the effect and extent of finding them entitled to the expenses found due by the defender and appellant in the Sheriff Court, and find them entitled to these expenses accordingly (under the reservation that upon the appellant making payment to the said Lindsay, Meldrum, & Oatts of the said expenses he shall be entitled to receive from the said Lindsay, Meldrum, & Oatts an assignation of their right to recover the same from the pursuer and respondent); and also sist the said minuters Lindsay, Meldrum, & Oatts and Erskine Dods & Rhind to the effect and extent of finding the said minuters entitled to the expenses of the minute of sist . . . and procedure thereon in this Court: Find the said minuters entitled to these expenses accordingly: Allow accounts of the said expenses to be lodged, and remit the same to the Auditor to tax and to report: Dismiss the appeal, and find the pursuer and respondent liable to

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the defender and appellant in the expenses incurred by him in defending the settlement made by the pursuer and respondent without the knowledge or consent of his agents: Allow an account of these expenses to be lodged, and remit the same when lodged to the Auditor to tax and to report."

ERSKINE DODS & RHIND, S.S.C.—DOVE, LOCKHART, & SMART, S.S.C.—Agents.

No. 53.

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THE PARISH COUNCIL OF THE PARISH OF STIRLING, Pursuers
(Respondents).—*Constable, K.C.—W. J. Robertson.*

THE PARISH COUNCIL OF THE PARISH OF DUNBLANE AND LECROPT,
Defenders (Appellants).—*Blackburn, K.C.—Wm. Mitchell.*

*Poor—Lunatic pauper—Capacity to acquire settlement—Proof of insanity
—Effect of subsequent certificate of insanity.*

In an action between two parish councils to determine which was liable to support a female pauper, who had been confined in a lunatic asylum on a certificate of insanity granted in 1908, the question depended upon whether, during the three years between 1903 (when she attained puberty) and 1906, she was mentally capable of acquiring a settlement in the parish in which she then resided.

Held that, in determining the question of the pauper's mental capacity during these years, the certificate of insanity subsequently granted raised no legal presumption of incapacity at the earlier period, but was merely one among other items of evidence to be taken into consideration.

Evidence of mental incapacity which was *held* sufficient to establish that a pauper was incapable of acquiring a residential settlement.

Process—Appeal—Competency—Poor—Pauper lunatic—Action to determine liability for pauper lunatic—Lunacy (Scotland) Act, 1857 (20 and 21 Vict. cap. 71), sec. 78.

Held that sec. 78 of the Lunacy (Scotland) Act, 1857 (which contains a clause making the Sheriff's decision final), only applies to the summary recovery of outlays with regard to pauper lunatics where there is no dispute as to the parties liable to reimburse these, and does not apply to actions brought to determine the liability of parishes *inter se* for the support of pauper lunatics, and accordingly does not prevent an appeal from the Sheriff to the Court of Session in such actions.

EXTRA
DIVISION.
Sheriff of
Perth.

THE PARISH COUNCIL OF THE PARISH OF STIRLING brought an action in the Sheriff Court of Perthshire, at Dunblane, against the Parish Council of the Parish of Dunblane and Lecropt for repayment of various sums, amounting in all to £54, expended by the pursuers on the maintenance of a pauper named Marjory Faichney, from and after 18th March 1908, and for declarator that in future the defenders were liable for her support.

Marjory Faichney was born in the parish of Dunblane in 1891. She attained puberty in 1903, when she was residing in the parish of Stirling, and she continued to reside there until 1908, when she was certified as insane, and removed to Larbert Asylum. The settlement of her father, who died in 1902, was in Dunblane parish.

The pursuers, the Parish of Stirling, averred that Marjory Faichney was incapable, owing to her mental condition, of acquiring a settlement by residence in their parish after attaining puberty, and accord-

ingly that Dunblane, as the parish of her birth or of her father's settlement, was liable for her support. The defenders averred that she had acquired a settlement by residence in Stirling. Dec. 22, 1911.

A proof was allowed and led. The import of the evidence will be found set forth in the Sheriff-substitute's note, *infra*. Stirling
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On 1st March 1911 the Sheriff-substitute (Sym) pronounced the following interlocutor:—"Finds in fact (1) That the action relates to the parish by which, as parish of settlement, Marjory Faichney, mentioned in the proof, is liable to be supported, and that it is not in dispute that the pursuers' parish of Stirling or the defenders' parish of Dunblane and Lecropt is the parish of her settlement; (2) that she is the daughter of William Faichney, labourer, Dunblane; (3) that she was born in 1891, and attained puberty in May 1903, at which time she was living with her mother in Stirling; (4) that her father died in 1902 in Stirling, but having a residential settlement, which he had never lost, in Dunblane; (5) that, at all events from very early youth, she has never been of normal intelligence, and that in 1908 she was certified to be insane; (6) that she is now a certified lunatic in Larbert Asylum under certificate of lunacy granted at said time; (7) that the Parish Council of Stirling in this action seek from the Parish Council of Dunblane reimbursement of sums paid for her support, and declarator that Dunblane, not Stirling, is liable in future for her support, maintaining that she never could or did acquire a settlement, and that Dunblane, as the parish of birth or the parish of her father's settlement, is the parish of her settlement; (8) that Dunblane contends that she was able to acquire and did acquire a residential settlement in Stirling, by residence for three years after the time of attaining puberty in 1903, during which years she was maintained without recourse to common begging or to parochial relief; (9) that she is not an idiot, but that her case is one of strong body, but of undeveloped mind and of much imbecility; (10) that there had been no pronounced change in her state prior to said certification, and that she might with the same justification have been certified insane at any time after attaining puberty; therefore finds (a) that she is a lunatic, and (b) was incapable of acquiring a settlement: Finds further in fact (11) that it is not established that the parish of Stirling has admitted that her settlement is in that parish, or (12) that the parish of Stirling has so acted as to deprive the parish of Dunblane of any evidence or to prejudice the position of that parish; therefore finds that her settlement is not in Stirling, but is in the defenders' parish of Dunblane; repels the defences, and grants decree of declarator and reimbursement as concluded for." *

* "NOTE.—The state of this young woman appears to be as follows:—She has been weak in mind from very early youth, and probably from birth. She was sent to school when she came to school age, but never made any real progress, though she learned to read a very few small short words and to write a very little, apparently by copying what was written for her. As she grew into a big girl, she did not associate with young people of her own age, but played with little children. She could distinguish between certain coins, such as a penny or a shilling, but she could not distinguish between such coins as a florin and a half-crown. At her home with her married sister she was very passionate without reason. She could wash a few dishes under supervision, but could not be trusted alone to go through the washing of the few dishes after a meal at which the family of three persons had been present. She could not be trusted to

Dec. 22, 1911. The defenders appealed to the Court of Session, and the case was heard before the Extra Division (consisting of Lord Kinnear, Lord Dundas, and Lord Mackenzie) on 17th November 1911.

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Council.** The respondents objected to the competency of the appeal, and argued;—The appeal was incompetent under section 78 of the Lunacy (Scotland) Act, 1857,* which applied to the present action,

watch a pot on the fire, nor did she learn the time properly on the clock. Though fond of playing with children, she could not be trusted to 'mind' a baby for any length of time alone lest she should drop the baby when carrying it about. She was of dirty habits in her person, though she could manage as to the calls of nature without guidance. She could go a simple message at times, but could not be trusted with more than one message.

"In youth Marjory Faichney did not have the advantage of the special care and skilful training which can now be afforded for very feeble-minded children. It is quite possible that if early taken into such care she could have learned more than she did. An ordinary industrial school could not have taken her. It appears that since she has been placed in Larbert Asylum as a young woman she has, though very slowly, learned a certain amount more. She can now write her name if asked, and, if in a humour to do it, can sing over, or at least say over, a piece of a hymn or a song, can sew some simple sewing, and can knit and knows coins, and how many pennies go to sixpence, and can do a little simple addition. Some days, it is thought, she is more willing or more able than others to concentrate such mind as she possesses upon the questions put to her, and she may feel more friendly to some people than to others. It does not seem possible to find that she has ever had delusions—though in conversation with Dr Skinner she maintained wrongly that 'General' Booth of the Salvation Army was in Stirling at a particular time when he was not. But then he has been sometimes in Stirling, and she was often at Salvation Army meetings, and this may be just a stupid mistake—obstinately adhered to. Physically the girl is fairly well grown and strong. She was at one time sent away to a Salvation Army 'Home' in Dundee, with the idea that this

* The Lunacy (Scotland) Act, 1857 (20 and 21 Vict. cap. 71), enacts :—
Sec. 78. "If the parish of the settlement of any such pauper lunatic cannot be ascertained, and if the lunatic has no means of defraying the expense of his maintenance, nor any relations who can be made liable for the same, the expenses attending the taking and sending such lunatic, and of his maintenance in the district asylum, shall be defrayed by the parish in and from which he was taken and sent, but with recourse, nevertheless, to such parish, at any time when it shall appear that such expenses are legally chargeable to any other party or parish, against such party or parish, and who or which shall be liable also in interest and expenses; and the Sheriff of the county in which the parish defraying such expenses in the first instance is situated shall certify under his hand the amount of such expenses; and such certificate shall be final and conclusive as to such amount, and shall not be subject to review by any process whatsoever under any proceeding instituted for recovery of the same, and the party entitled to recover such expenses shall proceed as accords of law against the party or the parish liable for the same, by summary process before the Sheriff of the county within which such party resides, or in which such parish is situated; and the judgment of such Sheriff shall be final: Provided always that the parish of settlement shall not in any case be liable in repayment of the expenses incurred in relation to any lunatic as aforesaid, unless written notice shall have been given by the parish or party disbursing the same to the parochial board of the parish of settlement, and shall then only be liable for the expenses incurred subsequent to such notice, and for the year preceding."

and enacted that the judgment of the Sheriff was to be final.¹ The fact that the case before the Sheriff had proceeded on the lines of an ordinary action did not take it out of the application of that section. The contention that it was now too late to state the objection was unsound.²

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Argued for the appellants ;—The appeal was competent, the action being an ordinary Sheriff Court action, and relating to a matter to which section 78 of the Act of 1857 had no application. Section 78 had no bearing upon the general question of the liability of parishes *inter se* for the support of lunatics. It merely provided a shorthand method of ascertaining certain expenses incurred in certain particular circumstances, and of recovering the amount so ascertained by a summary process, where the liability for the expenses was not disputed. The present was quite a different process, being an ordinary action with declaratory conclusions, which would determine a question

would save her from the 'sexual dangers' which her sad state made very evident (these dangers have something to do with her being certified a lunatic), and with the idea that with firm control and work to do, she could be taught to do a maid-servant's work. But though the experience was very short, it was negative of her powers so far as it went, and the matron of the 'Home' did not consider her a case of sufficient intelligence to be hopeful, and handed her over to the poor law authorities because she was suffering from a skin disease (impetigo). This disease assailed her because of a low state of health at the time, and of the dirty habits contracted before she went to the 'Home.'

"On the evidence the Sheriff-substitute considers that this young woman has always been unable to earn her own living, and that she has always been unable to do more than a little simple house-work under close supervision. She is not an *idiot*. She is of small and undeveloped intelligence requiring the guidance and management and aid of others to enable her to have any decent life. She might never have been certified lunatic had the means, and perhaps the wisdom, of those around her enabled them to give to her the special care she needs. She has been getting that for more than two years now—but under a lunacy certificate. [The Sheriff then referred to the authorities on the question of capacity to acquire a settlement—which will be found cited in the argument in this report—and continued]—

"One must take this question from the point of view that lunacy is a fact (*Cathcart* case, 8 F. 870). Thus a person not certified at the time to which the inquiry relates, or never certified at all, may have been a lunatic and so incapable of acquiring a settlement by residence in a parish. Then there is the case of one who can be certified as having at some particular date become lunatic.

"In this case Stirling's contention is that there has been no deterioration making Marjory Faichney liable to be certified in 1908, though not sooner, but, on the contrary, that she could have been certified before the alleged qualifying residence began or at any time during it. In the examination of the evidence it is to be noticed that there are sundry medical certificates relating to the girl's state which do not affirm lunacy at all. As to this certain of the doctors artlessly say, 'Oh, yes, but then these were only certificates for getting her into the poorhouse.' It is also to be noticed that when an asylum was thought to be the best place of care it was not at all an easy matter to grant a certificate. Thus Dr Murray, medical officer for

¹ Roxburgh, Berwick, and Selkirk District Board of Lunacy v. Parish Council of Selkirk, (1902) 4 F. 468.

² Shirra v. Robertson, (1873) 11 Macph. 660; Hillhouse v. Walker, (1891) 19 R. 47; Burns v. Waddell & Son, (1897) 24 R. 325.

Dec. 22, 1911. of continuing liability for probably the whole of this pauper's life. Even, however, if the respondents were right in their contention that section 78 applied, and that there was no appeal, it could not avail them, because in that event the whole proceedings initiated by them in the Sheriff Court were inept and incompetent. They had not obtained the certificate which was required under section 78, and the action was not, as the section required it to be, a summary process,¹ but was in fact an ordinary action with a declaratory conclusion and condescendence.

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LORD KINNEAR.—I think that the objections which have been stated to the competency of this appeal are altogether untenable. The action before us is not founded on, and has nothing to do with, section 78 of the Lunacy (Scotland) Act, 1857. That section does not deal with and in no way

Stirling (pursuer), says, 'I was requested by the inspector to watch the case and report progress. It was a case of this sort that I had to make a dozen or more visits to find out her mental condition . . . the difficulty was whether she had become insane or whether she was just an imbecile. I concluded that she was imbecile. I had seen her six or seven times before she was certified' (in 1908). The 'statement of facts indicating insanity observed by myself' in this certificate is certainly far from convincing. That also may explain Dr Carswell's answer.

"In March 1907, when those in charge of the Salvation Army Home at Dundee found that Marjory Faichney was not to be a success with them, and was suffering from impetigo caused by dirty habits, she had been examined by Dr Buist of Dundee ere admission to the poorhouse. The Sheriff-substitute is satisfied that he is a man of experience in mental cases, and gave careful, albeit brief, examination to the matter. He, in answer to the question 'Is applicant . . . lunatic, insane, idiot, or of unsound mind?' certified 'No.' She was in Dundee Poorhouse Infirmary for about a month, and was apparently so little suspected to be insane, that she was never so much as taken to the observation ward. Dundee, of course, gave information to Stirling and Dunblane. The former wrote to Dundee regarding her state thus, 'She is unfit to work, and has never been sent to employment being mentally deficient, . . . and has never been foris-familiated by being self-supporting.' At the beginning of the following month, after the girl had been returned to Stirling and to her sister's house there, Dr A. C. Buist of Dunblane, who had known her as a child, saw her there and certified her as 'well-developed physically and in good bodily health. Mentally she is weak, but the weakness is not of such extent as to prevent her from doing ordinary unskilled labour. If allowed to remain idle she will most probably deteriorate in mind and morals.'

"In the spring of 1908, after Dr Murray had made up his mind to certify Faichney to be a person 'of unsound mind,' it was resolved to obtain the sanction of the Board of Lunacy to board her out. The application bears that she is 'occasionally violent or noisy, that she is not of uncleanly habits or offensive to decency, nor dangerous to others day or night, and that she is capable of helping the proposed guardian a little in household or other work,' and the medical certificate bears that 'she does not require either for her own welfare or the safety of the public to be placed in an asylum.' Sanction having been got, an attempt was made to board her out at Causewayhead near Stirling. She would not stay, but returned to her sister's house. Then after some months authority was obtained to put her in the lunatic wards of Linlithgow poorhouse, but the governor of that poorhouse

¹ See Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. cap. 51), sec. 7.

affects the common law rights and liabilities of parishes *inter se* for the support of pauper lunatics. It provides a shorthand method for ascertaining expenses in a special case, and recovering the amount so ascertained by a summary process. A consideration of section 78, read along with the immediately preceding sections, makes this perfectly clear. Section 76 provides for the recovery from the parish of settlement of "all the expenses attending the taking and sending a pauper lunatic to any district asylum in or from any parish which is not the parish of the settlement of such lunatic." Section 77 then proceeds to provide for the recovery of the expense incurred by any superintendent of any asylum in relation to the examina-

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returned her without a day's delay because she was suffering again from a skin disease which made her unsafe for the other patients. Then it was, in September 1908, that the inspector of Stirling, after, of course, a petition setting forth that she was a proper person for treatment in an asylum for the insane, and producing medical certificates to that effect, obtained warrant of the Sheriff to send her to Larbert Asylum, the asylum where Stirling lunatic paupers are boarded. It cannot be disputed by anyone that to treat her at Larbert is one very good and humane way of treating her, though the well-known specialist, Dr Yellowlees, thinks that the case was not bad enough for an asylum, and that he would not have certified her, 'but some people would have certified her.' There is strong medical opinion from others that she was wisely certified, and that the asylum is the proper place for her.

"At all events certified she is—and it is not a question for the Court what is the best way of treating a particular lunatic. The *motive* certainly was the difficulty of otherwise disposing of the pauper. The *effect in law* of the certifying of the pauper, together with the strong medical evidence that she might have been certified at a far earlier date (including the time when she was twelve years old), is this, viz., the certification is proof that the girl was insane at its date. The certification is also an important piece of evidence that she was insane at an earlier date if the proof shows, as it is here held to show, that the mental condition has been practically the same from a period long anterior to the certification. The case is one of an undeveloped intellect, in which no definite change can be pointed to, but on the contrary in which the condition is shown not to have changed, and, indeed, in which no change could have taken place. The Sheriff-substitute holds on the facts as a whole that the imbecility, which at the time of certification was great enough to warrant the certificates, has existed all along and would have warranted earlier certification.

"So far as matter of law is involved in this opinion, the Sheriff-substitute refers to the opinion of Lord Skerrington in the case of *Inverkip v. Nairn*, Scots Law Times for 1909, p. 99; *aff.* 47 S. L. R., p. 54, 26th October 1909.

"That case is the more in point because Lord Skerrington would have thought, apart from the certification, that the case of the Inverkip pauper was ruled by the decisions in such cases as *Cassels* (12 R. 1155). That is just what the Sheriff-substitute would say of Marjory Faichney. He cannot express himself as wholly satisfied with the state of matters, because it is evident that the differentiation of one person from another in much the same mental condition is made a question not so much for the Court as for varying medical opinion as to what may be the best way to treat the case. But this *Inverkip* case seems entirely in point.

"It is thought, therefore, that the Sheriff-substitute must pronounce this pauper to have been lunatic and incapable of acquiring a residential settlement during the period within which Dunblane contends that such a settlement was acquired. . . ."

Dec. 22, 1911. tion, removal, and maintenance of any lunatic, and then follows section 78, which provides:—"If the parish of the settlement of any such pauper lunatic cannot be ascertained . . . the expenses attending the taking and sending such lunatic, and of his maintenance in the district asylum, shall be defrayed by the parish in and from which he was taken and sent, but with recourse, nevertheless, to such parish at any time when it shall appear that such expenses are legally chargeable to any other party or parish, against such party or parish . . ."; and then there follow provisions for the ascertainment and recovery of these expenses which amount to this, that the Sheriff of the county defraying the expenses in the first instance is to certify their amount; that his certificate is to be final; and that any proceedings necessary for recovery are to be summary in their character, and that the Sheriff's judgment is to be final.

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Accordingly, what is provided for is a summary method for recovering expenses from a parish whose liability for these expenses is apparent, and where the only questions are whether the expenses have in fact been defrayed by the party claiming recourse and, if they have, what is the amount? It is a condition precedent to the summary process that the expenses are legally chargeable to some other parish or party. So long as there is a dispute between two parties which is the party truly liable, section 78 does not come into operation, and the question of legal liability falls to be determined by the ordinary forms of process. If the action had been rested on section 78 the whole procedure which has taken place in the Sheriff Court would have been incompetent, because the requirements of the statute both as to the certificate which is to be the basis of the summary process prescribed, and as to the summary character of that process, have been completely disregarded. But the pursuers do not found their case upon that section; and I find nothing in the section to prevent them from raising an action in ordinary form to determine whether their parish or another is liable to maintain a particular pauper.

LORD DUNDAS.—I concur.

LORD MACKENZIE.—I am of the same opinion. I do not think section 78 of the Lunacy (Scotland) Act, 1857, was intended to apply to the decision of questions of liability between parishes. It seems to me ancillary to section 77, which provides that the expenses incurred by any superintendent of an asylum, or other party, for the examination, removal, and maintenance of a pauper lunatic, shall be defrayed by the parish of settlement of the lunatic, and that the superintendent, or other party, disbursing such expenses shall be entitled to recover them from those liable to defray the same. That section deals with expenses disbursed by an individual. Section 78 deals with the case where the parish of settlement of the lunatic cannot be ascertained, and provides that in such cases the expenses shall be defrayed by the parish from which the pauper lunatic was taken. The Sheriff of the county, in which the parish defraying such expenses is situated, shall certify the amount thereof. Then the party (not the party or parish) entitled to recover such expenses shall proceed against the parish liable by summary process before the Sheriff, and the judgment of the Sheriff shall be final. That is simply a shorthand method for getting repayment of the expenses

incurred under section 77. It therefore seems to me that the whole question of ulterior liability is left to be determined by the ordinary processes of law.

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The Court having repelled the objection to the competency of the appeal, the case was then heard on the merits.

Argued for the appellants;—The pauper had acquired a residential settlement in Stirling. She had admittedly resided there for the necessary period without recourse to public charity (and that, it had been held, was equivalent to “maintaining” herself¹); and the only question, accordingly, in the case was whether during the period of her residence she was, looking to her mental condition, capable of acquiring a residential settlement for the purposes of the poor-law. In the circumstances here that question fell to be answered in the affirmative. All that the law required was that the pauper should be mentally capable of exercising some degree of option or volition,² and the law assumed that such capacity existed in every person (not confined in an asylum) who was not positively insane or completely imbecile and idiotic.³ The pauper in the present case was, as the evidence showed, very far removed from either of these conditions. The pursuers, however, based their case chiefly on the certificate of 1908. That certificate had no importance except as an item of evidence, which might or might not throw light on her mental condition at the earlier period. In itself a certificate was not necessarily evidence that the certified person was incapable of exercising the necessary volition. That was a fact which required to be substantively established by evidence.⁴ It was true that a certified person was rarely capable of exercising volition and so acquiring a settlement, because certified persons were generally confined in asylums, and were thus, like prisoners in prison, deprived of the power of exercising such volition as they had.⁵ It was the confinement, however, and not the certificate which produced this result. It followed, accordingly, that mere proof that the pauper at the earlier period was in the same mental condition as at the date of her certification did not necessarily prove that at the earlier period she was incapable of acquiring a settlement, because at the later period it was not her mental condition but her confinement which made her incapable. The *Inverkip* case⁶ made no addition to, or alteration on, the previously established law. It was certainly no authority for the extravagant proposition that a certificate of insanity granted in 1908 drew back to 1903 provided it was supported by some evidence of incapacity at the earlier period. Upon the whole matter the evidence

¹ Parish Council of Kilmalcolm v. Parish Council of Glasgow, (1906) 8 F. (H. L.) 12, *per* Lord Robertson, at p. 13.

² *Cassels v. Somerville and Scott*, (1885) 12 R. 1155, Lord Shand, at p. 1161; Parish Council of Kirkintilloch v. Parish Council of Eastwood, (1902) 5 F. 274, Lord Stormonth-Darling, at p. 276.

³ *Watson v. Caie and Macdonald*, (1878) 6 R. 202; *Cassels v. Somerville and Scott*, 12 R. 1155; *Nixon v. Rowand*, (1887) 15 R. 191; Parish Council of Kirkintilloch v. Parish Council of Eastwood, 5 F. 274; Parish Council of Kilmalcolm v. Parish Council of Glasgow, 8 F. (H. L.) 12.

⁴ *Cathcart Parish Council v. Glasgow Parish Council*, (1906) 8 F. 870.

⁵ See *Crawford and Petrie v. Beattie*, (1862) 24 D. 357, at p. 369; *Melville v. Flockhart and Watt v. Hannah*, (1857) 20 D. 341, at p. 346.

⁶ *Inverkip Parish Council v. Nairn Parish Council*, (1909) 47 S. L. R. 54.

Dec. 22, 1911. clearly showed that the pauper was at the period in question possessed of considerable mental capacity, more indeed than had been found sufficient in many previous cases.¹

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Argued for the respondents;—The pauper had not acquired a residential settlement in Stirling, inasmuch as she had not during her period of residence there been in a mental condition in which she was capable of acquiring it. A survey of the cases disclosed the fact that the law recognised two tests of capacity, which were not, perhaps, entirely consistent with each other, but the poor-law was not conspicuous for its consistency. The first of these tests was the test adopted by the appellants, viz., whether the pauper was possessed of some power of volition or option. That test was not the one appropriate to the present case, but even were it to be applied the evidence showed that the pauper, during the period in question, was not possessed of the necessary power of volition. The other test, which, being clear and definite, was always to be applied where possible, was whether the pauper was certified or certifiable under the Lunacy Acts.² Here the pauper was certified in 1908. At that date, accordingly, it followed *ipso facto* that she was incapable of acquiring a settlement. It was proved by the evidence that her condition between 1903 and 1906 was precisely the same as her condition in 1908, *ergo* between 1903 and 1906 she was also incapable of acquiring a settlement. This method of reasoning had been recognised by the Court in the undernoted cases.³ The appellants' argument that it was not the certificate but the confinement that followed upon it which was of importance had already been stated in *Cathcart*,⁴ and inferentially rejected. The pauper's intelligence in the present case was lower than that of many persons who had been found incapable of acquiring a settlement.

At advising on 22nd December 1911,—

LORD DUNDAS.—The pursuers in this case are the Parish Council of Stirling, and the defenders are the Parish Council of Dunblane and Lecropt. The question is whether or not the defenders are liable to relieve the pursuers of the maintenance of Marjory Faichney, who is (and has been since 1908) a pauper inmate of Larbert Asylum. Marjory Faichney was born on 12th May 1891, and therefore attained the age of puberty on 12th May 1903. Her father died in 1902, having a settlement in the defenders' parish, though he had for some years prior to his death resided in Stirling. Her mother died in 1904. After that, the girl continued to live in the same house with her sisters, and (after March 1905) with the eldest of these, who at that time married a man named Thomson. In March 1908 Thomson applied for and got relief from the Stirling Inspector of Poor on Marjory's

¹ *E.g.* Cassels v. Somerville and Scott, 12 R. 1155; Nixon v. Rowand, 15 R. 191; Watson v. Caie and Macdonald, 6 R. 202; Parish Council of Kirkintilloch v. Parish Council of Eastwood, 5 F. 274.

² Watt v. Hannah, 20 D. 342; Crawford and Petrie v. Beattie, 24 D. 357; Cassels v. Somerville and Scott, 12 R. 1155, at pp. 1159 and 1160; Cathcart Parish Council v. Glasgow Parish Council, 8 F. 870.

³ Inverkip Parish Council v. Nairn Parish Council, 47 S. L. R. 54; Parish Council of Rutherglen v. Parish Council of Glenbucket and Dalziel, (1895) 33 S. L. R. 366, Lord Moncreiff, at p. 367.

⁴ 8 F. 870.

behalf. On 16th September 1908 the girl was admitted to the Larbert Dec. 22, 1911. Asylum (where she has since remained) upon a petition to the Sheriff Stirling accompanied by proper medical certificates, including an emergency certi- Parish Council cate to the effect that she was of unsound mind and a proper patient to be v. Dunblane placed in an asylum. The question of legal liability depends on whether Parish Council or not Marjory Faichney had prior to 1908 acquired a residential settlement Lord Dundas. in Stirling; and this again depends—the fact of residence being admitted—on whether or not, looking to her mental condition during the three years following on her attainment of puberty, she was capable of acquiring a settlement. The decision of the case depends, to my mind, wholly upon the view to be taken of the facts admitted or proved, but as we had a very full citation of authority at the discussion, it may be well at this stage to say what seems necessary in regard to existing decisions.

The recent case of *Kilmalcolm*¹—to go no further back—decides that, if a person has resided in a parish for the requisite period and has been maintained without recourse to common begging or to parochial relief, mental weakness, short of lunacy or idiocy, will not incapacitate him from acquiring a residential settlement there. Lord Robertson, in the course of his opinion, sketched the development of judicial construction, whereby the literal meaning of the words “maintained himself,” which occur in section 76 of the Poor Law Act, 1845, and are repeated in section 1 of the Act of 1898, has apparently been reduced to one synonymous with “lived,” but observed that “whether the authorised construction of the words ‘maintain himself’ will stand the strain of a condition of insanity” was “a question generically different from that before the House.” The *Kilmalcolm* case¹ was immediately followed by that of *Cathcart*,² the decision of which had, as appears from the reports, been delayed pending the judgment of the House of Lords. The Second Division—adhering to the interlocutor of the Lord Ordinary (Ardwall)—decided that “a person who is in fact insane, although not certified or under restraint, is incapable of acquiring a residential settlement.” It appeared that the pauper had resided in Cathcart parish from 1895 to 1903, and it was only in the latter year that he was certified insane and removed to an asylum, but the evidence showed that he was, during the whole period, in a fit state for certification, and would in fact have been certified as early as 1895 but for his mother’s strong aversion to that course. I observe that the reclaimers’ counsel argued—and the argument bears a very close resemblance to that maintained before us by Mr Blackburn for the present defenders—that “an insane person was not incapacitated from acquiring a settlement by residence unless he was certified to be insane and placed under restraint either in an asylum or in private custody. It was not insanity, or even certified insanity, that prevented *de facto* residence having the usual effect, but the fact of the residence being not voluntary but compulsory, and under restraint.” I notice also that reference was there made in the argument to, *inter alia*, an Outer House decision, *Cramond*,³ where Lord Kincairney said he thought “the cases have come to hold the test to be a certificate of lunacy and admission to a lunatic asylum on such a certificate.” The Second

¹ 8 F. (H. L.) 12.² 8 F. 870.³ (1903) 11 S. L. T. 12.

Dec. 22, 1911. Division, however, emphatically rejected the reclaimers' contentions. The Lord Justice-Clerk's opinion is short and strong, and Lord Stormonth-Darling said,—“In none of the cases has it ever been laid down that a medical certificate of lunacy was indispensable, or that insanity might not be proved as a fact in the case. On the contrary, Lord President Inglis in the case of *Cassels v. Somerville and Scott*,¹ after stating it as settled by the case of *Melville v. Flockhart*² that a person who was boarded in an asylum could not acquire a settlement in the parish in which the asylum was situated, and by the case of *Watt v. Hannah*,³ that the same result followed if the person was sent to be boarded under a keeper in respect he was a lunatic, went on to say,—‘The pauper here was not sent to be boarded in Lesmahagow because he was insane, but because, his mind being weak, he was not capable of earning a livelihood like other men in his position. He was not in any sense a lunatic.’ And his Lordship added,—‘It might have been shown that, though he had not been certified a lunatic, he was nevertheless one in fact.’” So much for the case of *Cathcart*.⁴ A later decision referred to in the discussion at our bar was *Inverkip*,⁵ to the supposed legal import of which too much was, in my opinion, attempted to be attached. I do not think the decision in the *Inverkip* case⁵ (to which I was a party) was intended to introduce, or did introduce, any new principle of law or rule of practice; it merely applied the result of prior decisions to the particular facts before the Court. Accordingly, I am not surprised to find that the case has not apparently been thought worthy of a place in the official series of our reports. The gist of the matter was this: the pauper was certified insane and admitted to an asylum in January 1905; but the crucial period in relation to her mental condition was that immediately following her attainment (in November 1899) of the age of puberty. The Court held it proved on the facts that there was practically no change in her condition between the two dates; and as it seemed clear that she was insane at the later date, “the natural and indeed inevitable conclusion” (as Lord Low put it) was “that at the former date she was also insane.” At the same time it was clearly stated, both in the Outer and the Inner House, that the fact of certification in 1905 did not of itself justify an inference of insanity in 1899, and raised no legal presumption to that effect,—a view which, I notice, had already been expressed, *mutatis mutandis*, by Lord Kincairney in the *Cramond* case.⁶ I think these views are correct; and that the fact of subsequent certification has not necessarily of itself any special virtue or significance as throwing light on anterior conditions, but is just one of the elements to be taken into account along with the others in a case where it is present. Nor do I consider that (as was suggested to us in the argument) Lord Moncreiff's opinion in the Outer House case of *Glenbucket*⁷ was intended to have, or has, when fairly read in the light of the facts then before him, any other or different import.

It seems, then, to be decided that insanity, for the purposes of a case like the present, does not require to be evidenced by actual certification and

¹ 12 R., at pp. 1159-60.

⁴ 8 F. 870.

⁶ 11 S. L. T. 12.

² 20 D. 341.

⁵ 47 S. L. R. 54.

⁷ 33 S. L. R. 366.

³ 20 D. 342.

confinement, but may be established as a fact by other proof; and that, Dec. 22, 1911. where a certificate exists, it does not of itself necessarily warrant an inference of insanity at a previous period. One must endeavour to apply these rules to the facts of the present case. The learned Sheriff-substitute (who has evidently bestowed much care upon the matter) has decided in favour of the pursuers. He considers, in the first place, and I think rightly, that Marjory Faichney must be taken to have been insane at the date of her admission to the asylum, and to be so still. I do not see that any other conclusion could properly be reached, looking to the fact of her certification and the whole other evidence bearing upon this point. But the Sheriff-substitute also "holds on the facts as a whole that the imbecility, which at the time of certification was great enough to warrant the certificate, has existed all along and would have warranted earlier certification." This is, to my mind, the crucial point in the case; for if the girl must be taken to have been insane in 1908, and if her mental condition from the age of puberty onwards has been practically the same, then, "the natural and indeed inevitable conclusion" (to use once more Lord Low's words in the *Inverkip* case¹) must be "that at the former date she was also insane." The Sheriff-substitute has summarised the mental condition of this girl at the outset of his note in a manner which both parties admitted to be substantially accurate and exhaustive; and he has considered and dealt with the points (and they are far from unimportant) in the evidence which tend in the defenders' favour. I do not propose to discuss the proof in detail, though I have read it carefully. It is enough to say that I should be very slow to differ from the learned Sheriff-substitute's conclusion upon a question of fact, unless I thought that he had plainly erred, which I certainly am not in this case prepared to affirm. Indeed, I rather think the scale may be considered to be decisively turned against the defenders by a passage in the evidence of their own witness, Dr Yellowlees, whose views are, of course, entitled to great weight in such matters. He agrees that this girl is a congenital imbecile, though (he considers) of a mild type; he states the opinion (based upon some degree of personal knowledge in both instances) that her mental case is worse than that of the *Inverkip* pauper; and he adds,—"I think her mental condition now is what she was born with." On the whole, therefore, I think we ought not to differ from the Sheriff-substitute's decision; and that we may of new find in fact and in law in terms of his interlocutor, though I do not greatly admire the actual terms in which it is framed. I ought, perhaps, to add that his decision upon the pleas in bar stated for the defenders was not made the subject of appeal in the discussion before us.

In arriving at these conclusions, I have not left out of view that it may well be, indeed I think it is, the fact that the mental condition of Marjory Faichney was and is no worse than that of some of those other afflicted beings who in previous cases have passed muster at the sight of the Court as capable of acquiring a residential settlement. But it would be vain to attempt to regulate our decisions by a method of comparison of the proofs submitted in successive cases; at the best, we can but try to preserve some

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¹ 47 S. L. R. 54.

Dec. 22, 1911. degree of uniformity of rule and principle. This view has often been expressed by the Court in similar cases, *e.g.*, by Lord Stormonth-Darling in the *Kirkintilloch* case,¹ where he said that "in all poor-law questions it is of much more importance to preserve uniformity of decision than to make any particular case square exactly with one's own notions of logic or even equity." Even more apposite here are Lord Ardwall's words in the *Cathcart* case²: "I am conscious that it is not easy to see as a mere question of fact why the pauper in this case should be deemed incapable of acquiring a settlement for himself, and the paupers in the cases of *Kirkintilloch*³ and *Glasgow*"⁴ (the *Kilmalcolm* case), "above quoted, should have been deemed capable of acquiring such settlement. But it has been recognised by the Court that some general rules should be laid down in such matters for the guidance of parishes, even though the application of these rules to particular cases may sometimes appear to produce anomalies." I quote this passage, not only because I agree with what Lord Ardwall said, but because it shows that "anomalies" precisely similar to those (such as they are) of the present case—which the Sheriff-substitute and counsel at our bar appear to think originated in the *Inverkip* case⁵ in 1909—were present to Lord Ardwall's mind in 1905, as raised by the case he was then considering. As already observed, I do not think anything said or decided in the *Inverkip* case⁵ altered in any way, for better or worse, the law or practice in such matters.

It might perhaps be desirable, from the point of view of expediency, that a definite line should be drawn, for the guidance of practitioners in this somewhat arid and artificial region of the law, between insanity and non-insanity in questions of settlement, by requiring, *e.g.*, the facts of certification and detention as proof of the former, and holding everything short of or different from these facts to be insufficient. Some such rule might probably minimise, or even extirpate, the expensive and regrettable class of litigations, of which the present is the latest example; though it would very likely result in a much greater number of paupers being certified in the future than has been customary in the past. But, if a new departure of the sort is desirable, it would, I apprehend, require to be inaugurated by the Legislature, and not by the Judges of the Court of Session.

LORD KINNEAR and LORD MACKENZIE concurred.

THE COURT adhered.

FRASER, STODART, & BALLINGALL, W.S.—DUNDAS & WILSON, C.S.—Agents.

¹ 5 F., at p. 276.

² 8 F., at p. 873.

³ 5 F. 274

⁴ 8 F. (H. L.) 12.

⁵ 47 S. L. R. 54

MRS MARY JANE BANNOCHIE OR COATS, Pursuer (Reclaimer).—

No. 54.

—*M'Lennan, K.C.—Dykes.*

GEORGE BENNET MITCHELL AND OTHERS (James Bannochie's Trustees),
Defenders (Respondents).—*Chree—Carmont.*

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Husband and Wife—Wife's capacity to contract—Assignment of spes successionis—Mandate to wife's father's trustees to retain her share of his estate.

A married woman, with consent of her husband, undertook that any debt due by her husband to her father at the latter's death should "form a debt due" by her and "a deduction from" her share of her father's estate. The agreement was contained in a deed signed by her and delivered to her father.

In an action for legitim brought by her against her father's trustees after his death (when her husband's indebtedness to her father admittedly exceeded her share of legitim), the pursuer pleaded that the agreement was not binding upon her, in respect that it was a personal obligation undertaken by a married woman.

Held that the agreement was binding, in respect that it was more than a personal obligation by the wife, being a mandate to her father's trustees to retain her share of his estate, and was effectual even though the subject dealt with was a *spes successionis*.

On 12th April 1910 Mrs Mary Jane Bannochie or Coats, wife of 2^D DIVISION.
and residing with Thomas Archibald Coats, brought an action against Ld. Ormidale.
George Bennet Mitchell and others, James Bannochie's testamentary trustees, for declarator that, as one of James Bannochie's children, she was entitled to legitim, and for payment of her share thereof. There was also a conclusion for reduction of the after-mentioned holograph writing of the pursuer dated 10th June 1902.

The pursuer averred that her father, James Bannochie, died testate on 29th June 1909, leaving certain moveable estate, out of which she claimed legitim.

The trustees under James Bannochie's will defended the action and lodged a statement of facts in which they averred:—(Stat. 1) "On 10th June 1902 the pursuer executed and delivered to the truster a holograph writing in the following terms:—'I, Mary Bannochie or Coats, wife of and residing with Thomas Archibald Coats, S.S.C., Aberdeen, do hereby undertake and agree that in the event of my said husband being indebted to you, James Bannochie above designed, to any extent at the time of your death, whether by way of obligation to any bank or bill or otherwise on any document held by you, the amount of said indebtedness shall, unless and until liquidated by the said Thomas Archibald Coats, form a debt due by me, and a deduction from my share of your means and estate.

' Adopted as holograph.

' MARY COATS.'

Said writing was executed by the pursuer with consent of her husband, who appended thereto the following docquet:—'I approve and confirm the above.

THOMAS A. COATS.'

The pursuer replied:—(Ans. 1) "Admitted that the said writing was executed by the pursuer, and the said docquet by her husband. They are referred to for their terms, beyond which no admission is made. Explained and averred that at the time of signing said writing the pursuer was a married woman, and was accordingly incapable of granting such an obligation as the said writing purports to grant; that

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she was in ignorance of her legal rights in her father's estate; that she had no independent legal advice, and that she received no consideration in exchange for signing said document. Further, the pursuer understood from her father that her share of his means and estate would be largely in excess of all sums advanced by him to her husband."

The defenders also averred, as was ultimately admitted, that at the date of James Bannochie's death the pursuer's husband was indebted to him in an amount which exceeded her share of legitim.

The pursuer pleaded;—(1) The pursuer, as one of the children of the said deceased James Bannochie, being entitled to legitim, and the defenders, as trustees and executors foresaid, being bound to hold just count and reckoning with her therefor, the pursuer is entitled to decree for the amount of said legitim, with interest and expenses as concluded for. (2) The pursuer having been a married woman at the time she executed the said pretended undertaking or agreement, she is not bound thereby, and the same should be set aside as null and void and of no force or effect as excluding the pursuer's claim to legitim. (3) The said pretended undertaking or agreement having been granted by the pursuer in ignorance of her legal rights in her father's estate is not binding on her, and ought to be set aside. (4) The said pretended undertaking or agreement having been granted without any consideration therefor, and for an indefinite amount, is null and void, and ought to be set aside.

The defenders pleaded;—(1) The defenders not being due any sum to the pursuer are entitled to absolvitor. (2) The defenders being entitled to set off against the pursuer's legitim the debts due by her husband to the truster at his death, and said debts being in excess of the pursuer's share of legitim, the defenders are entitled to absolvitor. (3) The pursuer's averments in support of the reductive conclusion of the summons are irrelevant.

On 25th February 1911 the Lord Ordinary (Ormidale) repelled the second plea in law for the pursuer, and continued the cause for further hearing.*

* "OPINION.—Mr James Bannochie died on 29th June 1909. This is an action at the instance of one of his children—Mrs Coats—against his trustees and executors for payment of legitim. The defenders plead that they are entitled to set off against the pursuer's legitim, the debts due by her husband to her father at the time of his death, and that, as these debts are in excess of the pursuer's share of legitim, they are entitled to absolvitor. The right to set off these debts depends on the nature and effect of a holograph writing, admittedly executed by the pursuer, dated 10th June 1902. It is quoted in the defenders' statement 1. The pursuer maintains that it is a cautionary obligation and nothing else. It is not disputed that if this is so, it is not binding on the pursuer, she being a married woman.

"In my judgment the writing is not a cautionary obligation, except perhaps in the sense that the bond and assignation in security by Mrs Halkett was a cautionary obligation in the case of the *Reliance Mutual Life Assurance Society v. Halkett's Factor*, (1891) 18 R. 615, for I think that here, as there, the wife did agree to interpose her personal credit for the purpose of assisting her husband. But she did not do so by becoming cautioner for him. The writing, if not strictly speaking an assignation, is of the nature of an assignation. No doubt the right to claim legitim did not vest in the pursuer until her survivance of her father, and, so regarded, is a mere *spes successionis*. But it seems to me to be none the less suscep-

On 9th March 1911 the Lord Ordinary pronounced this inter-locutor:—"Repels the third and fourth pleas in law for the pursuer, and in respect it is admitted at the bar that at the date of the death of the truster the debts due by the pursuer's husband to the truster were in excess of the sum of £700 sued for, assoilzies the defenders from the conclusions of the summons, and decerns: Finds the defenders entitled to expenses." Dec. 22, 1911.
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The pursuer reclaimed, and the case was heard before the Second Division on 15th November 1911.

Argued for the pursuer;—(1) On a true construction of the writing in question, it constituted a personal obligation undertaken by the pursuer, by which she became cautioner for her husband's debts.¹ Such an obligation by a married woman was not binding upon her.² The leading clause in the document was the pursuer's "agreement" that her husband's debt should "form a debt due" by her. The reference to the pursuer's share of her father's estate was not in form an assignation. Further, a *spes successionis* was not property,³ and therefore could not fall within the rule by which a wife

is entitled to be dealt with prior to the parent's death. It may certainly be satisfied, in whole or in part, by advances made to a child by a parent during his lifetime, and as certainly it cannot be gratuitously defeated by the parent. In any view of the right, the pursuer's legitim was at her own absolute disposal. It was her separate estate and she was, it seems to me, entitled to deal with it in any way she pleased.—*Biggart v. City of Glasgow Bank*, (1879) 6 R. 470; *Burnet v. British Linen Bank*, (1888) 25 S. L. R. 356.

"What she did do here, if not to assign it in security, was to give her father a mandate to treat it as a fund of credit for her husband, and to authorise him to debit it with the amount of any advances made by him to her husband. The essence of a cautionary obligation is that the cautioner becomes personally bound along with the principal debtor. Here it may be noted that at the date of the holograph writing there was no principal debtor for there was no principal debt. The wife's transaction with her father constituted an independent and substantive agreement. Moreover, she came under no personal obligation at all—none, at any rate, which the defenders are under any necessity by action or diligence of enforcing against her. If the writing had concluded with the words 'shall form a debt due by me,' there might have been room for the plea that there was a personal obligation of a cautionary nature. But I read these words as entirely separable from, or at most as merely introductory to, what follows. They are not the words on which the defenders found. They ignore them, as I think they are entitled to do, and rest their claim on the words 'shall form a deduction from my share of your means and estate.'

"What the wife did, therefore, was to bind, not herself, but her estate, and that has always been regarded as a vital distinction.—*Watson v. Henderson*, July 9, 1802, Hume, 208; *Harvey & Fawell v. Chessels*, Feb. 21, 1791, Bell's Octavo Cases, 255. This appropriation of her future estate might have been unavailing if there had been anyone in the person of a creditor to challenge it or to interfere with its operation.—*Bedwells & Yates v. Tod*, Dec. 2, 1819, F. C.; *Graham & Company v. Raeburn & Verel*, (1895) 23 R. 84. But there is no one claiming such a right.

"I shall therefore repel the second plea in law for the pursuer."

¹ Ball's Prin., sec. 245.

² *Biggart v. City of Glasgow Bank*, (1879) 6 R. 470; *M'Lean v. Angus Brothers*, (1887) 14 R. 448; *Jackson v. M'Diarmid*, (1892) 19 R. 528; *Ersk. Inst.* i. 6, 25.

³ *Reid v. Morrison*, (1893) 20 R. 510.

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had power to deal with her separate estate.¹ The only agreement which it was possible to make with reference to a *spes successionis* was an "agreement to convey the subject of the expectancy when it shall vest,"² and this was a personal obligation which was not binding on a married woman. (2) If the pursuer's second plea in law was repelled, she was entitled to a proof of her averments in support of her third and fourth pleas.

Argued for the defenders ;—(1) All obligations by a married woman charging or alienating her separate estate were effectual, even where they were accessory to a personal obligation which *per se* might not be binding.³ The agreement contained in the document of 10th June was in effect an assignation of the pursuer's personal estate in security of her husband's debts, and was binding upon her. Express words of conveyance were not necessary to constitute an assignation.⁴ If in addition the document contained a personal obligation, that was accessory to the assignation and would be disregarded. It was immaterial that the subject-matter of the transaction was a right in expectancy. A *spes successionis* could be assigned so as to give the assignee a good title to the subject when it came to be vested in the assignor.⁵ A married woman could assign a right in expectancy just as validly as she could assign any portion of her separate estate. (2) There were no relevant averments to support the third and fourth pleas in law for the pursuer. Want of consideration was no ground for reducing the agreement, and there was no statement that her ignorance caused her to sign the deed, or that she was induced to sign by any misrepresentation.

At advising on 22nd December 1911,—

LORD SALVESEN.—In this case we had an interesting argument as to the law applicable to the obligations of a married woman ; but in the end it became clear that parties were not so much at variance with regard to the law as with regard to its application to the document of 10th June 1902, on which the whole defence is founded. Speaking generally, and without attempting a complete statement of the law, it may be taken that a personal obligation granted by a married woman, even with her husband's consent, is not binding upon her unless it is *in rem versum* of her or relates to her separate estate. On the other hand, a married woman may validly convey or assign her separate estate to pay her husband's debts, and may grant securities over her separate estate to a creditor of her husband for the same purpose, although a personal obligation undertaken by her for behoof of her husband, such as a cautionary obligation, is not enforceable against her even to the extent of her separate estate.

¹ Laing v. Provincial Homes Investment Co., Limited, 1909 S. C. 812, *per* Lord Kinnear, at p. 821.

² Reid v. Morrison, 20 R. 510, *per* Lord Rutherford Clark, at p. 514.

³ Eleis v. Keith, (1665) M. 5987 ; Marshall v. Ferguson, (1683) M. 5990 ; Somerville v. Paton, (1686) M. 5990 ; Clark v. Sharp, (1717) M. 5996 ; Harvey & Fawell v. Chessel's Trustees, (1791) Bell's Octavo Cases, 255 ; Watson v. Henderson, (1802) Hume's Dec. 208 ; Reliance Mutual Life Assurance Society v. Halkett's Factor, (1891) 18 R. 615 ; Ersk. Inst. i. 6, 27.

⁴ Carter v. M'Intosh, (1862) 24 D. 925.

⁵ Trappes v. Meredith, (1871) 10 Macph. 38.

Assuming this to be a correct statement of the law, it remains to be considered how it applies to the writing in question. If that writing is to be read, as the pursuer's counsel argued, as a personal obligation undertaken by the wife along with an implied assignation of her *spes successionis* in her father's estate in security of her own personal obligation, I should be disposed to sustain her second plea in law. I cannot, however, so read it. I think that it does import a personal obligation upon her, and to that extent it would not be enforceable against any separate estate other than her share of her father's succession. But I think it is something more. Reading out the words which may be held to constitute the personal obligation, the document is, in substance, an undertaking by the pursuer that the amount of her husband's indebtedness, as at the time of her father's death, should form a deduction from her share of his means. Whether that is regarded as an assignation or not, it is, at all events, a mandate to his trustees to retain her share in liquidation of this indebtedness. It requires no personal action against her to make this mandate effectual, because the trustees are already in possession of the funds; and it appears to me to be very much in the same position as a pledge by a lady of her jewels to a creditor of her husband, or a conveyance of her separate estate to such a creditor. Transactions of this kind were held to be unchallengeable by the wife more than two centuries ago, when the law with regard to a married woman's personal obligations was rigidly applied (*Eleis v. Keith*¹; *Marshall v. Ferguson*²). I cannot differentiate this case from these or from the later case of *The Reliance Mutual Life Assurance Society*.³

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Lord Salvesen.

Another argument addressed to us on behalf of the pursuer was that the subject assigned, being a *spes successionis* which is not property, could not be validly conveyed by a married woman; that, in fact, the document conveyed nothing inasmuch as the granter had nothing to convey, and in the words of Lord Rutherford Clark in *Reid v. Morrison*,⁴ "It becomes effectual by accretion alone. Till then it is nothing but a mere agreement to convey the subject of the expectancy when it shall vest." It was maintained upon these words that the document founded on was, at most, a mere obligation to convey the pursuer's share of her father's estate, and, as such, was of the nature of a personal obligation.

I do not think any such conclusion is to be drawn from the words which I have read. I am not sure that the word "accretion" used by that very eminent Judge was a happy one; but all that it imports is that the conveyance cannot take effect until the subject vests. At any rate I see no warrant for the distinction that is sought to be drawn between an assignation of property in security of a husband's debt and an assignation of a chance that the assignor may become the proprietor of the subject assigned. It being perfectly clear that a *spes successionis* is assignable, I see no reason for inferring that a married woman is under a greater disability in dealing with her hopes of succession than with the succession itself when it has vested in her. I think, therefore, we must repel the second plea in law for the pursuer.

The third and fourth pleas are based on very meagre averments. The

¹ M. 5987.² M. 5990.³ 18 R. 615.⁴ 20 R. 510.

Dec. 22, 1911. pursuer says that at the time of granting the document of 10th June she was in ignorance of her legal rights in her father's estate; that she had no independent legal advice; and that she received no consideration in exchange for signing the document. Further, she understood from her father that her share of his means and estate would be largely in excess of all sums advanced by him to her husband. In my opinion these averments are irrelevant to support a reduction of the document. There is no statement of what her ignorance consisted in. She does not say that but for this ignorance she would not have signed the document in question; nor is there any statement that she was induced to sign under error induced by misrepresentation; for even if the pursuer's father told her that her share of his means would be in excess of the sums that he had already advanced, that statement may have been perfectly accurate when it was made. I therefore agree with the Lord Ordinary in repelling the third and fourth pleas in law for the pursuer, and also in his conclusion that the defenders fall to be assoilzied.

Coats v.
Bannochie's
Trustees.

Lord Salvesen.

The LORD JUSTICE-CLERK and LORD GUTHRIE concurred.

THE COURT adhered.

WM. B. RAINNIE, S.S.C.—LINDSAY COOK & DICKSON, Solicitors—Agents.

No. 55. MRS MARY BLAKEY, Pursuer (Respondent).—*D. Anderson—Steedman.*
ROBSON, ECKFORD, & COMPANY, LIMITED, Defenders (Appellants).—
Dec. 23, 1911. *Morison, K.C.—W. J. Robertson.*

Blakey v.
Robson,
Eckford, &
Co., Limited.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), sec. 1 (1)—
Accident arising out of and in the course of the employment—Heat apoplexy.

A plumber, who was engaged in laying and jointing iron pipes in the open air on a day of unusual heat and who had to stoop at his work, was taken ill while so employed and died some days afterwards from heat apoplexy.

Held that, even assuming that there had been an "accident," it did not arise "out of" the deceased's employment, as there was no peculiar danger to which he had been exposed by the nature of his employment beyond that to which other persons who had to stoop at outdoor labour on the day in question were exposed.

1ST DIVISION. IN an arbitration under the Workmen's Compensation Act, 1906, in the Sheriff Court at Hawick, in which Mrs Mary Blakey sought compensation from Robson, Eckford, & Company, Limited, contractors, Hawick, in respect of the death of her husband, Joseph Blakey, the Sheriff-substitute (Baillie) found that the death of Joseph Blakey was the result of an accident arising out of and in the course of his employment, and at the request of the defenders stated a case for appeal.

The case set forth:—"(1) The deceased Joseph Blakey, a plumber in the employment of the defenders, was engaged along with other workmen in their employment, in July 1911, in laying and jointing iron pipes in a trench cut in a road at Gateshead. . . .

"(2) That said iron pipes were 9 feet long by 5½ inches in diameter, and were jointed with lead. The pipes were laid along the side of

the trench, and three lengths requiring two joints were jointed out- side the trench, after which the resultant length of 27 feet of pipe was laid in the trench, and a joint made inside the trench with the pipe already there. The trench was on an average 2 feet 6 inches deep, and as the trench was dug the pipes were put in. This jointing of the pipes was the special employment of the deceased, but he was also employed in laying the pipes in the trench and guiding them into pipes already there.

Dec. 23, 1911.
Blakey v.
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Co., Limited.

"(3) The jointing was performed by first plugging the joint with yarn round the inner pipe, then forming a clay mould round the joint, after which molten lead, melted in a chafer and transported in a ladle, was poured in and the clay mould removed, and the lead then staved or hammered into the joint. Each jointing took, in the present case, about fifteen minutes, including the time occupied in going to and from the chafer. About four minutes only were occupied in dealing with the molten lead, of which about 3 lbs was required for each joint. On the day in question the deceased had made about six joints. The process described is the usual mode of jointing pipes. Both when laying and guiding the pipes, and also when jointing them, the deceased was obliged to stoop to a considerable extent over his work.

"(4) That on 26th July 1911, at about 9 A.M., while engaged inside the trench in guiding a length of jointed pipe into another pipe there, the deceased was seized with a sudden attack of illness, but after going to town and taking some stimulant, returned to his work. At or about 11 A.M. that day, while carrying the ladle containing about 3 lbs of molten lead from the chafer to the trench, he had another similar seizure and fell to the ground, after which seizure he left his work. Late that night and early next morning fresh attacks of his illness occurred, and he was sent home to Hawick, when he was found to be suffering from heat apoplexy. He remained there totally incapacitated and under medical treatment till his death on 1st August 1911.

"(5) That the deceased had been engaged at his said employment for about a fortnight before 26th July 1911. Considerable heat prevailed on that date and for some time before and after, and the stooping position in which the deceased was obliged to work caused the heat to have a special effect on him which it did not have on persons working in a more upright position, though he had not made any complaints. The deceased was in a state of impaired vitality at the time, partly owing to over-indulgence in alcohol and partly owing to his having been out of work for about six months before being employed by the defenders. It was not proved that the use of molten lead caused or contributed to the deceased's injury, or had any appreciable effect in aggravating the excessive heat of the sun. It was proved that it melts at a low temperature, gives off little heat, and was used in small quantities on this job.

"(6) That the cause of death was heat apoplexy, and this heat apoplexy was caused by the excessive atmospheric heat on said 26th day of July 1911 acting on his impaired vitality, aggravated by the stooping position in which he was obliged to work.

"On the above facts I found that the death of the said Joseph Blakey was the result of an accident arising out of and in the course of his employment, within the meaning of the Workmen's Compensation Act, 1906."

The questions of law for the opinion of the Court were:—"(1)

Dec. 23, 1911. Whether the personal injury to the deceased was caused by 'an accident' within the meaning of the Workmen's Compensation Act, 1906? (2) If the previous question be answered in the affirmative, whether the accident arose out of the deceased's employment within the meaning of the Workmen's Compensation Act, 1906?"

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Co., Limited.

The case was heard before the First Division (without Lord Johnston) on 9th December 1911.

Argued for the appellants;—There had been no accident arising out of the deceased's employment; his death being due to natural causes, including his impaired vitality, and not to exposure to any peculiar danger incidental to his employment.¹ That there were no conditions of artificial or aggravated heat to which the deceased was subjected distinguished the present from the cases of *Ismay, Imrie, & Company v. Williamson*² and *Morgan v. Owners of Steamship "Zenaida."*³ There had been exposure only to such risks as were common to all outdoor labourers who had to stoop at their work, and no mishap or untoward event had occurred.⁴

Argued for the respondent;—The question whether the death of the deceased was due to an accident was a question of fact upon which the Court would not interfere with the decision of the arbitrator. In any event, the arbitrator's finding that, in the circumstances disclosed here, there had been an accident was in harmony with the decisions.⁵ One whose work required continuous stooping under an unusually hot sun was exposed to an exceptional risk of heat apoplexy; thus the accident arose out of the deceased's employment.⁶ The present case was governed by the cases of *Ismay, Imrie, & Company v. Williamson*² and *Morgan v. Owners of Steamship "Zenaida."*³

At advising on 23rd December 1911,—

LORD PRESIDENT.—This is the case of a man who went out, in the course of his ordinary work, on a somewhat hot summer's day in Scotland, and bent over his work during part of the time he was engaged upon it, and consequently got his back heated. Being in a poor state of health he succumbed some days afterwards to an attack of apoplexy. Now, if, in the early days of judicial interpretation of the statutes dealing with workmen's compensation, anyone had stated these facts and argued upon them that the man had met with an accident arising out of and in the course of

¹ Warner v. Couchman, [1911] 1 K. B. 351.

² [1908] A. C. 437.

³ (1909) 25 T. L. R. 446, 2 Butterworth, 19.

⁴ Fenton v. Thorley & Co., [1903] A. C. 443. *The following further authorities were referred to:—*Wicks v. Dowell & Co., [1905] 2 K. B. 225; Brintons, Limited, v. Turvey, [1905] A. C. 230; Coe v. Fife Coal Co., 1909 S. C. 393; Clover, Clayton, & Co. v. Hughes, [1910] A. C. 242; Broderick v. London County Council, [1908] 2 K. B. 807; Millar v. Refuge Assurance Co., *supra*, p. 37.

⁵ Fenton v. Thorley & Co., [1903] A. C. 443; Ismay, Imrie, & Co. v. Williamson, [1908] A. C. 437; Morgan v. Owners of Steamship "Zenaida," (1909) 25 T. L. R. 446; Warner v. Couchman, [1911] 1 K. B. 351; Kelly v. Kerry County Council, (1908) 42 Ir. L. T. 23, 1 Butterworth, 194; Andrew v. Failsworth Industrial Society, [1904] 2 K. B. 32; Kelly v. Auchenlea Coal Co., 1911 S. C. 864.

⁶ Sheeran v. F. & J. Clayton & Co., (1909) 44 Ir. L. T. 52, 3 Butterworth, 583; Stewart v. Wilsons and Clyde Coal Co., (1902) 5 F. 120.

his employment, I think the Court would have replied by a somewhat surprised negative. And yet I quite admit that upon the decided cases there has been a fairly formidable argument presented in favour of saying that this was an accident arising out of the employment. In the case of *Coe*¹ I pointed out how one decision drove to another, in an observation which was afterwards approved of by more than one of their Lordships in the House of Lords; and I would like to add this, that there is danger of confounding the illustration of the principle with the principle itself.

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 Co., Limited.
 ———
 Ld. President.

Now, I am very clearly of opinion in this case that there is really no evidence upon which you could say that the man met with an accident arising out of his employment. Various cases were cited to us. I do not propose to go through them all; but I shall mention those on which most reliance is placed, and those to which exception falls to be taken.

I think there is considerable help to be got from the two lightning cases. In one, a rural labourer was struck by lightning. It was held that that was not an accident arising out of his employment, because his employment had not exposed him to any other danger than was common to every inhabitant of the British Islands who was at that moment within the area of the storm. On the other hand, in the other case, a man was employed on a very high scaffold and was struck by lightning, and it was held that he had met with an accident arising out of his employment, because there was scientific testimony to the effect that if a person was placed at a very great height from the ground, he was much more liable to be struck by lightning than people following their avocations on the ground. These are cases of the no doubt unexpected occurrence of a lightning flash; but when we come nearer the accident here—I mean in the quality of the injury—of course the two cases quoted to us were the well-known case of heat-stroke, in the House of Lords,² and then the case, not reported in the regular reports, of *Morgan v. "Zenaida,"*³ where the Court of Appeal held that a man on board the "Zenaida," who died of sunstroke, had met with an accident arising out of his employment. I think both of these cases are very easily distinguishable. In the case of heat-stroke, in the House of Lords, though there was a most emphatic dissent from one of their Lordships, it was held that there had been an accident, because the man had been exposed to the action of heat which brought on heat-stroke, by being obliged in the course of his employment, which was that of a trimmer, to stay in the stokehold. Other people who were not in the stokehold had no risk of that particular danger. The other case of the "Zenaida,"³ I think, may be explained in the same way. There the man was slung upon a scaffold in the tropics against the hull of the ship to do some painting, and there he got sunstroke. I am bound to say, if I agree with that case at all, it is only upon the ground that the peculiar position in which he was placed put him, so to speak, under a burning-glass and exposed him to a greater heat from the necessities of his occupation than other people were exposed to. If that is the true view of the case, and I think I am entitled to take

¹ *Coe v. Fife Coal Co., Limited*, 1909 S. C. 393, at p. 396.

² *Ismay, Imrie, & Co. v. Williamson*, [1908] A. C. 437.

³ 25 T. L. R. 446, 2 Butterworth, 19.

Dec. 23, 1911. it that it is the true view, then it is exactly in line with the case of heat-stroke in the stokehold.

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Ld. President.

But when you come to this case, there is nothing of that sort. The only two things that can be said about this man's employment are, first, that he was in the open air, and therefore was more exposed to the sun than somebody who sat in a cellar; and secondly, that at his work he had to bend. Now, since the days when Adam was expelled from Eden I think every outdoor labourer has had to bend at his work; and I think it would be the very climax of absurdity to say that because a man had to go into the open air, and because he had to stoop, he was exposed to a peculiar danger because of his employment. I think you reach the same result by putting the matter interrogatively. Before any accident has happened, ask yourself the question, To what class of dangers does this man's employment expose him? The answer is very obvious in most cases. Suppose he is a collier; I may say his employment exposes him to the risk of having things falling upon him from the roof, to the danger of tumbling down a shaft, and so on. In short, there is a peculiar class of dangers which exists only for people who go down into mines. I put in debate, I think, the illustration of the sandwichman, who goes about the streets all day and, mercifully for the other pedestrians, is not allowed to go on the pavements; he is exposed on the streets to the danger of being run over by wheeled traffic. But if you had asked this, What are the special dangers incidental to the employment of a plumber, who occasionally has outdoor work? nobody in their senses would have said, "Oh, heat apoplexy"; and when you come to the cause of heat apoplexy you come to the circumstances here, and I should say the *causa causans* was much more the man's own drinking habits than the sun on that particular day. There was an attempt to base an argument on the Sheriff's use of the words "excessive heat." Excessive heat is no standard. He only says it was in July 1911. We all know that July 1911 was a hot month; but to say that anyone who works, as it has been called, "'Neath the baleful star of Sirius," is necessarily exposed to an excessive or peculiar danger, is a proposition which has no foundation.

On the whole matter I am very clearly of opinion here that there was no ground upon which this workman ought to have been awarded compensation. I think this case is very analogous to the case of *Warner v. Couchman*,¹ and that one's whole opinion is very well summed up in the words in which the reporter has rubricked that case. It is this: that even assuming that there had been an accident, there was no peculiar danger to which the applicant had been exposed beyond that to which other persons engaged in outdoor work on that day had been exposed, and consequently that the accident had not arisen out of his employment.

LORD KINNEAR.—I agree, for the reasons which your Lordship has given, and which I do not repeat. I only say in a word that I do not think that this man was exposed by his employment to any special risk to which other people were not liable, provided they happened to be working in the open air on the 26th July 1911. The only special circumstance which the

¹ [1911] 1 K. B. 351.

Sheriff's statement of facts adds to that which I have mentioned is that Dec. 23, 1911. the man, owing to his own habits, was in a state of impaired vitality at the time; and accordingly the Sheriff thinks that the danger of working in unusual heat was aggravated by his own physiological condition. But that is not an exceptional circumstance incident to the employment; it is one incident to the person. I therefore agree with your Lordship.

Blakey v.
Robson,
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Co., Limited.

LORD MACKENZIE concurred.

THE COURT pronounced an interlocutor in the following terms:—

“Answer the questions stated by declaring that the injury to the deceased Joseph Blakey was not an accident within the meaning of the Workmen's Compensation Act, 1906, arising out of his employment: Therefore reverse the determination of the Sheriff-substitute as arbitrator, and remit to him to dismiss the claim.”

MACPHERSON & MACKAY, S.S.C.—STEEDMAN, RAMAGE, & Co., W.S.—Agents.

THOMAS GRAY, Pursuer (Appellant).—*D. P. Fleming.*
THE CALEDONIAN RAILWAY COMPANY, Defenders (Respondents).—
Hon. W. Watson.—Wark.

No. 56.

Dec. 23, 1911.

Reparation—Negligence—Safety of the public—Railway—Sparks from engine—Improper construction of engine—Negligent use of engine.

Gray v.
Caledonian
Railway Co.

A father claimed damages from a railway company in respect of injuries sustained by his six pupil children. He averred that while his children were standing on a railway platform, the driver of the engine of a train, finding it necessary to put on steam while passing the platform, did so carelessly, unnecessarily, and unskillfully, in such volume that large quantities of live cinders and soot were driven from the funnel and fell upon the children, causing the injuries complained of. He also averred that the defenders or their servants were in fault in not having the funnel properly cleaned from time to time, and in not having a cage at the mouth of the funnel, or adopting other means to prevent such an occurrence.

Averments which were held not to disclose a relevant case of improper construction, but to disclose a relevant case of improper use, of the engine.

Minor and Pupil—Process—Reparation—Action of damages by father as tutor and administrator for his pupil children—Necessity for separate conclusions for each child.

Held that a father, suing as administrator-in-law for his pupil children for damages for personal injuries suffered by them, must conclude for a separate sum for each child and not for a lump sum.

On 3rd October 1911, Thomas Gray, a miner at Stirling, brought an action in the Sheriff Court at Stirling against the Caledonian Railway Company, in which he, as tutor and administrator-in-law for his six pupil children and also as an individual, claimed damages in respect of certain injuries sustained by his children.

1st Division.
Sheriff of
Stirling, Dum-
barton, and
Clackmannan.

The pursuer's claim was:—“For payment of (1) £100 sterling (a) damages for personal injuries and shock to the system sustained by the pursuer's son, the said John Gray (aged 7 years), on or about

Dec. 23, 1911. the 22nd day of July 1911; and also (b) as damages for shock sustained to their systems by the said Mary Gray (aged 11), Grace Gray (aged 9), Thomas Gray (aged 5), James Gray (aged 4), and Elizabeth Gray (aged 18 months), while they were all waiting, and having each a return ticket purchased from the defenders from Haywood to Stirling, on the platform of their railway station at Carstairs, with the object of returning as passengers therefrom to Stirling, in consequence of an engine attached to a train of the defenders, by which the said John Gray, Mary Gray, Grace Gray, Thomas Gray, James Gray, and Elizabeth Gray, the pursuer's said children, intended to travel, and did travel to Stirling, while the said engine was being drawn up at Carstairs platform, having emitted live cinders and soot from the funnel upon all the pursuer's said pupil children, whereby the said John Gray was severely scalded and burned on the neck, and suffered and still suffers shock to his system, and the said Mary Gray, Grace Gray, Thomas Gray, James Gray, and Elizabeth Gray, also suffered shock to their systems, and still suffer therefrom, all through the fault, negligence, and carelessness of the defenders' servants, for whom they are responsible; and further, (2) £5 sterling, being the value of the clothing belonging to the pursuer worn at the time by the said John Gray, Mary Gray, Grace Gray, Thomas Gray, James Gray, and Elizabeth Gray, his said children, which was, time and place foresaid, destroyed and rendered useless and unwearable, and that also through the fault of the defenders' servants, for whom they are responsible, in allowing said live cinders and soot to be emitted and thrown off from said engine upon the persons of the pursuer's said pupil children while they were waiting on said date on the said platform, with the object before mentioned."

The pursuer averred (Cond. 2) that on 22nd July 1911, his wife, Elizabeth Morrow or Gray, and his six children were on the platform at Carstairs awaiting the arrival of a train which was to convey them to Stirling. "When the engine approached with steam shut off, the driver apparently found that he had not sufficient way on to bring it properly alongside the platform, and in consequence he had to apply steam in order to bring the train to its proper position at the platform, so that the engine was steaming when it passed that portion of the platform where the said Elizabeth Morrow or Gray and her children were standing. As it passed that point the engine was emitting dense smoke and steam, and live cinders and soot from the funnel of said engine fell on several people waiting on the platform, destroying their clothes, and otherwise injuring them." He then narrated that the fall of cinders and soot caused the injuries to his children and to their clothes set forth in the claim.

The averments of fault (Cond. 5) were as follows:—"It was the duty of the engine-driver to prevent the engine emitting live cinders and soot when passing a platform on which he knew there were passengers awaiting said train who might be injured by them, and if he had exercised ordinary care and skill he could have prevented this. He ought to have shut off steam at a point which would have enabled him to control his engine by means of the brakes alone, or at all events which would have enabled him to stop the train at the required point without giving off dense volumes of smoke and steam when passing along said platform. Further, even if it were necessary for him in consequence of his misjudging the distance, or from any other reason, to apply steam while passing along said platform, it was his

duty to apply it gradually and in small volume, so as to prevent doing injury to persons on the platform, but on the occasion in question the engine-driver carelessly and unskilfully applied steam suddenly and in large volume, with the result of driving large quantities of soot and live cinders out of the funnel. This would not have happened had steam been applied gradually, and in small volume. Further, it was the duty of the engine-driver, under the defenders' rules for the regulation of their traffic, to so arrange the fire in the engine as to avoid the unnecessary emission of cinders and soot from the engine while passing said station. The emission of live cinders and soot in the circumstances condended on was quite unnecessary, and the engine-driver was in breach of the defenders' own rule, which is intended to ensure the safety and comfort of the public. Further, the defenders or their servants were in fault in not having the funnel properly cleaned from time to time, and in not having a cage at the mouth of the funnel, or adopting other means of preventing live cinders and soot being emitted therefrom in large and dangerous quantities."

The defenders pleaded that the action was irrelevant.

On 20th November 1911 the Sheriff-substitute (Mitchell) repelled the plea of irrelevancy and allowed both parties a proof of their averments.*

On 24th November 1911, on the requisition of the pursuer, the case was remitted to the Court of Session.

On 23rd December 1911, on the case appearing in the Single Bills of the First Division (without Lord Mackenzie), the defenders objected that the pursuer had failed to aver a relevant case either of defective construction of the engine or of negligence on the part of the defenders' servants, and referred to the undernoted case.¹

The Lord President intimated that there was a radical defect in the action as laid, in respect that the pursuer claimed damages in a lump sum for the injuries sustained by his six children severally.

Counsel for the pursuer, having intimated that he did not object to the case being remitted back to the Sheriff, was not called upon to reply upon the relevancy.

LORD PRESIDENT.—This is an action which has been remitted from the Sheriff Court at Stirling with a view to having it tried by jury. We have had an argument directed to the question of relevancy. I think the law is perfectly well settled in this class of case. Where injury is done owing to the noxious effect of a machine which is driven upon the company's property, in direct pursuance of statutory duties which make them drive that class of machine, there can be no claim of damages against them for doing what the statute tells them to do; and, accordingly, there can only be a

* "NOTE.— . . . I think the case cited for both parties *Port-Glasgow and Newark Sailcloth Co. v. Caledonian Railway Co.*, 19 R. 608, affirmed 20 R. (H. L.) 35, which lays down the law authoritatively, recognises (after proof) the two spheres of possible negligence which are specified in the averments here, use of appliances and the nature of the appliances themselves. There may be a question how steam brings cinders through with it, but this is matter for proof."

¹ *Port-Glasgow and Newark Sailcloth Co. v. Caledonian Railway Co.*, (1892) 19 R. 608, *aff.* (1893) 20 R. (H. L.) 35.

Dec. 23, 1911. claim of damages for injury for burns or anything of that sort, resulting from sparks from an engine, if you can show that there has been negligence on the part of the company. That negligence may be of two kinds. It may either be negligence in having an improperly constructed machine, or it may be negligence in the manner in which a properly constructed machine is used.

Gray v.
Caledonian
Railway Co.

Ld. President.

I am bound to say that I find no relevant averment of there being improper construction of this engine; and, accordingly, I think that the Sheriff-substitute was wrong when he allowed a proof of the record as it stood. On the other hand, I think there is a relevant, though somewhat vague, averment of improper use of the machine, and I think upon that matter the case could not be turned out of Court without allowing inquiry.

But I do not think that this case could have been sent to a jury. The learned counsel for the pursuer has very properly, I think, made that concession; but the reason of it I need to mention, because there is, I think, an absolute fault in the action as laid which will have to be corrected when it goes back to the Sheriff Court (where I propose to send it), and the fault is this: the claim of the pursuer is a claim as tutor and administrator-in-law for his six pupil children, and he claims, in a lump sum, £100 sterling for injuries and shock sustained by their systems, as he puts it, by soot falling upon them out of this engine, and, in the case of one of them, by a cinder having lodged upon his neck. Well, you cannot, I think, sue as an administrator-in-law for a lump sum for various children. You are bound to particularise what is the sum which you think you ought to recover for each child, because, when recovered, it is not a common sum. The father does not recover for himself, but recovers as administrator-in-law for his children. No doubt the father is entitled to use the money of his children for their upkeep: otherwise, each sum recovered for each child would have to be put, so to speak, in a separate bank account. The action as laid seems therefore to be improperly laid in this matter. If it had been properly laid, it would have been perfectly apparent, I think, to anyone that no child would be receiving more than £50; and consequently it would have been one of those cases which upon value alone, according to the rules we have laid down, would have been appropriate for the Sheriff Court and not for this Court.

Accordingly, I think, upon the whole matter, the action should be re-remitted to the Sheriff with an instruction to him to allow an amendment of the pleading, which shall specify the amount sought to be recovered for each separate child, and also with an instruction to him that there is, in our view, no relevant averment of any improper construction of the engine.

LORD KINNEAR.—I concur with your Lordship. I think the liability of the Railway Company in an action of this kind is quite clearly established by the law laid down in the case of the *Port-Glasgow and Newark Sailcloth Co.*,¹ and by the previous case of *Hammersmith Railway Co. v. Brand*.² And I agree with your Lordship's statement of the law, which is also correctly

¹ (1892) 19 R. 608, *aff.* (1893) 20 R. (H. L.) 35.

² (1869) L. R., 4 E. & L. App. 171.

stated by the Sheriff-substitute. It follows, I think, that there is a relevant Dec. 23, 1911. case upon the negligent driving of the defenders' engine in the particular circumstances here.

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But then I agree also that the pursuer cannot be allowed to sue for one lump sum in respect of six separate injuries to six different people. The question of the injury done to each child is a separate and distinct question from the injury done to the other children. And the pursuer makes that clear enough when he says that in one case he is suing for damages for personal injuries done, and in the other cases for damages for shock sustained to the system. Whatever the meaning of that may be, it is clear enough that each child has a separate case for separate injury done to itself; and the fact that the father, as administrator-in-law, is entitled to recover the damages for each of his children does not make the six children into one pursuer. Therefore the separation, which I think the learned counsel admitted to be necessary, will require to be made before the case goes further.

Lord Kinnear.

LORD JOHNSTON.—I quite agree, and have nothing to add.

THE COURT pronounced the following interlocutor:—"Recall the interlocutor of the Sheriff-substitute of 20th November 1911: Repel said objections" [i.e., to the relevancy] "except in so far as they relate to the construction of the engine: Find that there is no relevant averment of improper construction of the engine: *Quoad ultra* remit the case back to the Sheriff for proof, and instruct him to allow the pursuer to amend the record to show the amount sought to be recovered for each child, and to proceed with the cause."

HUGH FRASER, Solicitor—HOPE, TODD, & KIRK, W.S.—Agents.

WILLIAM SPENCE, Appellant.—*G. Watt, K.C.—A. M. Mackay.*
WILLIAM BAIRD & COMPANY, LIMITED, Respondents.—*Horne, K.C.—*
Pringle.

No. 57.

Jan. 13, 1912.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), sec. 1 (1)—
Injury by "accident"—Incapacity due to heart disease.

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William
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Limited.

In an arbitration under the Workmen's Compensation Act, 1906, it was proved that a workman, while engaged in lifting a weight in the course of his employment, felt a pain in the breast followed by palpitation of the heart; that he was found to be suffering from heart disease of long standing, which was bound to manifest itself sooner or later and probably in the way described; and that from that time his condition became gradually worse until, eventually, he became permanently incapacitated for work as a result of the diseased state of his heart. It was not proved that the lifting of the weight had accelerated the progress of the disease.

Held that on the facts stated the arbitrator was entitled to find, as he did, that the workman had failed to prove that his incapacity was due to an "accident" within the meaning of the Workmen's Compensation Act, 1906.

Clover, Clayton, & Company, Limited, v. Hughes, [1910] A. C. 242, distinguished.

Jan. 18, 1912. **IN** an arbitration under the Workmen's Compensation Act, 1906, between William Spence, miner, Croy, and William Baird & Company, Limited, colliery owners, Glasgow, the Sheriff-substitute of Lanarkshire at Glasgow (Thomson) refused compensation, and at the request of the workman stated a case for appeal.

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2D DIVISION.
Sheriff of
Lanarkshire.

The case set forth:—

“ The case was heard before me and proof led, when the following facts were admitted or proved :—(1) That the appellant was roadman and fireman in respondents' Bedlay pit, Chryston, at a wage of 34s. 10d. a week; that he had been employed there for about a year, and that he had been employed in similar work in coal pits for ten years or thereby immediately preceding; (2) that his ordinary daily duties involved, *inter alia*, the lifting and moving of loaded hutches from the lye at the back of the haulage wheel on to the rails of the haulage road, which was work requiring considerable physical exertion; (3) that the appellant on the morning of Friday, 20th May 1910, he being then alone, while lifting a derailed loaded hutch from the lye on to the haulage road, felt a sharp pain immediately above the stomach, followed by palpitation of the heart and a shortage of breath; that he lifted no more hutches that day, but remained till the end of the shift performing such light work as fireman as there was to do; that after a rest on the Saturday and Sunday (which were not working days for him) he resumed work on the Monday morning, and while in the act of moving a hutch he again experienced the same sensations as on the Friday; (4) that the appellant, however, adduced no direct evidence to corroborate his own statement that an accident had occurred on the Friday in lifting the hutches, but he consistently, when examined at the time and later by doctors on his own behalf and on behalf of the respondents, repeated his statement as to the sensations which he experienced in lifting the hutch, and his physical condition (to be immediately referred to) makes his statement quite probable; (5) that the appellant on being medically examined was found to be suffering from advanced disease of the mitral valve of the heart, with enlargement of the heart; that this condition was not due to the alleged accident, but was of long standing, although possibly the appellant may not have been aware of the disease; that it was in its nature progressive and was bound to manifest itself sooner or later, and would do so probably in the way in which appellant describes, and might do so even when he was not engaged in active exercise; (6) that the appellant's condition has gradually become worse since 20th May 1910, and he is now permanently incapacitated for work as the result of the diseased condition of the heart; (7) that it is not proved that the lifting of the hutches on 20th May accelerated the progress of the disease.

“ On these facts I found that the appellant, even on the assumption that his statements as to his sensations were proved (as I believed them to be), had not proved that he had sustained an accident arising out of and in the course of his employment with the respondents, and therefore I dismissed the petition.”

The question of law for the opinion of the Court was:—“ Was the arbitrator justified on the above facts in finding that the appellant had not proved an ‘ accident ’ within the meaning of the statute ? ”

The appeal was heard before the Second Division on 13th January 1912.

Argued for the appellant;—The appellant had sufficiently proved

that his incapacity was due to an accident, and the facts did not justify the arbitrator's decision. An incident, such as a strain, was none the less an "accident" because of the fact that, but for pre-existing disease, it would not have resulted in the injury which produced the incapacity.¹ It was proved that, on the 20th May, the appellant was suffering from a "progressive" disease of the heart; that, on that date, and while exerting himself in the course of his employment, he felt certain sensations which were symptomatic of heart disease; and that from that date his condition had become worse. This raised a presumption, which it was for the respondents to displace, that his disease had been aggravated by the exertion, and that he had thus sustained injury by an accident arising out of and in the course of his employment. The arbitrator had erred by assuming the contrary, as was shown by article 7 of his findings, viz., that the burden was still on the appellant to bring further evidence to show that the lifting of the hutches had accelerated the progress of the disease. There was the necessary fortuitous element in the occurrence which constituted it an accident.² If the findings did not sufficiently bring out the connection between the exertion and the injury which the medical evidence showed to exist, the case should be remitted for further statement, as was done in the case of *Borland v. Watson, Gow, & Company, Limited*.³

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Counsel for the respondents, who was not called upon for argument, mentioned the case of *Hawkins v. Powells Tillery Steam Coal Company, Limited*.⁴

LORD JUSTICE-CLERK.—The Sheriff-substitute sitting here as an arbitrator has found that it has not been proved that the injury from which this man suffered, and which has disabled him from work, was caused by an accident; and that being really a finding in fact, unless there are grounds in law for holding from the arbitrator's statement that he could not find that in fact, we cannot interfere. I think that is well recognised in the cases which have been decided. The case⁵ in which the majority of the House of Lords held that a man who was working with a spanner when an aneurism in his heart burst, had met with an accident, was an appeal against a decision finding in fact that it was an accident, and that distinguishes it very clearly from this case. There are other cases which have occurred, and I should like to refer to the Lord President's opinion in the case of *Coe v. The Fife Coal Company*,⁶ in which he says,—“This is a stated case under the Workmen's Compensation Act, and the question put to us is whether an injury to a workman was due to an accident within the meaning of the Workmen's Compensation Act.” That, of course, is a question of law, but his Lordship continues,—“That seems to me to be primarily a question of fact, and therefore, as usual, we must see, before we could interfere with the judgment of the Sheriff, whether he has in some way drawn conclusions which cannot

¹ *M'Innes v. Dunsmuir & Jackson*, 1908 S. C. 1021; *Ismay, Imrie, & Co. v. Williamson*, [1908] A. C. 437; *Clover, Clayton, & Co., Limited, v. Hughes*, [1910] A. C. 242.

² *Stewart v. Wilsons and Clyde Coal Co., Limited*, (1902) 5 F. 120.

³ *Supra*, p. 15.

⁴ [1911] 1 K. B. 988.

⁵ *Clover, Clayton, & Co., Limited, v. Hughes*, [1910] A. C. 242.

⁶ 1909 S. C. 393, at p. 395.

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Clerk.

properly be drawn, or which are vitiated by wrong knowledge of the law, from the particular facts which he found proved." Now that, I think, is just the position in which we stand in this case. Then, after going over the evidence, the Lord President concludes,—“It seems to me that the end of it all really comes to be a question of fact. Where so many have failed I certainly am not going to try to define what ‘accident’ is, but I can say without fear of being wrong that, negatively, ‘accident’ connotes something different from disease.”

Now, in this particular case, the man who is asking compensation was a man who was suffering from an advanced disease in the mitral valve of the heart, and from enlargement of the heart, and it is found in fact that this condition was not due to the alleged accident but was of long standing, though possibly the appellant may not have been aware of the disease; that it was in its nature progressive, and was bound to manifest itself sooner or later, and would do so probably in the way in which it did, and might do so even when he was not engaged in active exercise.

Now, that seems to me to indicate a case where a man was suffering from a progressive disease which must sometime or other manifest such symptoms as he showed, and I cannot discover in any of the findings of the Sheriff anything to show that they were produced by what he was doing at the time of the alleged accident. He was engaged in ordinary work, and at a certain time while he was engaged in that work he felt this pain and shortage of breath, and he says that must have been from a strain which he received at that time. I do not see that there is any evidence of that, and I do not see that the Sheriff-substitute finds that there was; on the contrary, his seventh finding negatives that view.

In these circumstances it seems to me impossible to say that the finding of the Sheriff-substitute refusing compensation was wrong in point of law. He has not held it proved that the injury was caused by anything which happened in the employment; on the contrary, he has found that the appellant in this case has failed to prove that. In these circumstances it seems to me that if we sustained the appeal we would be interfering with the arbitrator's finding in fact, which we have no right to do. Mr Mackay in the course of his speech repeatedly suggested that if we would only look at the evidence we might come to the opposite conclusion. That is not within our province. If the Sheriff-substitute gives us a sufficient statement of the facts he found proved, and of the decision he came to, it cannot be interfered with on the ground that he has not decided the case correctly in fact. We are bound to accept the facts he has found proved, and his finding that certain facts are not proved. On these grounds I think we cannot interfere with his judgment. I think the proper course for us is to dismiss the appeal.

LORD DUNDAS.—I entirely agree. No doubt the Courts have sometimes gone very far in these cases in favour of the workman, and probably rightly so, because these Acts were designed for the benefit of workmen; but I do think there is a very real danger of the Court going too far, such as was pointed out by Lord President Dunedin in the case of *Coe v. The Fife*

Coal Company,¹ when he referred to a situation "where one seems almost driven by the course of decisions, each of which gradually goes a little further than the one which preceded it, until at last you reach a point which, when the first decision was given, was probably not contemplated." I think that the facts in this case illustrate well the kind of point at which the Court ought to call a halt. No doubt what happened occurred in the course of the man's employment, but I cannot for myself see how it can be said to have been an injury by accident arising out of the employment. At all events, and this is sufficient for the purpose, I am totally at a loss to see how it can be affirmed that the Sheriff-substitute was bound so to find. The appellant's counsel naturally relied upon the well-known case of *Clover, Clayton, & Company v. Hughes & Company*² in the House of Lords—the "aneurism" case—which probably went as far in this region of the law as any case that has yet been decided. But the facts there were not the same as the facts here; and it is important to observe that the decision of the majority (and it was a very narrow majority) was expressly put upon the view that there was evidence upon which the learned County Court Judge, upon a conflict of evidence, was entitled to hold as he did in favour of the workman. That view is not applicable here. The Sheriff-substitute has held upon the facts that the man has not proved that he sustained an accident within the meaning of the statute; and among the facts, as your Lordships know, we have it that this man suffered from an advanced disease of the heart of long standing, which was bound to manifest itself sooner or later, and might do so even when he was not engaged in active exercise; that the duty of lifting these hutches was among his ordinary daily duties; and that it is not proved that the lifting of the hutches on 20th May 1910 accelerated the progress of the disease. In that state of the facts it seems to me that this is really a clear case, and that we should not be right if we were to hold that the arbitrator was not entitled to find as he did. I see no reason to doubt that the finding was correct; but, at all events, it seems to me impossible to say that it was not such as the arbitrator was entitled upon the facts to arrive at.

LORD SALVESEN.—I entirely agree. I think this is a very clear case indeed. It would have been a difficult case perhaps if the Sheriff-substitute had decided the other way, but, having come to the conclusion that there was no evidence that the progressive disease from which this man suffered had been in any way affected by the work in which he was engaged, it seems to me that he could come to no other result than that the man did not suffer injury by reason of any accident arising out of his employment.

LORD GUTHRIE.—I agree. The appellant's argument depended upon three mistaken assumptions. The first is that the question raises the correct issue, whereas the proper question is not whether the arbitrator was justified, but whether he was entitled, to find as he did. The second is that the appellant can make use of facts, which the arbitrator has not found, in

¹ 1909 S. C. 393, at p. 396.

² [1910] A. C. 242.

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Jan. 13, 1912. answer to difficulties put to him which he could not answer without bringing in these facts; but although it is the practice of counsel when hard pressed to take this course, it is obvious that we cannot look at statements by medical men or by fellow-workmen which the Sheriff-substitute has not accepted. And third, the appellant seems to have mixed up pain and disease. There may have been excessive strain, and that may have produced pain; the question is, did that contribute to the progress of the disease? But the Sheriff-substitute has held on that question that it is not proved that the lifting of the hutches accelerated the progress of the disease. That seems to satisfy the test laid down by the Lord Chancellor when he says in the case of *Clover, Clayton, & Company*,¹ that the question is, "did he die from the disease alone or from the disease and employment taken together, looking at it broadly? Looking at it broadly, I say, and free from over-nice conjectures, was it the disease that did it, or did the work he was doing help in any material degree?"

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—
Lord Guthrie.

I therefore agree that the question should be answered as your Lordship proposes.

THE COURT pronounced this interlocutor:—"Answer the question of law by declaring that the arbitrator was entitled to find on the facts stated in this case that the appellant had not proved an 'accident' within the meaning of the statute; therefore affirm the award of the arbitrator, and decern. . . ."

ST CLAIR SWANSON & MANSON, W.S.—W. & J. BURNES, W.S.—Agents.

No. 58.
—
Jan. 20, 1912.
—
Edgar v.
Hector.

MELVIN EDGAR, Pursuer (Appellant).—*Wilson, K.C.*—*T. D. K. Murray.*
WILLIAM CUNNINGHAM HECTOR, Defender (Respondent).—*Constable, K.C.*—*J. A. T. Robertson.*

Error—Essential error induced by misrepresentations—Sale—Rescission—Error as to substance of articles sold—Modern imitations of antique furniture.

A dealer in modern and antique furniture sold to a customer ten ribbon-backed chairs, which he described in a receipt for part payment of the price as a "set of antique mahogany chairs," but which proved not to be genuine antiques, but to be modern imitations. The price stipulated was a fair price for the articles actually sold. The seller gave no history of the chairs or guarantee that they were antique, but he made certain representations, held not to be fraudulent, which induced the buyer to believe that he was buying a set of old chairs.

Circumstances where held that there had been such misrepresentation as to the substance of the articles sold as to entitle the buyer to rescind the contract.

1ST DIVISION. IN June 1911 Melvin Edgar, a furniture dealer in Glasgow, brought an action in the Sheriff Court there against William Cunningham Hector, an artist, in which he claimed payment of the balance of the price of a set of chairs, sold by him to the defender at a price of £145, to account of which the defender had paid £95.

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¹ [1910] A. C. 242, at p. 247

In answer the defender stated that the chairs in question were sold to him on the representation that they were genuine antique chairs of a period, and at least 100 years old; but that after delivery, and after making the payment to account of their price, he had discovered that the chairs were "modern faked chairs," made within the last three to five years, and so treated as to have the appearance of being old chairs, and that he had consequently rejected them. He also stated a counter claim for the £95 which he had paid to account of the price.

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A proof was allowed and led. The following narrative of the facts established at the proof is taken from the opinion of Lord Mackenzie:—

"The pursuer carries on business in Glasgow, and designs himself as a dealer in antiques. On 18th May 1910 he sold to the defender six small and two arm ribbon-back mahogany chairs at the price of £120; the defender agreed to pay the pursuer a further sum of £25 if the pursuer could procure for him two additional small chairs. On the same date the pursuer handed the defender a memorandum in these terms:—'241 Eglinton Street, Glasgow, 18th May 1910.—From Edgar's Antique Stores, Dealer in Furniture, Curios, Gold and Silver Watches, Rings and Jewellery of every description.—Bought of M. Edgar, set mahogany chairs, 6 small, 2 arms, for £120. WILLIAM C. HECTOR, 164 Bath Street. Same as two shown.' When the defender agreed to buy the chairs he had only seen two of them, an armchair and a small chair, these being all that there were in the pursuer's shop. The chairs were sold without a guarantee that they were antique. On 1st June the pursuer delivered ten chairs to the defender, and was paid £95 to account of the price. The pursuer granted a receipt in these terms:—'Received £95 in part payment of £145 for set Antique Mahogany Chairs. June 1st, 1910. (Signed) M. EDGAR.' On 4th June he called on the defender for payment of the balance of £50. Between the 1st and 4th of June the defender had ascertained, what has been proved to be the fact, that the chairs were not antique, but were reproductions, and refused to make payment."

Evidence was also led to the effect that the chairs in question were purchased by the pursuer from William Bissett, another furniture dealer in Glasgow, who in turn had procured them from a firm in London, who manufacture such articles. Bissett, in the first instance, so procured eight chairs, two of which, supplied by him to the pursuer for the purpose of exhibition and sale, were those originally seen by the defender. He subsequently procured two more from the same source. Bissett gave no history of the chairs to the pursuer, and warned him not to sell them as antiques.

The defender's evidence as to the representation made to him by the pursuer at an interview on the 18th of May, was as follows:—
"He told me that he found he could only give me eight chairs, because the people who had them had sold two of them to somebody else. I asked him if he would allow me to call and examine the remainder of the set and he told me the people had sent down two, an armchair and a small chair, and we would have one of each to examine in the shop, as they did not want people coming about and looking at the chairs. He told me that I would get the chairs at the end of May. I told him why I thought it important to see the whole set of chairs. I thought it was unsatisfactory seeing the two,

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because some of the others might be broken and might be replaced by some reproductions. The pursuer told me he had examined them all himself, and that he could answer for them. In the course of discussion about the chairs the pursuer spoke to me of the fineness of the carving, and he said that we could not get such work done nowadays, and if we could we could not get the class of wood to do it, and that we could not get men to do it. He said we could not get either the men to do it or the work. He also told me that he thought that they were very fine chairs, and they ought to be put in a museum, because they were too good for use. I asked him for the history of the chairs. I asked him if they were in the hands of the people, and I told him to find out where they had bought them, and all about them. I understood they were in the hands of some private party when I asked these questions, because the pursuer explained that the other people had sold two of the chairs out of the set. I was rather annoyed at that, because I thought it was a great shame to break up the set, and I thought he should try and get them back. He said that he would, but he did not wish to offend the people, because they had some old hall furniture that he hoped to buy from them. When I asked him to get the history of the chairs for me he said that I knew as much as he did, but he said he would see what he could do. He did not say where he would get it from. He said he would ask the people for the history of the chairs, and where they got them from . . . (Q.) What impression did you have in your mind at the time as to the age of the chairs? (A.) That they were antique, and what I was looking for. That was the impression his statements left in my mind at the time. I was not looking for reproductions of antique at that time."

Evidence was also led as to an interview between the parties on 4th June, when the defender repudiated the bargain, the pursuer's attitude at which was thus described by the Sheriff-substitute:—"The attitude of the pursuer was not that of a merchant who had sold, without any representations to a customer, the chairs. His attitude, as I read the evidence, was that of a merchant who had not supplied what he had professed to sell, or, to be more accurate, what he had sold."

On 19th December 1910 the Sheriff-substitute (Craigie) pronounced this interlocutor:—"Finds in fact (1) that the defender bought, under essential error induced by the representations of the pursuer, ten chairs at the price of £145, the representations being that said chairs were antique, whilst in fact they were not so; (2) that on 1st June 1910 the defender, whilst unaware of the true nature of said chairs, paid £95 to account of said £145: Sustains the plea in law for the defender in so far as it bears that the contract of purchase of the chairs was induced by the misrepresentations of the pursuer: Repels the pleas for the pursuer, and assoilzies the defender from the conclusions of the petition: Sustains the counter-claim for defender and decerns against the pursuer for £95." *

* "NOTE.—[After referring to the evidence]—In giving decree in favour of the defender, I proceed on the simple ground that the defender, when he agreed to purchase the ten chairs, and paid the £95 to account thereof, did so under essential error induced by the representations of the pursuer (see *Stewart v. Kennedy*, 17 R. (H. L.) 25). I accordingly do not require to consider, on the one hand, how far the decision in *Hill v. Gray*, 1816, 1

On 31st March 1911 the Sheriff (Millar), on appeal, adhered to Jan. 20, 1912. this interlocutor.

The pursuer appealed to the Court of Session, and the appeal was heard before the First Division (without Lord Johnston), on 6th December 1911. Edgar v.
Hector.

Argued for the appellant;—The case must be approached from the point of view that had been arrived at by the Sheriffs on the evidence, viz., that there had been no guarantee of antiquity, that the pursuer's representations were not fraudulent, and that the price stipulated had been a fair one for the articles actually sold. The latter circumstance was in itself sufficient to distinguish this case from the case of *Patterson v. Landsberg*,¹ but in that case it was also to be noted that the representations were made by a wholesale dealer who must be presumed to have known the true nature of the articles he sold, while the present case concerned a middleman to whom such knowledge should not be attributed. In these circumstances the doctrine of *res ipsa loquitur* did not apply, and the question was, did the defender, in making his bargain, rely on misrepresentations of fact made by the pursuer?² Such a situation was not disclosed by the evidence. Any representations that were made were representations not of fact but of opinion, and on matters with regard to which the defender was as capable of forming an opinion as the pursuer. The most that could be said against the pursuer was that he had passively acquiesced in the self-deception of the buyer, and this was not a sufficient ground for rescission of the contract.³ The decision in *Stewart v. Kennedy*⁴ did not apply. The question in that case was as to the meaning of a written contract, and the contract was reduced on the ground of essential error. Essential error in a case of this kind must be error as to the identity of the thing sold. Here, if there was any error, it was error as to certain qualities of the thing, and that was not a sufficient ground for rescission.

Argued for the respondent;—The Sheriffs were right in holding that the contract was entered into under essential error, induced by the false representations of the pursuer. In these circumstances, even in the absence of fraud, the defender was entitled to be relieved of his bargain. There was no doubt as to the nature and effect of these representations. The pursuer held himself out as a dealer in antique furniture, and described the chairs as "antique" in the receipt. He now admitted that they were not genuine. By verbal representations he knowingly conveyed to the defender the impression that the material and workmanship of the chairs proved their antiquity, and that they had in fact been obtained as a set from some private person.

Starkie, 434 (see *Keats v. Earl of Cadogan*, 1851, 10 C. B. 591, at page 600, and Lord Chelmsford in *Peak v. Guernsey*, 1873, L. R., 6 (H. L.) 377, at 390), is still an authority on the law of sale; or on the other hand, how far the principle enunciated by Lord Kyllachy in *Patterson v. Landsberg & Son*, (1905) 7 F., at p. 681, should, in a case like this, be applied. That principle is that the offer for sale of articles appearing to be antiques is in itself a misrepresentation on the principle of *res ipsa loquitur*, and that the seller of such articles is not entitled to leave the articles to speak for themselves, but is bound to displace the inferences which the appearance of the articles is, to his knowledge, bound to suggest."

¹ (1905) 7 F. 675.

² Pollock on Contracts, 8th ed., p. 598.

³ *Smith v. Hughes* (1871) L. R., 6 Q. B. 597.

⁴ (1890) 17 R. (H. L.) 25.

Jan. 20, 1912. He also concealed the fact that he had been warned against selling them as antiques. In these circumstances it was not necessary for the defender to show that these representations were the inducing cause of the contract, it was enough for him to show, as he had shown, that they had influenced him in arriving at his determination to buy.

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At advising on 20th January 1912,—

LORD MACKENZIE.—The question in this case is whether the Sheriff-substitute and the Sheriff were right in holding that the defender is entitled to set aside a contract of sale on the ground of essential error induced by the misrepresentation of the pursuer. [Here followed the narrative quoted above.]

He [the defender] had contracted to buy originals, not copies. He was thus in error as to the identity of the subject-matter of the contract. In such a case a misrepresentation made by the seller, even if innocent, if it induced the contract, will be a ground for rescinding it. Upon this matter I refer to *Stewart v. Kennedy*,¹ and the opinion of Lord Kyllachy in *Woods v. Tulloch*.² There is no question on the evidence that the defender believed he was buying antiques. That he had grounds for this belief is apparent from the expert evidence in the case. The chairs were what is termed in the parlance of the trade “faked.” Although the appearance of age and other appearances presented by the chairs in question may not constitute by themselves misrepresentations—although the case is not analogous to that of *Patterson v. Landsberg & Son*³—the appearance of the chairs cannot be left out of view as an element in the case. It cannot be said that the defender had only to look at the chairs in order to see that although he was contracting to get one thing he was getting another. I agree with the Sheriff that a case of fraud has not been established against the pursuer. The question, however, in the case is whether the defender’s essential error was induced by misrepresentations made to him by the pursuer.

The defender’s evidence is that the pursuer made statements to him which left the impression in his mind at the time that the chairs were antique and what he was looking for. The material statements made by the pursuer to the defender before the contract was entered into were that “we could not get such work done nowadays, and if we could, we could not get the class of wood to do it, and we could not get the men to do it.” The pursuer also said he thought they ought to be put in a museum, because they were too good for use. These were all statements calculated to influence the mind of a purchaser who was in search of the antique. The fact in regard to the chairs that the pursuer so represented is that the pursuer had bought first of all eight of them from Alexander Bissett & Sons, cabinetmakers and upholsterers, 235 Hope Street. Mr Bissett was examined as a witness, and depones that he warned the pursuer on more than one occasion against selling them as antique chairs. In his interview with the defender the pursuer told him he found he could only give him eight chairs, because the people who had them had sold two of them to somebody else. It plainly appears from the evidence that the pursuer conveyed the impression to the defender

¹ 17 R. (H. L.) 25.

² (1893) 20 R. 477.

³ 7 F. 675.

that what he was getting was a set of ten chairs. It was not the case that Jan. 20, 1912. there was a set of ten, two of which had been already sold. Bissett says ^{Edgar v.} he never told the pursuer that he had sold the other two, because he had ^{Hector.} never bought them then. He got other two chairs from the firm in London ^{Lord Mac-} who make these things, on the pursuer's representations that he could sell ^{kenzie.} other two. In spite of this the pursuer told the defender at the meeting on the 18th of May that he had examined all the chairs himself and that he could answer for them, and made this statement in consequence of an apprehension the defender had that some of the chairs which he had not seen might have been broken and replaced by reproductions. As has been already pointed out the defender had only seen two of the chairs when he made the contract. The conclusion, therefore, to which I have come is that the defender's essential error was induced by what the pursuer told him at the meeting on the 18th of May. It is necessary to advert to one passage in the defender's evidence in which he is represented as assenting to the view that the pursuer told him he could get no history of the chairs, and that he could give him no guarantee. This passage in the proof is not consistent with what the defender says earlier in his evidence, or indeed with what the pursuer admits in his own examination. As regards the receipt granted by the pursuer on the 1st of June, he states he would not have signed it if he had noticed the word "antique" in it, but I do not think this can be taken off his hands.

I take the same view as the Sheriff-substitute in regard to what passed between the pursuer and the defender at their meeting on 4th June. It is only fair to the pursuer to recognise the fact that £145 was not an unfair price for the chairs, and that if the chairs had been genuine, they would have been worth a great deal more. The defender, however, does not seem to have been possessed of the necessary knowledge to be aware of this fact. For the reasons above stated I am of opinion that he is entitled to be relieved of his bargain.

I therefore think the judgments appealed against should be affirmed.

LORD PRESIDENT.—I cannot conceal from myself that I have had considerable difficulty in coming to a decision, because I think the line is very narrow in a case like this. The seller here had three great points in his favour, first, that he did not get a price which was more than the fair market value of the articles sold; second, that the buyer saw at least two of the articles purchased, and, it may be presumed, formed his own opinion about them; and third, that the case falls far short of anything like fraudulent misrepresentation on the part of the seller. The latter point is admitted by both the learned Sheriffs, and especially by the learned Sheriff who saw the parties. But in the end I have come to the same conclusion as has just been expressed by Lord Mackenzie.

I do not think that the law on this matter is anywhere better expressed than by Lord Blackburn in the case of *Kennedy v. Panama, &c., Mail Company*.¹ Lord Blackburn says, at p. 587, "Where there has been an innocent misrepresentation or misapprehension, it does not authorise a

¹ (1867) L. R., 2 Q. B. 580.

Jan. 20, 1912. rescission unless it is such as to show that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration . . . the principle of our law is the same as that of the civil law, and the difficulty in every case is to determine whether the mistake or misapprehension is as to the substance of the whole consideration, going, as it were, to the root of the matter, or only to some point, even though a material point, an error as to which does not affect the substance of the whole consideration." In the course of the passage from which I have quoted, Lord Blackburn refers to the illustration of Ulpian which has been so often quoted, and which I may read in Mr Mackintosh's translation¹ instead of the original Latin: "If I buy a female slave, supposing her to be a virgin when she is not so, the sale will stand, for there was no mistake about the sex. But if I sell you a slave woman, and you suppose you are buying a slave boy, the contract is an absolute nullity, because there is a mistake about the sex." There is another passage of Ulpian to be found in the same excellent book of Mr Mackintosh,² which goes even nearer to the precise class of trouble which we have here, and it is this: "But what if both parties were mistaken about the nature and quality of the thing? for example, if I thought I was selling and you thought you were buying gold when it was bronze; or suppose that an heir bought from his co-heirs at a fancy price a bracelet, described as being of gold, but afterwards found to consist in great part of alloy. It is certain that the sale is good because there is some gold in it. For if a thing which I took to be pure gold contains an admixture of gold, the sale stands, but if bronze be sold as gold the sale is void." In applying that to the matter in hand, the whole question, I think, comes to be whether the chairs were sold and bought as antiques. Now, I agree that there has been no fraudulent representation and no warranty by the seller; but for the same reasons as Lord Mackenzie has detailed, it is quite clear that the seller certainly induced the buyer to consider that he was buying a set of old chairs which were got from somewhere as a set, and about which the seller was in a position to say, "You can get no such workmanship nowadays." That being so, I think here there was a misrepresentation as to the real thing itself and not merely as to the quality of the thing; and therefore, upon the whole matter, I come to the same conclusion as Lord Mackenzie, which is in the result the same as that arrived at by the learned Sheriffs, though not based precisely upon the same grounds.

The Lord President intimated that LORD KINNEAR, who was absent at advising, concurred in his judgment.

LORD JOHNSTON, who had been absent at the hearing, delivered no opinion.

THE COURT affirmed the judgments of the Sheriff-substitute and of the Sheriff, of new assoilzied the defender, and sustained his counter claim.

JAMES M'WILLIAM, S.S.C.—LAING & MOTHERWELL, W.S.—Agents.

¹ Roman Law of Sale, p. 33, Ulp., lib. xxviii., ad Sab.

² *Ibid.*, p. 35.

WALTER CHARLES COPELAND, Pursuer (Reclaimer).—*Party*.
 THE RIGHT HONOURABLE IVOR BERTIE, BARON WIMBORNE, AND
 ANOTHER, Defenders (Respondents).—*Sandeman, K.C.—Wilton*.

No. 59.

Jan. 20, 1912.

Process—Reclaiming—Effect of reclaiming note in bringing prior interlocutor under review—Interlocutor importing appointment of proof—Finality—Court of Session Act, 1868 (31 and 32 Vict. cap. 100), secs. 28, 52—Act of Sederunt, 10th March 1870, secs. 1 (3) and 2.

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 Wimborne.

Held that a reclaiming note against a judgment of the Lord Ordinary, disposing of the cause, did not submit to review under sec. 52 of the Court of Session Act, 1868, a prior interlocutor appointing proof which had not been reclaimed against within six days, in respect that that interlocutor had become final under sec. 28 of that Act, and secs. 1 (3) and 2 of the Act of Sederunt, 10th March 1870.

ON 25th November 1910 Walter Charles Copeland, barrister-at-law, brought an action against the Right Honourable Ivor Bertie, Baron Wimborne, concluding for payment of the sums of £700, £899, and £3500.

2D DIVISION.
 Lord Guthrie.

The pursuer averred that in 1900 the defender employed him to perform certain services in connection with the publication of *The Rock*, a newspaper in which the defender was interested and which ceased to exist in 1905. The sums sued for were for services rendered and disbursements made on the authority, as was alleged, of the defender.

The defender pleaded, *inter alia*;—(3) The pursuer's averments can only be proved by the writ or oath of the defender.

On 26th October 1911 the Lord Ordinary (Guthrie) pronounced this interlocutor:—"Sustains the defender's third plea in law, and finds that the pursuer's averments can only be proved by the defender's writ or oath: Allows to the pursuer such restricted proof, and appoints the same to be taken on a day to be afterwards fixed." *

* "OPINION.—This record contains many expressions which have no recognised legal meaning, and are therefore not appropriate for use in a legal pleading. Some of these expressions are even of doubtful popular significance. The condescendence bears evident marks of the pursuer's own revision. But, as afterwards explained, I think he has not succeeded in making it altogether irrelevant.

"If the case now goes for investigation, it will do so in the most unfavourable circumstances for the pursuer, in view of his unexplained delay, the complications arising from the liquidation of *The Rock* Company, the admitted destruction of important papers, for a part of which destruction the pursuer must himself be held responsible, and the impossibility, through death and bodily infirmity, of leading certain important oral evidence.

"The case made by the pursuer is, on the face of it, an improbable one; and, although a diligence was granted to the defender before the closing of the record for recovery of all documents in the hands of the pursuer vouching the pursuer's claim, no such writing has been produced by him. It is stated that the defender's health is not such as to admit of a reference to his oath, and it seems probable that no writings exist to establish the pursuer's case. In these circumstances it may turn out that even if the pursuer is entitled to a proof by writ or oath, the only practical question is whether he has averred a relevant case for inquiry *prout de jure*. [His Lordship then examined the pursuer's averments and stated his reasons for holding that the contract alleged was unusual and anomalous.]

"In these circumstances, if the pursuer has a relevant case of employ-

Jan. 20, 1912. On 10th March 1911 Lady Wimborne was appointed the receiver to administer the defender's estate under an order of the Masters in Lunacy in England, and on 9th November 1911 a medical certificate was lodged (No. 112 of process), certifying that the defender, on account of his mental state, was unable to be examined on any subject, and that there was no prospect of an improvement in his health.

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The pursuer produced no writ of the defender other than certain letters enclosing money in answer to appeals for help in carrying on *The Rock*.

On 9th December 1911 the Lord Ordinary pronounced the following interlocutor:—"The Lord Ordinary sists the Right Honourable Cornelia Henrietta Maria, Baroness Wimborne, as a party defender in the action, in terms of the minute of sist, No. 113 of process, and holds the defences stated to the action as the defences of the minuter; and, having considered the cause, finds that the pursuer has no proof by writ to offer: Finds, further, that in respect of the medical certificate, No. 112 of process, the defender, Lord Wimborne, is not in a state of health to emit on oath, therefore assoilzies the defenders from the conclusions of the summons, and decerns: Finds no expenses due to or by either party."

The pursuer reclaimed, and the case was heard before the Second Division (without Lord Guthrie) on 18th and 20th January 1912.

Argued for the pursuer;—The pursuer was entitled to a proof of his averments *prout de jure*. His averments were relevant, and there was nothing of an unusual or anomalous nature about the contract between himself and the defender¹: it was an ordinary contract of agency. The interlocutor of 26th October was brought under review by the present reclaiming note, by virtue of section 52 of the Court of Session Act, 1868.* Even if the proof were restricted the defender

ment as the defender's agent (and I have not felt myself able to say he has not), the case seems to me clearly to fall under a class of case covered by the rule limiting inquiry to writ or oath."

¹ Forbes v. Caird, (1877) 4 R. 1143.

* The Court of Session Act, 1868 (31 and 32 Vict. cap. 100), enacts:—

Sec. 28. "Any interlocutor pronounced by the Lord Ordinary as provided for in the preceding section . . . shall be final, unless within six days from its date the parties or either of them shall present a reclaiming note against it to one of the Divisions of the Court by whom the cause shall be heard summarily. . . ."

Sec. 52. "Every reclaiming note, whether presented before or after the whole cause has been decided in the Outer House, shall have the effect of submitting to the review of the Inner House the whole of the prior interlocutors of the Lord Ordinary of whatever date, not only at the instance of the party reclaiming, but also at the instance of all or any of the other parties who have appeared in the cause, to the effect of enabling the Court to do complete justice, without hindrance from the terms of any interlocutor which may have been pronounced by the Lord Ordinary, and without the necessity of any counter reclaiming note"

The Act of Sederunt, 10th March 1870, enacts:—

"I. That the 27th section of the [Court of Session Act, 1868] shall be altered to the effect of substituting for the enactments thereof the following provisions:—

"At closing the record the Lord Ordinary shall require the parties to state whether they renounce probation; and—"

"(3) If the parties are at variance as to whether there shall be proof, or as to what proof ought to be allowed, or if they or any of them shall main-

should not be assoilzied, for though he could not emit on oath, his letters, enclosing money for carrying on the newspaper, were sufficient written proof of the contract. The defences were lodged when the defender was insane, and had never been authorised by him.¹

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Argued for the defender;—The motion for a proof at large was incompetent. The interlocutor of 26th October, not having been reclaimed against within six days of its date, became final, and was not submitted to review by the present reclaiming note.² The general rule laid down in section 52 of the Act of 1868 was subject to exception,³ and did not apply to the case of an interlocutor which was expressly declared to be final. In *Stewart v. Clark*⁴ there was not, as here, an appointment of proof, within the meaning of section 2 of the Act of Sederunt, 10th March 1870. Further, the pursuer's averments were irrelevant and wanting in specification, and in any event the contract averred was of such an anomalous character that it could only be proved by the defender's writ or oath.⁵ The defender was entitled to absolvitor. The defender could not be examined on account of his health, and the letters referred to were insufficient to prove the constitution of the alleged contract.⁶ Any objection to the validity of the defences was obviated by the sisting of the receiver.⁷

LORD JUSTICE-CLERK. — On 26th October 1911 the Lord Ordinary appointed proof, limited to the defender's writ or oath, to be taken on a day to be afterwards fixed. This interlocutor was not reclaimed against; and on 9th December,—proof by oath being impossible owing to the defender's state of health, and no proof by writ having been offered,—decree of absolvitor was pronounced. The pursuer now reclaims against this interlocutor, and moves for a proof *prout de jure* of his averments. I am clearly of opinion that this motion cannot be granted. The interlocutor of 26th October 1911, by which the method of proof was settled was not reclaimed against within six days, and therefore, by the operation of section 28 of the Court of Session Act, 1868, and sections 1 (3) and 2 of the Act

tain that one or more of the pleas stated on the record should be disposed of before determining on the matter of proof, the Lord Ordinary shall appoint the cause to be enrolled in a roll to be called the procedure-roll; and the cause shall be forthwith enrolled in the said roll by the Lord Ordinary's clerk; and, after hearing the parties in the said roll, the Lord Ordinary shall pronounce such interlocutor as shall be just; and may either appoint proof to be taken, or dispose of such pleas on the record as he thinks ought to be disposed of at that stage . . .

"II. That the provisions of the 28th section of the said statute shall apply to all the interlocutors of the Lord Ordinary hereinbefore referred to, so far as these import an appointment of proof, or a refusal or postponement of the same."

¹ Mitchell v. Whitelock, (1864) 3 Macph. 229.

² Court of Session Act, 1868, sec. 28; Act of Sederunt, March 10, 1870, sec. 1 (3), 2.

³ Cf. North British Railway Co. v. Gledden, (1872) 10 Macph. 870.

⁴ (1871) 9 Macph. 616.

⁵ Garden v. Earl of Aberdeen, (1893), 20 R. 896; M'Murich's Trustees v. M'Murich's Trustees, (1903) 6 F. 121; Woddrop v. Speirs, (1906) 44 S. L. R. 22; M'Fadzean's Executor v. M'Alpine & Sons, 1907 S. C. 1269.

⁶ Kennard & Sons v. Wright, (1865) 3 Macph. 946.

⁷ Lynch v. Stewart, (1871) 9 Macph. 860.

Jan. 20, 1912. of Sederunt, 10th March 1870, it has become final and not subject to review. The pursuer is not in a position legally to ask that he shall now be allowed any other proof than that appointed by the Lord Ordinary. He referred to section 52 of the Court of Session Act, 1868, and maintained that the present reclaiming note brought under review all the previous interlocutors, including the interlocutor of 26th October; but in my opinion section 52 has no application to the case of an interlocutor which has become final under section 28.

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Clerk.

This is sufficient for the disposal of the case. Reference to Lord Wimborne's oath is admittedly impossible, and no writ of the defender has been produced which can support the pursuer's claim. The pursuer being thus unable to substantiate his claim by the only mode of proof which is open to him, it follows that the defender is entitled to absolvitor. It is therefore unnecessary to consider the relevancy of the pursuer's averments, his delay in bringing the action, or any of the other points which were raised at the debate. I should only say that it is unfortunate, especially as the decision turns on a question of procedure in our Courts, that the pursuer did not have the assistance of counsel of this bar.

LORD DUNDAS.—I agree. The interlocutor of the Lord Ordinary of 26th October sustained the defender's third plea in law, found that the pursuer's averments could only be proved by the defender's writ or oath, and allowed to the pursuer "such restricted proof," on a day to be afterwards fixed. That interlocutor was allowed to become final, because it was not reclaimed against within six days. I do not think the reclaimer can pray in aid, as he sought to do, the 52nd section of the Court of Session Act, 1868, by which in general terms it is provided that every reclaiming note brings under review all prior interlocutors of the Lord Ordinary, because it seems to me that the section cannot mean that such a reclaiming note is to bring up an interlocutor which, by force of an earlier section of the same statute, has already become final. I am not aware of any decision precisely settling the point, but that is the view laid down by Mr Mackay in his standard text-book on the subject at p. 304, where he says that the wide power of section 52 is subject to two limitations, one of which is that interlocutors settling the mode of proof are final if not reclaimed against within six days. If this view be correct, as I think it is, I agree that it ends the matter; because, while it is technically competent to reclaim against the interlocutor of 9th December, still, if the earlier interlocutor is not subject to review, there is really nothing left to reclaim about. It is not necessary for us to say whether Lord Guthrie's decision of 26th October was right or wrong. I have formed no concluded opinion upon that matter, although I see no reason to doubt that it is right. But I desire to add, and I think it is perhaps fair to the pursuer to do so, that, speaking for myself, I have much graver doubts than the Lord Ordinary says he has,—and he says he has some,—as to whether there is really any relevant case at all. Although I have read the record more than once, and have heard it read, I have the greatest difficulty in formulating in my own mind what sort of contract is founded on. We were told that it is a contract of agency; on the other hand, parts of the record seem to point to a contract of service. I confess

I have not been able to discover with any degree of clearness what were the Jan. 20, 1912. duties or services undertaken to be performed by the pursuer, or upon what terms or to whom. It is unnecessary to form any decided or concluded view upon that matter, but I think it right to say that, as at present advised, I have very great doubt whether there are really here the bones of a relevant case at all.

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LORD SALVESEN.—I am of the same opinion.

THE COURT adhered, and found the pursuer liable in expenses since 9th December 1911.

STURROCK & STURROCK, S.S.C.—DAVIDSON & SYME, W.S.—Agents.

THE REVEREND ROBERT BROWNE AND OTHERS, Pursuers (Respondents). No. 60.

—*Lord-Adv. Ure—Morison, K.C.—Gillon.*

D. C. THOMSON & COMPANY, Defenders (Reclaimers).—

Murray, K.C.—H. P. Macmillan—W. L. Mitchell.

Jan. 26, 1912.

Browne v.
Thomson &
Co.

Reparation—Slander—Slander of a class—Title of individuals to sue—Innuendo—Province of jury.

A newspaper published an article on Ireland stating that in Queens-town instructions were issued by the Roman Catholic religious authorities that all Protestant shop assistants should be discharged, and that a shopkeeper who had refused so to act had had his shop proclaimed and had been forced to close it.

An action was brought by the Roman Catholic Bishop at Queens-town and six of his clergy (who averred that they were the Roman Catholic religious authorities referred to), in which they, suing as individuals, sought to recover separate sums of damages on account of the accusations in the article. The article was innuendoed as charging the pursuers with abusing their religious influence to procure the indiscriminate dismissal of Protestant shop assistants, and with ruining a shopkeeper's business.

Held (1) that the pursuers were entitled to sue for damages as individuals; (2) that it was for the jury to determine whether they or any of them were the Roman Catholic religious authorities referred to; and (3) that the article could bear the slanderous meaning put upon it.

ON 10th October 1911 The Most Reverend Robert Browne, Bishop of the Roman Catholic diocese of Cloyne, residing at Queenstown, County Cork, and six other clergymen of the Roman Catholic Church, who had all been resident in Queenstown as such clergy during the year 1909, brought an action against D. C. Thomson & Company, publishers and proprietors of the *Dundee Courier*, in which the Bishop of Cloyne sought to recover £2000, and the other pursuers sums of £500 each, as damages for a slander alleged to have been published by the defenders.

1ST DIVISION.
Lord Hunter.

The pursuers averred:—(Cond. 1) “ . . . The pursuers are the sole persons who exercised religious authority in name and on behalf of the Roman Catholic Church in Queenstown aforesaid in the year 1909. During that year the pursuers alone were the ‘Roman Catholic religious authorities’ of Queenstown, and alone had power and jurisdiction to issue instructions to the members of their religious

Jan. 26. 1912. institutions. . . .” (Cond. 3) “In the *Dundee Courier* of Tuesday, 15th August 1911, there appeared an anonymous article entitled:—
 —
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‘ SINISTER SIDE-LIGHTS ON HOME RULE.
 ‘ Irish Incidents showing feeling toward Britain.
 ‘ By one who has lived in Ireland.’

A print of said *Dundee Courier* of said date is produced herewith. Said article was written by or to the order of the defenders, and circulated widely throughout the United Kingdom. The defenders made every effort to secure for the article, and did secure for it, the widest publicity by pushing the sale of the number in which it appeared, and by permitting and encouraging the copying of it in other journals.” (Cond. 4) “The portion of said article, which is in the following terms:—‘ Religion makes all the difference in everything in Ireland. This incident will show what it can do and has done. Two years ago, in Queenstown, County Cork, instructions were issued by the Roman Catholic religious authorities that all Protestant shop assistants were to be discharged. One shopkeeper, a Roman Catholic, refused to discharge an assistant he had had for a number of years. The consequence was that his shop was proclaimed, and in three months he had to close and clear out, his stock being sold for next to nothing. He and his family left for Britain, where, as he said, he could employ an atheist if he liked,’—was written and published by the defenders of and concerning the pursuers. The defenders were well aware that the pursuers, the Bishop of Cloyne and the said Queenstown clergy, as at a date approximately two years prior to the publication of the said article, constituted and could alone constitute ‘the Roman Catholic religious authorities’ of Queenstown, and it was their intention in publishing and circulating the article complained of to slander the pursuers, and injure their reputations as office-bearers of the Catholic Church.” (Cond. 5) “In the portion of said article quoted in the preceding article of the condescendence, the pursuers are falsely, calumniously, and maliciously charged with having conceived, out of a spirit of religious intolerance and persecution, and to have put into operation, a criminal and illegal conspiracy to secure by an underhand use of ecclesiastical influence upon the Catholic laity the indiscriminate dismissal of all the Protestant shop assistants—a numerous body—in the employment of Roman Catholics in Queenstown, solely on account of their being Protestants; and further, with having caused the banishment from Ireland and ruined the business of a Roman Catholic shopkeeper in Queenstown for refusing to discharge a Protestant employee, when ordered to do so by the pursuers in the execution of their alleged illegal scheme and abuse of ecclesiastical authority and influence.” (Cond. 6) “The statements contained in the said article and the imputations therein conveyed are false, calumnious, and malicious. They constitute a gross libel on the pursuers. In point of fact, no instructions whatever were issued by the pursuers either individually or collectively, for the dismissal of Protestant shop assistants as alleged; no Roman Catholic shopkeeper was treated in the manner alleged, and the said story is a deliberately concocted tissue of false and calumnious statements, fabricated and published by the defenders in order to defame the characters and reputation of the pursuers and injure them in the eyes of the public.” (Cond. 7) “The said false and calumnious state-

ments have seriously injured all the pursuers in their character and reputation as priests and citizens. By them the defenders falsely and calumniously represented and intended to represent that the pursuers were unworthy of their offices in the Catholic Church; that they were guilty of criminal conspiracy according to the law of Ireland, and of tyranny over the members of their Church, and of gross oppression of the Protestant shop assistants in Queenstown, and that they were actuated by feelings of bitter animosity and hatred towards the inhabitants of Great Britain. . . .”

The pursuers pleaded, *inter alia*;—(1) The defenders having slandered the pursuers, as condescended on, are liable in damages. (2) The statements complained of in the said article being of and concerning the pursuers, and being false and calumnious, the pursuers are entitled to reparation.

The defenders pleaded, *inter alia*;—(2) The averments of the pursuers being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed. (3) The defenders, not having slandered the pursuers, ought to be assoilzied. (4) The material averments of the pursuers being unfounded in fact, the defenders ought to be assoilzied.

On 9th January 1912 the Lord Ordinary (Hunter) approved of the following issue for the trial of the cause:—“It being admitted that on or about 15th August 1911, the defenders printed and published in the *Dundee Courier* of that date an article entitled ‘Sinister Side-Lights on Home Rule,’ of which the schedule appended hereto contains an extract—

“Whether the statements in said extract, or part thereof, are of and concerning the pursuers, or any of them, and falsely and calumniously charge them with abusing their religious influence over the Catholic laity to procure the indiscriminate dismissal of all Protestant shop assistants in the employment of Catholics in Queenstown, and with ruining the business of a Roman Catholic shopkeeper who had refused to discharge a Protestant employee, to the loss, injury, and damage of the pursuers?

“Damages laid as follows:—

“The Bishop of Cloyne,	.	.	.	£2000
The Rev. Thomas Madigan,	.	.	.	500
The Rev. Cornelius Corbett,	.	.	.	500
The Rev. Denis O’Connor,	.	.	.	500
The Rev. John O’Donoghue,	.	.	.	500
The Rev. David Kent,	.	.	.	500
The Rev. Wm. Francis Browne,	.	.	.	500

“ SCHEDULE.”

[The schedule contained the extract quoted *supra* from the article in the *Dundee Courier*.] *

* “ OPINION.— . . . The defenders maintained two points to me (first) that the article did not refer to the pursuers, and (second) that it was not slanderous. It appears to me that both these points must be left to the jury. As regards the first, I think a jury would or might be entitled to hold that the article attacked the conduct of the Roman Catholic religious authorities in Queenstown, and was therefore of and concerning the pursuers. As regards the second, I cannot agree with the argument of the defenders that there is nothing in the article except a general railing accusa-

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The issue proposed by the pursuers had contained no innuendo, and the issue in the form allowed was adjusted by the Lord Ordinary.

The defenders reclaimed, and the case was heard before the First Division (without Lord Johnston) on 26th January 1912.

Argued for the reclaimers;—The language of the article did not support an innuendo either in terms of condescendence 5 or of condescendence 7, because there was nothing in the article to connect the pursuers with the charges made. It was not even said that the instructions had been issued by the Queenstown authorities, much less by the pursuers. [The LORD PRESIDENT referred to *Hulton & Co. v. Jones*.¹] Even if the article could be read as referring to the Queenstown authorities, it was merely a libel of a class, and gave no right of action to individuals who might be included in it.² It was only when the individual was named or clearly indicated, and had thereby suffered patrimonial loss, that an action at his instance would lie.³

Counsel for the respondents were not called upon.

LORD PRESIDENT.—As the pursuers are content with the issue as adjusted by the Lord Ordinary, I do not think it is necessary to call upon them for a reply. I think it is perfectly clear on principle, and certainly on authority—I refer to the case of *Hulton & Co. v. Jones*¹—that it is for a jury to say whether the pursuers are the persons who would be understood to be referred to as the “Roman Catholic religious authorities.” As to the question of libel, I think the innuendo proposed is a possible one. It is in the interest of the defenders themselves that I should not say more, and it would be prejudging the case to make up one’s mind whether the innuendo can properly be extracted from the language used before the whole circumstances are known. I think the Lord Ordinary has quite fairly put

tion, or what might be regarded as attributing meritorious conduct to the pursuers from the standpoint of those professing the same form of faith. Falsely to accuse the teachers of any form of Christian doctrine of such bigotry as leads them to compass the temporal ruin of those professing another form of Christianity appears to me an odious charge reflecting upon character and entitling those accused to maintain an action of slander against those making or circulating the charge. I shall therefore allow the pursuers an issue.

“The pursuers have proposed an issue without an innuendo, and putting to the jury the question whether the statements in the extract are of and concerning the pursuers, and are false and calumnious. In support of this form of issue I was referred to the case of *Macrae v. Wicks*, 13 R. 732; but that was an article reflecting upon an hotelkeeper’s conduct of his business, and is not a form of issue that has been widely followed in practice. I think that, where the slander is a reflection upon personal character, and is contained in a series of sentences, each one of which is not necessarily slanderous, it is usual to focus what is defamatory by means of an innuendo. The issue which I propose to allow is in the following terms:—[His Lordship stated the terms of the issue quoted *supra*].”

¹ [1910] A. C. 20.

² *M’Fadyen v. Spencer & Co.*, (1892) 19 R. 350, Lord Justice-Clerk, at p. 353, Lord Young, at p. 354.

³ *Hustler v. Watson*, (1841) 3 D. 366; *Williams v. Allan*, (1841) 3 D. 600.

the matter in the form of the issue which he has approved, and has quite fairly put upon the pursuers a considerable burden. If they discharge that burden I think they will be entitled to a verdict.

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The only other matter that was dealt with by Mr Murray was the question of individual and collective action. There might be difficult questions about such a matter, but I do not think any arise here. We are not dealing with any corporation or body known to the law, but merely with a certain congeries of individuals. I quite see that if the defence had been that the statement complained of was true, then there might have been a powerful argument that inasmuch as the statement was only made as to the joint action of a body of persons, no individual person could have a ground of action, even though able to show that he himself had no part in the initiation of the joint action. But there is no case of that sort here. I think it is quite evident that if a certain set of people are accused of having done something, and if such accusation is libellous, it is possible for the individuals in that set of people to show that they have been damnified, and it is right that they should have an opportunity of recovering damages as individuals. On the whole matter I think the reclaiming note should be refused.

Ld. President.

LORD KINNEAR.—I agree with your Lordship; and I express no opinion with reference to the greater part of the argument which we have heard from Mr Murray. Much of it will be available to him before a jury; and, at all events, it raises a question which it is not for us to decide. The question for the Court is whether the words complained of will bear the innuendo which it is sought to put upon them. If they will, then it is for the jury to say whether they do in fact bear that meaning—whether they would be understood by persons reading the article to convey a slanderous imputation. It is also a question of fact for the jury whether, holding the article to be libellous, it applies to the persons now complaining of it. That is a question of fact, and each of the pursuers must satisfy the jury that he is hit by the language of which they all complain. It might very well be that one might succeed and another might fail, but the question is one of fact, and the case must go to a jury.

LORD MACKENZIE concurred.

THE COURT adhered.

P. GARDINER GILLESPIE & GILLESPIE, S.S.C.—MENZIES, BRUCE-LOW, & THOMSON, W.S.—Agents.

No. 61.

Jan. 26, 1912.

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of Glasgow v.
Smithfield
and Argentine
Meat Co.,
Limited.

THE CORPORATION OF THE CITY OF GLASGOW, Complainers
(Reclaimers).—*Clyde, K.C.—M. P. Fraser—Russell.*

THE SMITHFIELD AND ARGENTINE MEAT COMPANY, LIMITED,
Respondents.—*Wilson, K.C.—D. M. Wilson.*

Public Health—Possession and sale of food—Seizure of meat erroneously alleged to be unsound—Claim for compensation—Liability of Local Authority—Public Health (Scotland) Act, 1897 (60 and 61 Vict. cap. 38), secs. 43, 164, 166.

Limitation of action—Public Health—Claim for compensation against Local Authority under Public Health Act, 1897—Application to Local Government Board for appointment of arbiter—Limitation of time for taking proceedings—Public Health (Scotland) Act, 1897 (60 and 61 Vict. cap. 38), sec. 166—Public Authorities Protection Act, 1893 (56 and 57 Vict. cap. 61), secs. 1, 3.

The Public Health (Scotland) Act, 1897, provides, by sec. 43, that a veterinary surgeon, approved by the local authority, may seize and carry away meat which appears to him to be diseased. Sec. 164 provides that compensation, to be ascertained in certain circumstances by arbitration, shall be paid to any person sustaining damage through the exercise of any of the powers under the Act. Sec. 166 provides that the local authority "shall not be liable in damages for any irregularity committed by their officers in the execution of this Act," and that every "action or prosecution" on account of any "wrong" done in any operation under the Act must be commenced within two months.

The Public Authorities Protection Act, 1893, provides, by sec. 1, that any "action, prosecution, or other proceeding" in respect of an act done in execution of an Act of Parliament must be commenced within six months of the act complained of, except (sec. 3) when the Act of Parliament applies only to Scotland and contains a limitation of the time for the action, in which case the Public Authorities Protection Act does not apply.

A veterinary surgeon, approved by the local authority under the Public Health Act, 1897, seized and carried away meat which appeared to him to be diseased, but which eventually did not prove to have been diseased. The owners of the meat claimed compensation from the local authority for the value of the meat, and presented an application to the Local Government Board, more than six months after the seizure of the meat, for the appointment of an arbiter to ascertain the compensation due. The local authority thereupon brought an action to interdict the application from proceeding.

Held (1) that the local authority were not relieved from liability by virtue of sec. 166 of the Public Health Act, the claim not being a claim of damages for an "irregularity" in the sense of that section, but a claim for compensation under sec. 164; (2) that the proceedings were timeously taken, in respect that this was not the case of an "action or prosecution" for a "wrong" in the sense of sec. 166 of the Public Health Act, which had to be brought within two months, nor of an "action, prosecution, or other proceeding" in the sense of sec. 1 of the Public Authorities Protection Act, which had to be brought within six months; and interdict refused.

Held further (*per* Lord Salvesen) that, in any event, an action, prosecution, or other proceeding on account of an act done under the Public Health (Scotland) Act, would fall within the proviso in sec. 3 of the Public Authorities Protection Act, so as to exclude the application of that statute.

IN June 1910 the Corporation of the City of Glasgow, being the Local Authority acting under the Public Health (Scotland) Act, 1897, presented a note of suspension and interdict against (1) The Smithfield and Argentine Meat Company, Limited, London, and (2) The Local Government Board for Scotland, for any interest they might have. In the note the complainers craved the Court "to interdict, prohibit, and discharge the respondents The Smithfield and Argentine Meat Company, Limited, and all others acting in their behalf or by their authority from in any way proceeding with or following forth a pretended application, dated 10th June 1910, made by them to the respondents the Local Government Board for Scotland, and bearing to be an application for the appointment of a sole arbiter to ascertain the pretended compensation to be paid to them by the complainers under section 164 of the Public Health (Scotland) Act, 1897; and further, to interdict, prohibit, and discharge the respondents the Local Government Board for Scotland from proceeding to the appointment of a sole arbiter, or from in any way acting under the said pretended application." *

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* The Public Health (Scotland) Act, 1897 (60 and 61 Vict. cap. 38), enacts:—

Sec. 43 (1). "Any . . . veterinary surgeon approved for the purposes of this section by the local authority may . . . inspect and examine (a) any animal alive or dead intended for the food of man which is exposed for sale . . . ; and if any such animal . . . appears to such . . . veterinary surgeon to be diseased, or unsound, or unfit for the food of man, he may seize and carry away the same . . . in order to have the same dealt with summarily by a Sheriff . . ."

Sec. 145 (11) (a). "Any question of disputed compensation . . . shall be referred to the arbitration of a sole arbiter appointed by the parties, or if the parties do not concur in the appointment of a sole arbiter, then, on the application of either of them, by" the Local Government Board for Scotland.

Sec. 164. "Full compensation shall be made . . . to all persons sustaining any damage by reason of the exercise of any of the powers of this Act . . . and in case of dispute . . . when the sum claimed exceeds £50, such compensation shall be ascertained and disposed of by a sole arbiter, appointed in manner set forth in section 145 (11) of this Act."

Sec. 166. "The local authority and the Board shall not be liable in damages for any irregularity committed by their officers in the execution of this Act, or for anything done by themselves in the *bona fide* execution of this Act; and every officer acting in the *bona fide* execution of this Act shall be indemnified by the local authority under which he acts in respect of all costs, liabilities, and charges to which he may be subjected; and every action or prosecution against any person acting under this Act on account of any wrong done in or by any action, proceeding, or operation under this Act shall be commenced within two months after the cause of action shall have arisen . . ."

The Public Authorities Protection Act, 1893 (56 and 57 Vict. cap. 61), enacts:—

Sec. 1. "Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance or execution, or intended execution, of any Act of Parliament, or of any public duty or authority, . . . the following provisions shall have effect:—(a) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of . . ."

Sec. 3. "This Act shall not apply to any action, prosecution, or other

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Answers were lodged by The Smithfield and Argentine Meat Company, Limited.

The following narrative of the facts, which were not disputed, is taken from the opinion of Lord Salvesen:—

“This action is brought to restrain the respondents from following forth an application for the appointment of a sole arbiter to ascertain the claim of compensation to be paid to them by the complainers under section 164 of the Public Health (Scotland) Act, 1897. The main pleas on which the action is founded are that the proposed proceedings are excluded by section 166 of the Public Health Act, or alternatively, by the provisions of the Public Authorities Protection Act of 1893.

“The facts out of which the claim arises are very simple. On 24th and 25th December 1908 Mr William Trotter, the veterinary surgeon appointed by the complainers and approved by them for the purpose of section 43 of the Public Health Act, seized a quantity of beef in the Meat Market of Glasgow under the powers of that section as being unsound and unfit for the food of man. The meat remained in a detention chamber until 30th December, when it was placed in a cold store. On 31st December a complaint was served at the complainers' instance on Duncan Perritt & Son, in whose premises it had been exposed for sale, and who are the agents of the respondents, the owners of the beef. This complaint was tried on 1st February and subsequent days before the Sheriff-substitute, who, on 4th March 1909, found the charge ‘not proven,’ and awarded Duncan Perritt & Son fifty guineas of expenses. On 5th March 1909 Messrs Perritt's law-agents wrote claiming compensation in terms of section 164 of the Public Health Act, and calling on the Corporation to concur in appointing a sole arbiter. On behalf of the respondents an intimation was made in similar terms to the town-clerk. The complainers refused to recognise the claim, and thereafter, on 10th June 1910, Messrs Russell & Duncan, on behalf of the respondents, wrote to the Secretary of the Local Government Board for Scotland asking the Board to appoint a sole arbiter to ascertain the compensation to be paid to the respondents. The present action was then brought to stop these proceedings.”

The amount of compensation claimed was £69, 3s. 1½d., being the value of the meat which had been seized and carried away.

The complainers pleaded, *inter alia*;—(1) The proceedings complained of being incompetent and excluded by section 166 of the said Public Health Act, suspension and interdict should be granted as craved. (2) In any event, the proceedings complained of are barred by the provisions of the Act 56 and 57 Vict. cap. 61. (3) The alleged claim of the respondents The Smithfield and Argentine Meat Company, Limited, not being a claim for compensation within the meaning of section 164 of the said Public Health Act, under which it bears to be made, suspension and interdict should be granted as craved.

The respondents pleaded, *inter alia*;—(3) The respondents The Smithfield and Argentine Meat Company, Limited, as the owners of

proceeding for any act done in pursuance or execution, or intended execution, of any Act of Parliament, . . . when that Act of Parliament applies to Scotland only, and contains a limitation of the time and other conditions for the action, prosecution, or proceeding.”

said beef being entitled to claim compensation in terms of the 164th section of the said Public Health Act, and to make the application complained of, the note should be refused.

On 26th January 1911 the Lord Ordinary (Ormidale) refused the prayer of the note, with expenses.*

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* "OPINION.—I was asked to determine this case on the assumption that the meat in question has been destroyed or at least damaged, and that the sole question between the parties is whether the claim made by the respondents is truly a claim for compensation under section 164 or a claim for damages under section 166 of the Public Health Act, 1897. If the claim is just the equivalent of an action of damages, then I understand it is not disputed that it is barred in respect that more than two months had elapsed after the cause of action had arisen before proceedings against the Corporation were taken.

"After careful consideration of the arguments *hinc inde* I have come to the conclusion that the respondents have tabled a competent and relevant claim for compensation under section 164 for the damage sustained by them in respect of the loss of the meat in question, and as the amount claimed is over £50, and the complainers have refused to concur in the appointment of an arbiter, that they were within their right in applying to the Local Government Board to appoint an arbiter to ascertain and dispose of the compensation.

"Section 164 enacts:—'Full compensation shall be made . . . to all persons sustaining any damage by reason of the exercise of any of the powers of this Act except where otherwise specially provided.'

"The present claim does not fall under any of the sections of the Act containing specific provisions as to compensation.

"The words of section 164 are very wide, and all that the respondents have to show in order to satisfy its requirements is that they have sustained damage, and that by reason of the exercise by the complainers of any of the powers conferred upon them by the Public Health Act, 1897.

"Section 43 confers a power upon any veterinary surgeon approved by the Local Authority for the purposes of this section to examine any article intended for the food of man, and if the article appears to him to be unsound or unfit for the food of man he may seize the same in order to have the same dealt with summarily by the Sheriff.

"The averments of the complainers are that Mr Trotter, a veterinary surgeon appointed by them and approved by them for the purposes of section 43, in virtue of the powers conferred on him by that section, seized the meat in question, and carried it away to be dealt with summarily, and that following upon the seizure a complaint was served upon the respondents' agents. The meat was kept in a detention chamber for a week and then deposited in a cold store. There apparently the greater part of it still remains. It has suffered some diminution because of the removal of various portions to be used, in the proceedings before the Sheriff, as evidence of the condition of the meat at the time of its seizure. On 4th March 1909 the charge was found not proven.

"The averment of the respondents in their application for the appointment of an arbiter by the Local Government Board is, that in consequence of the seizure and detention of the beef and of the handling it received in connection with the legal proceedings, the meat was rendered worthless, and that they have lost the value thereof, viz., £69, 3s. 1½d., which is the amount of compensation claimed by them from the Local Authority. It is to be noted that nothing but the value of the meat is included in the claim for compensation. The costs incurred by the respondents in the prosecution proceedings are not included, nor is any other item of expense incurred by the respondents in connection with the seizure of the meat.

"It was argued for the complainers that on the respondents' own state-

Jan. 26, 1912. The complainers reclaimed, and the case was heard before the Second Division (without Lord Dundas) on 19th and 20th December 1911.

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Argued for the reclaimers;—Section 164 of the Public Health (Scotland) Act, 1897,¹ under which the respondents' claim was brought, had no application to the present case. That section was intended to provide for cases analogous to the taking of land under the Lands Clauses Consolidation (Scotland) Act, 1845,² cases, namely, of damage suffered by an individual through the proper exercise of powers under the Act, such as making sewers, entering lands, or removing nuisances.³ The seizure of the meat was not an act of this nature. It was an act which, though executed with due regard to statutory procedure,⁴ proceeded on an error of judgment on the part of the veterinary surgeon, who believed the meat to be unsound when in fact it was not. Such an act was an "irregularity" in the

ment the damage sustained by them was, at the worst for them, the result of the combined action of the veterinary surgeon in seizing the meat and of the Local Authority in taking proceedings, that the veterinary surgeon is not the Local Authority, and that the Local Authority is not responsible for what injury he may do. They further maintained that the claim is truly one in respect of the blunder made by Mr Trotter in wrongly seizing meat which was in fact fit for the food of man, that in doing so he was not acting under the statute, and that therefore the proceeding was outwith the provisions of section 164 altogether—the assumption of that section being the right, and not a mistaken or blundering, exercise of the statutory power. For the wrong so done, it was said, the respondents' relief, if any, against Mr Trotter—if taken within two months—was to be found under section 166. The only complaint, it was further said, properly made against the Local Authority was the handling of the meat in the course of the proceedings before the Sheriff, and any liability for damages in respect thereof was covered and barred both by the initial clause of section 166 and also by the time limitation contained in that section.

"It seems to me that the seizure of the meat is the predominant factor, the *fons et origo mali*, and that the legal proceedings, viz., the complaint, and the proof following upon it, cannot be so dissociated from the seizure as to constitute a separate and distinct act or exercise of power by the Local Authority. They were the natural and necessary consequences of the seizure, and if the meat was lost to the respondents in the course of them, it was none the less lost by reason of the exercise of the powers conferred by the Public Health Act, in respect of which the meat had been seized. The whole *res gestæ*, from the seizure of the meat to the dismissal of the complaint, constituted one continuing exercise of power under the Act. I cannot hold that the Local Authority only came on to the scene, and that its liability only commenced, with the prosecution. It may be that the veterinary surgeon was entitled to act on his own initiative, but he was the approved official of the Local Authority, and their hand in carrying into effect the powers conferred by section 43.

"Nor can I discover anything of the nature of an irregularity in the action of the complainers from start to finish, and yet irregularity is the key-note to the application of section 166. The complainers, no doubt,

¹ 60 and 61 Vict. cap. 38.

² 8 and 9 Vict. cap. 19.

³ Public Health Act, 1897, sec. 20 (3) (b), 103, 109; Macdougall & Murray's Handbook of Public Health, Part I., p. 153.

⁴ Cf. Edwards v. Parochial Board of Kinloss, (1891) 18 R. 867; Mitchell v. Magistrates of Aberdeen, (1893) 20 R. 253; Sutherland v. Magistrates of Aberdeen, (1894) 22 R. 95.

sense of section 166 of the Act, for which the reclaimers were not liable in damages. If the respondents' reasoning were sound, it would lead to the conclusion that they would have been entitled to compensation even if the meat had turned out to be unsound, which was absurd. Further, it was a "wrong" in the sense of the latter part of the same section, and the application for appointment of an arbiter was an "action," and was therefore barred by the fact that it had not been made till more than two months after the date of the operation. The cases of *Bater*¹ and *Walshaw*,² on which the Lord Ordinary relied, were distinguishable, in respect that they were decided under a statute which contained no section equivalent to section 166 of the Public Health Act, 1897. It might well be that circumstances might arise which, assuming the respondents' construction of the section to be correct, would give a good claim for compensation under section 164 but for the protection to the Local Authority provided by section 166, and accordingly decisions under an Act which provided no such protection were of no value as authorities in the present case. Also the soundness of *Walshaw*² had been questioned in *Hobbs v. Winchester Corporation*.³ Alternatively, and on the assumption that the application was not barred by section 166 of the Public Health Act, 1897, it was barred by section 1

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were in the event found to be in error in the opinion they formed as to the condition of the meat. But a failure to prove themselves infallible does not constitute an irregularity. The Act clearly assumes that in exercising the powers conferred by section 43 they may be mistaken. It was a sufficient warrant for the action of Mr Trotter that the meat appeared to him to be unfit for the food of man, and the regularity of his action is not made dependent on his being able to justify it, by showing that the meat was in fact unsound meat. He made no blunder in the procedure he followed, and showed no negligence in what he did. It is not suggested that he showed any want of proper skill and care, or that the meat did not really appear to him to be unsound when he ordered its seizure. The decision in *Duncan v. Magistrates of Hamilton*, 5 F. 160, appears to me to have no application to the present circumstances. That action was properly brought under section 166, for it was founded on a relevant averment of negligence on the part of the Local Authority in the performance of a statutory duty. For the reasons I have stated, no such negligence can be predicated of the Local Authority's action in this case. The cases of *Bater*, [1893] 1 Q. B. 679, 2 Q. B. 77, and *Walshaw*, [1899] 2 Q. B. 286, appear to me directly in point. Section 308 of the Public Health Act, 1875, which was the subject of construction in them, is in very similar terms to section 164, and I do not see that the absence from the English statute of any section equivalent to section 166 makes any difference.

"It was suggested, rather than strenuously maintained, that the present claim for the appointment of an arbiter was excluded by the Public Authorities Protection Act, 1893, in respect that more than six months have elapsed since the cause of action arose, but in my judgment that Act does not apply to a proceeding like the present, which is taken merely to have an arbiter appointed to ascertain the *quantum* of compensation payable by the complainers to the respondents.—*Delaney*, (1867) L. R., 2 C. P. 532, 3 C. P. 111; *Glasgow Corporation v. Miller*, (1905) 13 S. L. T. 167; *Gilliland v. County Council of Ayr*, (1907) 15 S. L. T. 21."

¹ *In re Bater and Mayor, &c., of Birkenhead*, [1893] 1 Q. B. 679, *aff.* [1893] 2 Q. B. 77.

² *Walshaw v. Brighthouse Corporation*, [1899] 2 Q. B. 286.

³ [1910] 2 K. B. 471, *per* Cozens-Hardy, M.R., at p. 485.

Jan. 26, 1912. of the Public Authorities Protection Act, 1893.¹ Whether or not a further action was required to enforce the arbiter's award, the arbitration by which the respondents sought to constitute their claim was, according to the ordinary use of language, a "proceeding" against the reclaimers for an act done "in pursuance" of the Act of 1897. The cases relied on by the Lord Ordinary were distinguishable. *Delaney*² was decided under another statute. In *Miller*³ the real ground of decision was that the Public Authorities Protection Act had not been timeously pleaded. *Gilliland*⁴ was not a claim for compensation at all.

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Argued for the respondents;—It was admitted—and indeed was part of the respondents' case—that the meat had been seized not only with due regard to the procedure prescribed by the statute, but also in proper exercise of the powers which it conferred. This was just a case for compensation such as was contemplated in section 164. It was in accordance with the scheme of the Act that, after arranging for compensation in certain specified instances, such as the destruction of infected bedding⁵ and the making of sewers,⁶ it should by section 164 provide generally for compensation in all similar cases. Compensation was naturally provided for in any Act by which, for the benefit of the community, loss was caused to individuals through no fault of their own.⁷ The first clause of section 166 had no application. A claim for compensation was quite distinct from a claim for damages, the former being a claim arising out of a lawful act, the latter out of an unlawful act.⁸ By comparison with the decisions in similar cases, it was clear that the present claim was not one for damages but for compensation.⁹ No "irregularity" had been committed; on the contrary, the proceedings had been perfectly regular. Neither had the second clause of section 166 any application. In the first place, the application for the appointment of an arbiter to ascertain the compensation was not an "action or proceeding," and, in the second place, for the reasons above stated, the operation through which loss had been suffered was not a "wrong." Further, the action was not barred by the Public Authorities Protection Act, 1893. The application was not an "action, prosecution, or proceeding" within the meaning of section 1,¹⁰ and in any event, since

¹ 56 and 57 Vict. cap. 61.

² *Delaney v. Metropolitan Board of Works*, (1867) L. R., 2 C. P. 532, *aff.* 3 C. P. 111.

³ *Corporation of Glasgow v. Miller*, (1905) 13 S. L. T. 167.

⁴ *Gilliland v. County Council of Ayr*, (1907) 15 S. L. T. 21.

⁵ Secs. 47 (5), 48 (2), 96.

⁶ Sec. 102.

⁷ *New River Company v. Johnson*, (1860) 2 E. & E. 435, *per* Cockburn, C.J., at p. 442.

⁸ *Dixon v. Calcraft*, [1892] 1 Q. B. 458, *per* Esher, M.R., at p. 463.

⁹ *Peterhead Granite Polishing Co. v. Parochial Board of Peterhead*, (1880) 7 R. 536, *per* Lord Gifford, at p. 546; *Brierley Hill Local Board v. Pearsall*, (1884) 9 App. Cas. 595; *District Committee of the Middle Ward of Lanarkshire v. Marshall*, (1896) 24 R. 139, *per* Lord Pearson (Ordinary), at p. 144; *Blyth v. Magistrates of Edinburgh*, (1905) 13 S. L. T. 459; *Thomson v. Local Authority of Edinburgh*, (1908) 25 S. L. Rev. 73; *Cessford v. Commissioners of Millport*, (1899) 15 S. L. Rev. 362; *Thomson v. Broughty-Ferry Commissioners*, (1898) 14 S. L. Rev. 365; *Christie v. Broughty-Ferry Commissioners*, (1898) 14 S. L. Rev. 368.

¹⁰ *Delaney v. Metropolitan Board of Works*, L. R., 3 C. P. 111; *Corpora-*

the Public Health Act applied only to Scotland and, in section 166, Jan. 26, 1912. contained a limitation as to the time within which actions might be brought, the Public Authorities Protection Act did not apply.¹

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At advising on 26th January 1912,—

LORD SALVESEN.—[After the narrative of facts above quoted]—Section 164 of the Public Health (Scotland) Act, 1897, provides that “full compensation shall be made . . . to all persons sustaining any damage by reason of the exercise of any of the powers of this Act.” The respondents say that the beef which was seized was in fact sound when seized, but that it became unsound and valueless by the subsequent detention and handling to which it was subjected. They make no charge of negligence against Mr Trotter. Their claim, which is only for the value of the beef, assumes that he acted *bona fide* in the execution of the Act, but that he made a mistake in seizing, as unsound, meat which was in reality perfectly wholesome; and that they have thus suffered loss “by reason of the exercise” of one of the powers contained in the Act. The complainers say that under the guise of a claim of compensation the respondents are really making a claim of damages, and that such a claim is excluded by section 166. They rely upon two clauses in that section. The first provides that the Local Authority shall not be liable in damages for any irregularity committed by their officers in the execution of the Act; and the second, that every action or prosecution against any person acting under this Act on account of any wrong done in or by any action, proceeding, or operation under this Act, shall be commenced within two months after the cause of action shall have arisen.

It is not easy to interpret the word “irregularity” occurring in this section. At first sight, it might have been supposed to refer to an irregularity of procedure; but this construction appears to be conclusively negatived by three judgments of the First Division (*Edwards*,² *Mitchell*,³ and *Sutherland*⁴). All these decisions deal with the construction of an identical clause in the previous Public Health Act of 1867, and it was held that the section did not apply where the procedure prescribed by the Act had not been followed. In *Mitchell's* case³ the pursuer averred that a person had been removed to hospital without a warrant from the Sheriff, and against his consent; and it was held that the Local Authority, assuming this to be established, were entirely outwith the Act, and therefore not protected by the section relied on. The decision in the case of *Sutherland*,⁴ which was an action of damages based on the averment that a sick child had been removed to hospital without a warrant from a magistrate, and that the child had died in consequence of the negligent manner in which its removal had been conducted, was to the same effect. It must therefore be taken to be

tion of Glasgow v. Miller, 13 S. L. T. 167; Gilliland v. County Council of Ayr, 15 S. L. T. 21; Muirhead's Municipal and Police Government, 2nd ed., p. 1009; Glen's Law of Public Health, 13th ed., vol. i., p. 921; Lumley's Public Health, 7th ed., vol. i., p. 1030, citing Moreton v. Alfreton, May 6, 1898 (unreported).

¹ Public Authorities Protection Act, 1893, sec. 3.

² 18 R. 867.

³ 20 R. 253.

⁴ 22 R. 95.

Jan. 26, 1912. settled that "irregularity," within the meaning of the section, does not mean a failure to comply with the prescribed procedure, for the officer who is guilty of such irregularity cannot be held to be acting in the execution of the Act but outwith its provisions. It may be noted that there is no clause, such as occurs in the other Act founded on, "or the intended execution of the Act."

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Lord Salvesen. The reclaimers accordingly contended, with much force, that the phrase "irregularity" must include a mistake *bona fide* made by an officer in the course of performing his duties under the Act, and that this is the nature of the respondents' claim. It is certainly not easy, in view of the decisions already referred to, to define what is meant by "irregularity" (and on this point we received little assistance from counsel), but it is to be noted that it is something which is presumed to give rise to a claim of damages. Does "irregularity" include negligence on the part of the officer, and is it synonymous with "wrong" used in the subsequent clause? If this be the true view the section is clear enough. The Local Authority are not to be liable in damages for anything done by themselves in the *bona fide* execution of the Act, nor for any wrong committed by their officers in the execution of the Act. The action of damages must therefore in the general case be directed against the officer—although he is entitled to be indemnified by the Local Authority if he acted *bona fide*—and it must be instituted within two months of the cause of action having arisen. If "irregularity" is something different from "wrong" then the officer is not entitled to the benefit of the statutory limitation; but it is difficult to conceive any kind of "irregularity" which could give rise to a claim of damages under this section which did not constitute some form of delict.

It is, however, unnecessary to decide this because, on the facts as averred by the complainers, I feel unable to affirm that Mr Trotter committed any "irregularity" in the execution of his duty. Under section 43 he was authorised to seize and carry away any animal intended for the food of man which was exposed for sale, provided only it appeared to him to be unsound or unfit for the food of man. He is so authorised, no doubt, in order that the animal seized may be dealt with summarily by a Sheriff, Magistrate, or Justice; and if it appears to the latter that the animal seized is unsound, his duty is to condemn it and order it to be destroyed or so disposed of as to prevent it from being exposed for sale or used for the food of man. There is, however, no express provision as to what is to be done with the animal in the meantime, nor as to the period within which a complaint against the owner is to be served. It cannot therefore be affirmed that Mr Trotter acted irregularly or wrongfully in keeping the meat in a detention chamber for about a week, although it may well be that this detention was sufficient to make the meat valueless for food. The complainers' own averments seem to exclude the idea that Mr Trotter acted otherwise than in accordance with his duty, for they found upon the Sheriff's expression of opinion to the contrary. Nor does it follow that the fact that he was mistaken in seizing the meat inferred any negligence on his part. In the public interest it may occasionally be the duty of an officer to seize meat which is exposed for sale if he has probable grounds for doing so; or, to use the language of the Act, if it appears

to him to be unsound. For so acting he cannot be charged with negligence Jan. 26, 1912.
or with "irregularity," but it may nevertheless be just that the owner of
the meat should not suffer loss by his action when he turns out to be mis- Corporation
taken, but should be indemnified by the general body of ratepayers in of Glasgow v.
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If I am right so far, it seems to me perfectly clear that the second clause of section 166 does not apply. That clause provides that every action or Lord Salvesen.
prosecution against any person acting under this Act on account of any
wrong done in or by any action, &c., under this Act shall be commenced
within two months after the cause of action shall have arisen. It is plain,
therefore, that the clause only deals with actions for delict and not with
claims for compensation. Apart from this, no lawyer would describe a
claim for compensation which falls to be determined by an arbiter as an
action or prosecution. The characteristic feature of an action is that it asks
the Court to pronounce a decree against the person cited as defender,
whereas an arbiter's award cannot itself be enforced except by an action on
the award. The latter kind of action cannot have been contemplated, for
the period is so short that, however promptly the claim were made, it would
be almost impossible to obtain an award within the time specified. In any
case, such an action would not be "on account of any wrong done." A
claim for compensation, to use Lord Gifford's words in the *Peterhead
Granite Polishing Company* case,¹ is for injury legally and rightfully caused
by the exercise of statutory powers.

It remains to consider whether the Public Authorities Protection Act, 1893, applies. The language is very wide, for it applies to "any action, prosecution, or other proceeding . . . against any person for any act done in pursuance or execution, or intended execution, of any Act of Parliament, or of any public duty or authority." If the word "proceeding" stood by itself it might conceivably cover a claim in an arbitration; but I think it falls to be construed by reference to the words with which it is associated, and must be read as meaning any proceedings of the nature of an action or prosecution. In the case of *Delaney*,² similar words were held not to exclude a claim and demand of arbitration for damage done to buildings by a public body acting under their statutory powers. The decision in the case was affirmed on appeal,³ the Chief Baron saying that the matter was too clear for argument. It would indeed be startling if it were otherwise, for there would then be a statutory limitation of claims for compensation under the Lands Clauses Act. This question was expressly raised in a case that was decided by Lord Ardwall in the Outer House,⁴ in which he held that the Public Authorities Protection Act had no application to claims for compensation under the Lands Clauses Act. Now, the claim for compensation under section 164 of the Public Health Act, 1897, falls to be ascertained in exactly the same way as claims for compensation under the Lands Clauses Act, and is truly a claim of the same nature. There is a further ground on which the same decision may be reached, for by section 3 of the 1893 Act its application is excluded where the action, prosecution, or other proceed-

¹ 7 R. 546.² L. R., 2 C. P. 532.³ L. R., 3 C. P. 111.⁴ Corporation of Glasgow v. Miller, 13 S. L. T. 167.

Jan. 26, 1912. ing is on account of any act done under an Act of Parliament, and that
 Corporation of Glasgow v. Act of Parliament applies to Scotland only, and contains a limitation of the
 Smithfield and Argentine Public Health Act, 1897, exactly answers this description, and it seems to
 Meat Co., Limited. me vain to contend that because there is no limitation of time within which
 Lord Salvesen. a claim for compensation must be made, that a six months' limitation is to
 be read in from the Public Authorities Protection Act. I have therefore
 in the end come to be of opinion that the Lord Ordinary has arrived at the
 right conclusion and that his interlocutor ought to be affirmed.

LORD GUTHRIE.—I agree. The reclaimers do not dispute that, under the Public Health (Scotland) Act, 1897, a claim for compensation accrued to the respondents out of the proceedings detailed on record. But they say that, by section 166 of the Act, the respondents are excluded from enforcing the claim, because they failed, within two months of the cause of action having arisen, to commence against the reclaimers what the section calls an "action or prosecution." By section 164 the respondents' claim for compensation must be disposed of by an arbiter, on whose award an action may be raised. If the reclaimers are right in their contention, the statutory remedy could only be made effectual in the rare cases in which it might be possible to obtain an award, and commence an action thereon, within two months after the cause of action arose. In most cases, the remedy could be avoided by the skilful use of the law's delays.

I agree with your Lordship that section 166 does not apply to the respondents' claim. The section only applies in the case of an "irregularity" committed by the officers of a local authority, and where there has been a "wrong done." The proceedings of the reclaimers' officers, on which the claim is based, did not involve any "irregularity" on their part, nor was there any "wrong done" by them. Whatever the scope of section 166 may be, it cannot apply to a case where it is admitted that the officials in question were acting at every step in the *bona fide* intended execution of their statutory duty.

The case is of general importance. Section 43 of the Act, under which the reclaimers' proceedings were taken, applies not only to animals, but to "any article, whether solid or liquid, intended for the food of man." It therefore covers articles inspection of which, by outside appearance, may be even more likely to lead to honest mistakes, whether of soundness or unsoundness, than in the case of flesh. And it would appear as if claims for compensation under such sections of the Act as 18, 43, 103, and 109 would be equally subject to the limitations contained in section 166, if the reclaimers' construction of that section is correct.

I agree with your Lordship that the arbitration in question is not "an action, prosecution, or other proceeding" in the sense of the Public Authorities Protection Act, 1893.

The LORD JUSTICE-CLERK concurred.

THE COURT adhered.

CAMPBELL & SMITH, S.S.C.—PATRICK & JAMES, S.S.C.—Agents.

ROBERT NEVILLE DUNDAS AND OTHERS (Sir Robert Dundas' Trustees), No. 62.

First Parties.—*D.-F. Dickson—Pitman.*

ROBERT NEVILLE DUNDAS AND OTHERS (Captain Dundas' Marriage-Contract Trustees), Second Parties.—*Murray, K.C.—Skelton.* Jan. 31, 1912.

Marriage-Contract—Construction—Death-duties—Incidence of duties—Obligation to "make up" the capital held by the marriage-contract trustees to a certain sum—Whether trustees entitled to receive capital sum free of death-duties. Dundas' Trustees v. Dundas' Trustees.

A father was a party to his son's marriage-contract which provided that a sum of £30,000 should be vested in the trustees, to be made up as follows:—(1) by an immediate payment by the father of £20,000; (2) by the appointment of the son to a share of a fund liferented by the father, valued at the date of the contract at £6250, but whose actual value could not be ascertained until the termination of the liferent; and (3) by an obligation undertaken by the father binding his executors to pay to the trustees the sum of £3750, or such other sum more or less as should "make up the sum of £30,000 to be received by the trustees."

Held that the father's obligation did not bind his estate to make good the total sum of £30,000 free of all Government duties.

Revenue—Succession—Settlement estate-duty—Incidence—Obligation by father to pay sum to his son's marriage-contract trustees—Marriage-contract fund settled—Parties liable for settlement estate-duty—Finance Act, 1894 (57 and 58 Vict. cap. 30), section 5 (1)—Finance Act, 1896 (59 and 60 Vict. cap. 28), section 19 (1).

Held (diss. the Lord President) that when a father becomes a party to the marriage-settlement of a child, and covenants to pay at his death a certain sum to the marriage-contract trustees, the settlement estate-duty on that sum falls to be borne by the marriage-contract trustees, and not by the father's executors.

In re Maryon-Wilson, [1900] 1 Ch. 565, followed.

Expenses—Special Case—Question depending on construction of an Act of Parliament.

In a special case arising out of a marriage-contract, where there was no arrangement between the parties as to expenses, and where the main question concerned the construction of an Act of Parliament and not of the deed, the unsuccessful party was found liable in expenses.

ON 6th April 1911 a special case was presented by the testamentary trustees of the late Sir Robert Dundas of Arniston, Bart., *first parties*, and by the marriage-contract trustees of his second son, Captain, afterwards Sir Henry, Dundas, *second parties*, for the opinion of the Court on certain questions as to the respective liabilities of the parties for death-duties which had been paid by Sir Robert's executors. 1ST DIVISION.

The following narrative of the facts set forth in the case is taken from the opinion of the Lord President:—

"The late Sir Robert Dundas was a party to the marriage-contract of his son Henry, now Sir Henry.

'The said marriage-contract recites that it was part of the treaty for the marriage that a sum of £30,000 on behalf of Henry should be vested in the marriage-contract trustees, and goes on to mention that the said sum is made up of (1) securities and cash to the extent of

Jan. 31, 1912. £20,000, presently paid over; (2) the share of the funds in the marriage-contract of Sir Robert which has been apportioned to Henry (these amounted at date to £6250 or thereby); and (3) an obligation by Sir Robert to pay the sum of £3750, or such other sum, more or less, as should make up the sum of £30,000.

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"The reason why the sum in the obligation of Sir Robert could not be precisely specified was because the marriage-contract funds under his (Sir Robert's) marriage-contract were still held by trustees and were not payable to the children of the marriage until Sir Robert's death, as he enjoyed the *liferent*. Sir Robert had by deed of even date irrevocably apportioned in favour of Henry one equal fourth share of the said funds (under deduction of £500 already apportioned to Robert *secundus*, the eldest son) along with his three sisters. The value of such fourth as at date was estimated at £6250, but obviously its actual value could not be precisely ascertained till the trust came to be wound up at Sir Robert's death and the investments realised.

"The actual words of obligation whereby Sir Robert bound himself in the marriage-contract to make payment of the £3750, more or less, were as follows: 'The said Sir Robert Dundas has agreed, and hereby agrees and binds and obliges himself, his heirs, executors, and successors whomsoever, without the necessity of discussing them in their order, all jointly and severally, to make payment to the trustees at the first term of Whitsunday or Martinmas after his death of the sum of three thousand seven hundred and fifty pounds, or such other sum more or less as with the said capital sum of twenty thousand pounds, and the said sum of six thousand two hundred and fifty pounds more or less, apportioned to the said Henry Herbert Philip Dundas as aforesaid, shall make up the sum of thirty thousand pounds to be received by the trustees, and which sum the said Sir Robert Dundas hereby undertakes and guarantees to make up to the trustees, with a fifth part more of the said sum of three thousand seven hundred and fifty pounds or other sum as aforesaid of liquidate penalty in case of failure, and interest of the said sum at the rate of five pounds per centum per annum from and after the date of death till payment thereof. . . .' The whole sums payable to the marriage-contract trustees were settled upon the spouses in *liferent* and the children of the marriage in fee.

"Sir Robert Dundas died on 11th November 1909, and left a trust-disposition and settlement under which he conveyed all his property to trustees with directions, *inter alia*, to implement all obligations he had undertaken in his children's marriage-contracts. As residuary legatee he appointed Robert Dundas, his eldest son, since deceased.

"On Sir Robert's death there became due to the Crown and there has been paid by the executors the following duties:—

"1. Estate-duty on the £6250. This fund, except as to so much of the capital as represented the sum of £200 a year which was contributed by Sir Robert's wife, and was treated as an 'estate by itself,' fell to be aggregated with Sir Robert's other estate.

"2. Succession-duty on the same sum.

"3. Estate-duty on the £3750.

"4. Succession-duty on the same.

"5. Settlement estate-duty on the same."

The contentions of the parties were stated as follows:—"With regard to the share falling to Captain Dundas' marriage-contract

trustees, the first parties maintain that the estate-duty and succession-duty payable on or in respect of said share of £6250 fall to be paid by the second parties. They further maintain that the settlement estate-duty and succession-duty payable on or in respect of the balance required to make up the said sum of £30,000 fall to be paid by the second parties. On the other hand, the second parties maintain that the obligation by the said Sir Robert Dundas in the antenuptial contract of marriage of his son Captain Dundas was to make up a sum of £30,000 to be received by his said son's marriage trustees, and that, therefore, this amount should be accounted for to the latter's marriage trustees without any deduction for duty whatever, either in respect of the said share of £6250 or of the balance required to make up the said sum of £30,000."

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The following were the questions of law:—“(1) In ascertaining the balance payable by the first parties to the second parties, do estate-duty and succession-duty, or either of them, fall to be deducted from the said sum of £6250? (2) Do settlement estate-duty and succession-duty on the balance of £3750, more or less, required to make up the said sum of £30,000, fall to be paid by the first or second parties?”

The case was heard before the First Division (without Lord Johnston) on 7th December 1911.

It was admitted in the course of the argument that two questions were involved in the case. (1) Whether, on a sound construction of the marriage-contract, Sir Robert's estate was bound to make good to the trustees a capital sum of £30,000 after all Government duties had been paid. It was admitted that in the event of this question being answered in the negative, estate and succession-duties on the sum of £6250 and succession-duty on the sum of £3750 fell to be paid by the second parties.* (2) Whether (whatever might be the effect of the Finance Act, 1894) section 19 (1) of the Finance Act, 1896, ruled, so as to throw the burden of settlement estate-duty on the sum of £3750 upon the second parties.†

Argued for the first parties;—(1) *On construction of the marriage-contract.*—The words of the contract did not compel the construction contended for by the second parties and put by the Court upon the somewhat different expressions used in the case of *Maryon-Wilson*.¹

* Before this admission was made the following cases on the incidence of estate and succession-duties had been referred to:—*In re Countess of Orford*, [1896] 1 Ch. 257; *In re Gray*, [1896] 1 Ch. 620; *In re Hadley*, [1909] 1 Ch. 20; *Berry v. Gaukroger*, [1903], 2 Ch. 116; *In re Higgins*, (1885) 31 Ch. D. 142.

† The Finance Act, 1894 (57 and 58 Vict. cap. 30), enacts:—Sec. 5 (1). “Where property in respect of which estate-duty is leviable is settled by the will of the deceased, or having been settled by some other disposition passes under that disposition on the death of the deceased to some other person not competent to dispose of the property—(a) a further estate-duty (called settlement estate-duty) on the principal value of the settled property shall be levied”

The Finance Act, 1896 (59 and 60 Vict. cap. 28), enacts:—Sec. 19 (1) “The settlement estate-duty leviable in respect of a legacy or other personal property settled by the will of the deceased shall (unless the will contains an express provision to the contrary) be payable out of the settled legacy or property in exoneration of the rest of the deceased's estate.”

¹ [1900] 1 Ch. 565.

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It was clear from the circumstances of the provision that the introduction of the words "make up" was due to this peculiar position, that the actual value, at the date when it would fall to be paid, of the apportioned share of Sir Robert's marriage-contract fund could not be ascertained at the date of his son's marriage-contract. The effect of this circumstance was that the direction to the executors had to be one to pay a sum presently unascertained, but whose amount was to be subsequently calculated according to a method of calculation directed by the expression in question. This was the purpose of the expression, and the wider construction which the second parties sought to put upon it was beyond its obvious and natural meaning. Had the sum stated at £6250 been one of fixed amount no such words would have been necessary; the direction to the executors would have been simply a direction to pay a definite sum, and in that case the present question could not have arisen. The fact that the direction was not to pay a fixed sum, but to pay a balance ascertainable at the death of Sir Robert, could not alter the nature of the obligations imposed on the recipients of the gift.

(2) *On the Finance Act, 1896.*—The provisions of section 19 (1) of this Act, amending the Finance Act, 1894, imposed the burden of settlement estate-duty on the settled fund, in exoneration of the rest of the estate of the deceased, in cases where the settlement was made by will. It was true that the section did not in terms apply to a fund settled otherwise than by will, but it should be applied in the present case not only because the settlement under consideration was clearly of a testamentary nature, but also because the matter was settled by authority in England where, in the case of *In re Maryon-Wilson*,¹ the section had been held to apply to a settlement of precisely the same nature as that under consideration here. In that case Lindley, M.R., disapproving of the reasoning of North, J., in *In re Webber*² as to the effect of the Finance Act, 1894, expressed the opinion, concurred in by the rest of the Court, that it was an irrational conclusion, and one not compelled by the language of the statute, that the Legislature had intended to give different treatment to a fund settled by will from that given to one settled by deed. Accordingly, as the law in England now stood, the incidence of settlement estate-duty, in the absence of express provision to the contrary, was in all cases the same as if the property had been settled by will of the deceased.³

Argued for the second parties ;—(1) *On construction of the marriage-contract.*—The whole question was as to the intention of Sir Robert with regard to the £30,000 settled by the marriage-contract. The circumstances of the deed and the form of expression pointed to an intention to provide a clear capital sum of that value. The sum of £30,000 was to be contributed from three sources, the first two of which did not form part of Sir Robert's estate. As regards the third portion of the fund, he bound his estate to contribute the balance or amount which would be found necessary to make the sum provided from the first two sources up to £30,000. The intention of this provision obviously was that a total capital sum of £30,000, without any deductions, should be built up for the benefit of his son. This

¹ [1900] 1 Ch. 565.

² [1896] 1 Ch. 914.

³ Hanson's Death-Duties, 6th ed., pp. 128, 251; *In re Duke of St Albans*, [1900] 2 Ch. 873.

situation was in clear contrast to that represented by the first parties, Jan. 31, 1912. viz., of a direction to the executors to pay a definite sum. (2) *On the Finance Act, 1896.*—These parties were creditors of Sir Robert, ^{Dundas' Trustees v.} not his legatees, and the whole scheme of the Finance Acts was to ^{Dundas' Trustees.} tax legatees and not creditors. According to the provisions of the Finance Act of 1894 settlement estate-duty was in the same position as estate-duty as regards incidence, methods of collection, &c.; it was payable by the executors of the deceased, and no provision was made for its repayment in any case.¹ The state of the law under the Act of 1894 was correctly stated by North, J., in *In re Webber*.² The relaxation of the previous rule provided by section 19 (1) of the Finance Act, 1896, was expressly confined to the case of settlement by will, and did not apply to the present case where the settlement was by *inter vivos* deed or contract. The actual decision in *In re Maryon-Wilson*³ did not affect the question here, for the expression under construction in that case was that a certain sum should be paid "without any deduction," and that expression was of itself sufficient to instruct that settlement estate-duty should be paid out of residue. It was not necessary for the Court in that case to decide the question raised upon the construction of the Finance Act, and the remarks of Lindley, M.R., on this part of the case must be treated as *obiter*. In any event, the views expressed by North, J., in *In re Webber*,² although they were not approved of in *Maryon-Wilson*,³ were sound.

At advising on 31st January 1912,—

LORD PRESIDENT.—[After the narrative quoted *supra*].—Two questions have arisen between the executors and the marriage-contract trustees of Henry: 1st. On whom do the various duties primarily fall? 2nd. Is this incidence altered by the obligation of Sir Robert which binds him to pay £3750, more or less, so as to make up the sum of £30,000? Although logically the latter question comes second, it will be convenient to take it first, or, in other words, to assume first that all the duties above narrated fell to be entirely borne by the recipients, *i.e.*, the marriage-contract trustees, and not by the residuary legatee under Sir Robert's will.

I am of opinion that upon a fair construction of the words used Sir Robert's obligations do not bind him to make good a total sum of £30,000 after all Government duties have been paid. I think the words are accounted for by the narrative I have already given. It seems to me that the parties were considering only the three sources from which the £30,000 was to be made up—first, the £20,000 hard cash; second, the share of the old marriage-contract funds apportioned to Henry to the extent of £6250; and third, such balance as it was necessary to provide—keeping in view the fact that £6250 was not an exactly ascertained figure—to make up the £30,000. I do not think the case falls within the considerations which are given effect to in *Maryon-Wilson's* case,³ where a father had consented to pay to the trustees of his daughter's marriage-settlement £25,000, "without any deduction," and it was held that his executors must bear the settlement estate-duty payable in respect of that sum. The word "deduc-

¹ Finance Act, 1894, secs. 5 and 6 (2); *In re Gray*, [1896] 1 Ch. 620.

² [1896] 1 Ch. 914.

³ [1900] 1 Ch. 565.

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If this be so, parties are really agreed as to all the other taxes except one. They agree that Sir Robert's executors must bear the estate-duty on the £3750 and that Henry's marriage-contract trustees must bear estate-duty on the £6250 and succession-duty on both the £6250 and the £3750. They do not agree as to which should bear settlement estate-duty on the £3750. I am of opinion that this falls to be borne by Sir Robert's executors.

I am aware that in coming to this conclusion I am disagreeing not only with your Lordships but also with the reasoning in the judgment of Lindley, M.R., in *Maryon-Wilson's* case,¹ and one must always be diffident of an opinion which is diametrically opposed to such high authority—I am not sure that I ought not to add the authority also of Rigby and Vaughan Williams, L.JJ., who concurred in the judgment. I say I am not sure, because they delivered no opinion, and the actual judgment rests, as I have already mentioned, on the expression "without deductions," and did not therefore actually require that an opinion should be pronounced on the question who would have had to bear the settlement-duty had the words not been there. But as my own opinion is clear, I do not think I should be doing justice to the litigant before me if I bowed in silence to authority with which I did not agree. I may also add that my opinion is the same as that of North, J., pronounced in the earlier case of *In re Webber*,² which was of course disapproved by Lindley, M.R., in *Maryon-Wilson's* case.¹

I pause to say that so far as the facts are concerned there is on this point no difference between that case and the present. Indeed, the question may be put generally thus: When a father becomes a party to the marriage-settlement of a child and covenants to pay at his death a certain sum to the marriage-contract trustees, is it the father's executors or the marriage-contract trustees who have to bear the settlement estate-duty?

Lord Lindley's reasoning is as follows:—"The argument for the appellants, so far as it is based on the Finance Acts, is reducible to the following propositions:—(1) That by the Act of 1894, sections 5 and 6, subsection 2, the settlement estate-duty is payable by the executors of the testator; (2) that the Finance Act does not say by whom the duty so payable is ultimately to be borne in a case like the present, section 8, subsection 4, not applying; (3) that consequently the duty must be borne by the residuary legatees. The first two of these propositions are correct, but the third is, in my opinion, erroneous, although it was adopted by North, J., in *In re Webber*.² The executors pay the settlement estate-duty as trustees for somebody, but as trustees for whom? Certainly not as trustees for the residuary legatees, who take no interest whatever in the fund in respect of which the settlement estate-duty is payable. The executors pay that duty as trustees for those who are beneficially entitled to that fund, and upon plain principles of equity the executors are entitled to be repaid out of that fund what they have by law to pay in respect of it. In my opinion it lies upon the beneficiaries of that fund to show why this burden which thus falls upon them should be borne by somebody else. The settlement estate-duty, although

¹ [1900] 1 Ch. 565.

² [1896] 1 Ch. 914.

described and imposed as a further estate-duty, is imposed, not on the Jan. 31, 1912. general estate of the deceased, but on specific portions of it, and ought in common fairness to be borne by those who take those portions. To facilitate collection the executors have to pay it, but this I regard as mere machinery." ¹

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The flaw in the reasoning, to my mind, consists in the introduction of equitable considerations, which, in my judgment, have nothing to do with the question. It must be remembered that, not only as between each other but also as regards all other persons, the marriage-contract trustees are creditors of the deceased, who bound himself in an onerous obligation, the consideration for which was the marriage. Had the deceased died insolvent, the marriage-contract trustees would have ranked on his estate *pari passu* with all other onerous creditors. Accordingly, the demand of the marriage-contract trustees as made is—Pay us x pounds which the deceased bound himself to pay us at his death. Now, it is true that for the purposes of the Finance Act the money so due is not allowed as a deduction. That is the result of section 7 (1), which provides:—"In determining the value of an estate for the purpose of estate-duty allowance . . . shall not be made—(a) For debts incurred by the deceased, or incumbrances created by a disposition made by the deceased, unless such debts or incumbrances were incurred or created *bona fide* for full consideration in money or money's worth wholly for the deceased's own use and benefit, and take effect out of his interest." That, however, is dealing only with the matter of ascertaining the value of the deceased's estate on which duty is payable, and in no way touches the incidence of the duty. Lord Lindley indeed concedes this when he says that propositions (1) and (2) are correct. To my mind, if these propositions are conceded everything is conceded. What is the answer to the demand for x pounds? I have had to pay duty, says the executor. To which the answer is conclusive: You have had to pay it because the statute made you pay it—what have I to do with that? The proper retort for the executor would be: And the same statute said I might deduct it from your share; but that retort is impossible if proposition (2) is correct.

To my mind the fallacy of the reasoning is apparent when the learned Judge deals with the third proposition. In the first place, I think the third proposition is inaccurately stated. The third proposition is not that consequently the duty must be borne by the residuary legatee; it is that consequently it must be borne by the person on whom the statute put it, viz, the executor, or, in other words, the deceased's estate. Of course, where there is a residuary legatee it is his pocket which in the end will suffer, but that is only because he is a residuary, as opposed to a special, legatee, and on that account it is he who bears the duty. But that is a convenient, not an accurate, way of describing what really happens. Take the case where there is no residuary legatee, as, e.g., where a testator directs his whole estate to be divided in equal parts between A, B, and C. The executor pays the duties and they do not fall on the residuary legatee, because there is none. The same fallacy lurks in the expression that follows. "The executors," says his Lordship, "pay the settlement estate-

¹ [1900] 1 Ch., at p. 570.

Jan. 31, 1912. duty as trustees for somebody, but as trustees for whom?" I do not think the executors pay the duty as trustees for anybody. They pay it because the Act of Parliament has made them pay it. In certain cases the statute provides that the executors may get back part of what has been paid from someone else, *e.g.*, section 9 (4). But as to this duty the statute is admittedly silent (proposition (2)). Indeed if the "trustee" theory were correct I do not see why it would not embrace the estate-duty just as much as the settlement estate-duty. The residuary legatee "takes no interest whatever in the fund," which is given to a special legatee, or is paid over to the marriage-contract trustees as a debt. But no one doubts that in these cases he eventually bears the brunt of the estate-duty, or that *In re Gray*¹ was rightly decided.

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Of course, when one comes to equitable considerations in the business of legislation one can easily see why the residuary legatee, just because he is a residuary legatee, should be left to bear the brunt of the general estate-duty, but should not be asked to bear the settlement estate-duty, which is really exacted in respect of the enfranchisement for a period from estate-duty of the settled fund in which the residuary legatee has no interest. To say that the testator had nothing to do with it is, I think, in a case like this, to go too far. The testator knew when he bound himself that the money for which he bound himself was to be settled and was settled in the very deed to which he was a party (section 5 (1) (b)). But if the residuary legatee was not to bear the settlement estate-duty it was for the Legislature to say so, and admittedly it did not say so in the Act of 1894 (proposition (2)). It did say so in 1896 (59 and 60 Vict. cap. 28, section 19), but in saying so it used a form of expression which does not apply to this case. According to Lord Lindley the Act of 1896 was unnecessary except to save time in appealing the judgment in *In re Webber*.² I think that is a curious view. But it is immaterial whether it is right or wrong. The true meaning of a statute is *pro tempore* at least the meaning which the Courts of law put upon it. When the statute of 1896 was passed, *In re Webber*² held the field. The statute was passed to fill up the gap disclosed by *In re Webber*.² It adopted a certain form of words which suited the particular gap in *In re Webber*,² but did not suit other gaps analogous thereto.

The result, says Lord Lindley, will be that if his ruling is not correct there will be an anomalous distinction between the effects of settlements made by will and settlements made by deed. That is so. It is not the first time that an amending statute has not hit by its words all possible forms of the evil it sought to amend. But that fact, if the words be explicit, does not invest the law Courts with the function of amending legislation, as was said by their Lordships in the case of *Banknock Colliery Co.*³ in the House of Lords a few weeks ago.

On the whole matter, therefore, I am of opinion that the first question of law in the case should be answered in the negative, and that the second question should be answered by saying that settlement estate-duty on the

¹ [1896] 1 Ch. 620.

² [1896] 1 Ch. 914.

³ *Supra*, House of Lords Cases, and [1912] A. C. 105.

£3750 falls to be paid by the first parties, and succession-duty by the Jan. 31, 1912. second parties.

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LORD KINNEAR.—I agree with your Lordship on all points except as to the incidence of the settlement estate-duty on the balance of £3750 required to make up the £30,000 provided by Sir Robert Dundas in his son's marriage-contract. I have found that question to be one of great difficulty, not only in itself, but more especially because I have been unable to agree upon it with your Lordship. But my difficulties have been finally resolved by the reasoning by the Master of the Rolls, afterwards Lord Lindley, in the case of *In re Maryon-Wilson*.¹ That is not a judgment which is binding on this Court, and an opinion on this particular point was not necessary for the decision of the case then before the Court of Appeal, but it is a judgment of very high authority, and I think that great weight ought to be attributed to it, as determining a very difficult question. I agree that the incidence of taxation is not to be determined by considerations of equity, but by construction of the taxing enactment. But it does not necessarily follow that the consequent rights and liabilities of the persons affected are not to be determined by the settled principles of law and equity on those points on which the Act is silent; and I do not think that Lord Lindley referred to considerations of equity for any other purpose. I think the true ground of judgment is to be found where his Lordship says that the settlement estate-duty is imposed, not on the general estate of the deceased, but on the settled portion of it, and I think we should be departing from the words of the statute if we imposed settlement estate-duty on the general estate and not on the particular portion of it appointed by the statute. The particular portion of the estate is set apart in a very specific manner which answers directly to the description of the subject on which settlement estate-duty is imposed, for that duty is to be charged when property in respect of which estate-duty is leviable has been settled by disposition, and passes under that deed on the death of the deceased to some person not competent to dispose of it. When that happens the statute says that the property so settled shall be liable to settlement estate-duty. Why should that tax fall upon any other part of the estate of the deceased? It is said that it must do so because it is the executor who pays it. But in doing so he is only performing an administrative duty incumbent upon him in executing the will of the deceased, and makes the payment on behalf of the persons ultimately liable. The argument to which Lord Lindley declined to give effect is that, under the Act of 1894, settlement estate-duty is to be paid by the executor, and, as the Act does not say by whom it is ultimately to be paid, that consequently the residuary legatee is to pay. I cannot see the consequence. No one doubts that the executor is liable in the first instance, but he is liable only as trustee, and he is entitled to relief from those upon whom ultimate liability for the tax falls. If he is not in express terms authorised to recoup himself by deduction from the settled property, just as little is he authorised to deduct the tax from any other part of the estate. He is paying it as a trustee. That

¹ [1900] 1 Ch. 565.

Jan. 31, 1912. expression may or may not be perfectly exact, but at least he pays only as administrator of the estate: and on plain principles of equity, as the Dundas' Trustees v. Dundas' Trustees. Master of the Rolls said, he must be entitled to charge the payment on that part of the estate which is subject to the tax.

Lord Kinnear. The question therefore comes to be, What is the estate subject to this tax? This question is not to be solved by answering that it is the estate of the testator. That is the assumption with which the question starts. The £3750 is as much a part of the estate as any other sum that comes into the hands of the executor. It is because the executor takes up the whole of the estate that he has to pay out this sum as well as the rest. But the sum is chargeable with duty only when set apart in accordance with the settlement for the benefit of particular persons and not of the residuary legatee. Each portion of the estate must be subject to the obligations of the testator, but when the will is to be carried out, then, if the statute says that property settled in the terms of the Act itself is to be taxed, why is that tax to be laid upon some other portion of the testator's estate and not upon the portion thus settled?

That does not, of course, exhaust the question, because there may be no residue. The estate may be exhausted by special legacies, and, if so, there is nothing in the statute which will entitle the executor to deduct the tax from one or all of those. Or the estate may be insolvent; and in that case I can see no ground on which creditors in the position of the second parties could throw the burden of their tax on the competing creditors with whom, as the Lord President points out, they are entitled to rank. The opinion of North, J., would be conclusive if it were sound, because he decides that the burden of the settlement estate-duty is thrown upon the executor in respect of the residue of the estate. From that proposition I respectfully differ. I think it is thrown upon him in respect of a particular part of the estate, the whole of which is in his hands in his capacity of executor.

I am not disturbed by the provisions of the Act of 1896. I do not think it is a relevant inquiry whether that Act was a recognition by the Legislature of the soundness of the reasoning of North, J., or, as Lord Lindley thought, was passed in order to correct a mistake and save further litigation. I cannot say that I think it is doing justice to Lord Lindley to say that he thought it was introduced in order to prevent an appeal. The Crown was not a party to the case, and could not appeal. But the suggestion is not improbable that, if a decision which could not be regarded as final were either erroneous or doubtful, it must give rise to litigation, and therefore it was thought that the question should be cleared by Act of Parliament. Lord Lindley's suggestion seems to me worthy of consideration, that, since litigation had been the main result of the Act, it had seemed better to put matters on a clearer footing in a later statute. I can hardly assent to the opinion that the Act was intended to be an amendment of the existing law as expounded by North, J. The existing law was what the statute of 1894 made it, and it was for the Court to interpret the Act. But a single decision by a single Judge does not make law, and the weight which would otherwise have been due to Mr Justice North's opinion is displaced, because his judgment is distinctly overruled by the Court of Appeal. The question is, What did

the Act of 1894 really provide? and as to that I acquiesce in the reasoning, Jan. 31, 1912. and I think we should follow the judgment, of Lord Lindley.

The result is that if the Act of 1896 is to be held to rule cases to which it applies, that is, cases of settlement by will, and if Lord Lindley was wrong in his construction of the Act of 1894, there would undoubtedly be an anomaly; in the case of a settlement by will the settlement estate-duty would be borne by the property settled, and in the case of a settlement by deed it would be borne by the general estate. This seems to me to be an unreasonable result, which we ought not to accept unless we are compelled to do so by the plain terms of the statutes.

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—
Lord Kinnear.

LORD MACKENZIE.—I concur with your Lordship in the chair, except as regards settlement estate-duty. Upon that question I agree with the opinion just expressed by Lord Kinnear. I am of opinion that the executors of the deceased Sir Robert Dundas, who have paid settlement estate-duty upon the sum of £3750 mentioned in the case, are entitled to be repaid the amount out of the settled fund.

The benefit in respect of which settlement estate-duty is paid is one which enures solely to those who take under the settlement. The clauses referred to in the Finance Act of 1894 do not, in my opinion, saddle the estate of the deceased with the ultimate liability for it. No doubt section 5 (1) (a) calls settlement estate-duty a further estate-duty. But it is not a mere addition to the estate-duty; it is imposed on the settled property because it is settled. It is of the nature of a composition which enfranchises those who take under this settlement, until the death of one competent to dispose of the settled property at the date of his death, or who had been competent at any time during the continuance of the settlement. This leads to the conclusion that even if by the provisions of the Finance Act it is not expressly provided that the executor who pays in the first instance shall be repaid out of the specific fund, this is to be inferred from the nature of the duty itself. It is said that settlement estate-duty must be borne ultimately by the person on whom the statute puts the burden, viz., the executor, i.e., the deceased's estate. The statute no doubt says, as in a question with the tax-collector, that the person to pay is the executor. It is natural there should be this provision for the convenience of collection. The whole estate of the deceased is embraced in the administrative title of the executor, but he takes that estate as trustee merely. The enactment that he is to pay does not determine the question of ultimate liability. The burden is not the direct consequence of the statute, but is a result which follows from the act of one who may be a stranger to the estate. It was argued that the deceased contracted to pay £3750, or such sum as was necessary to make up £30,000, and that the result of giving effect to the contention of the first parties would be to enable his executors to fulfil their obligation by paying a lesser sum, and accounting for the balance to the revenue in name of settlement estate-duty. This argument, however, is double-edged. Why should the executors of the deceased, whose debt was limited to a definite sum, have their debt increased in amount? Again, it is replied this is done by the statute. With deference, it appears to me that the debt is increased by an act of

Jan. 31, 1912. the creditor, which is solely for his own benefit, or the benefit of those who come after him.

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kenzie.

The argument put forward by the second parties here was maintained as regards legacies and residue settled by a testator's will in the case of *In re Webber*.¹ North, J., held that the whole of the duties must be borne, not by the settled legacies or shares, but by the general residue. The immediate result of this judgment was that section 19 of the Finance Act, 1896 (59 and 60 Vict. cap. 28), was passed, which provides :—(1) "The settlement estate-duty leviable in respect of a legacy or other personal property settled by the will of the deceased shall (unless the will contains an express provision to the contrary) be payable out of the settled legacy or property in exoneration of the rest of the deceased's estate."

This section does not apply to the case in hand, for the settlement is not contained in the will of the deceased. The result of holding that the settlement estate-duty is to be borne by the general residue is that, as the law now stands, if the settlement is by the will of a Scotch testator settlement estate-duty is payable out of the settled legacy or property in exoneration of the rest of the deceased's estate; if, on the other hand, the settlement is by some other disposition the residuary legatees of the deceased are to bear the burden of the settlement estate-duty. If settlement estate-duty is to be a burden on the general residue here, then not only will there be a difference in Scotland between settlement by will of the deceased and settlement by other disposition, but the effect of the Finance Act of 1894, in this respect, will be different in Scotland and in England. The reasoning of Lindley, M.R., in *In re Maryon-Wilson*,² involves this. No doubt the judgment in that case was that the settlement estate-duty was to be paid out of the residuary estate, but this was because there was a covenant by the father with the trustees of his daughter's marriage-settlement that his executors should within six months after his death pay to them the sum of £25,000 "without any deduction," to be held by them upon the trusts of the settlement. Before deciding that the effect of these words was to free the settled fund from liability for the settlement estate-duty the opinion was expressed by the Master of the Rolls that but for these words the settled fund would have had to bear the duty. I think it must be held that Rigby and Vaughan Williams, L.JJ., (who concurred in the judgment), concurred in this part of it. The Court of Appeal in that case held that they were not compelled by the language of the statute to reach what was there described as an utterly irrational conclusion, viz., that if a settlement is made by will the settlement estate-duty is to be borne by the settled property, whereas if the settlement is made by deed that duty is not to be borne by that property at all. With all deference I take the same view.

I am therefore of opinion that settlement estate-duty on the balance of £3750, more or less, required to make up the said sum of £30,000, should be paid by the second parties.

Counsel for the second parties moved the Court for a finding that expenses should be borne by the general estate of the testator.

¹ [1896] 1 Ch. 914.

² [1900] 1 Ch. 565.

LORD PRESIDENT.—This is a case in which the expenses must follow the Jan. 31, 1912. result, there being no arrangement between the parties. We are accustomed in many cases to give expenses out of the estate when the difficulty has been due to some act of the testator. But here that is not so. The question is as to the true meaning of an Act of Parliament. It must always be assumed that parties know the true meaning of Acts of Parliament, and if they go wrong in their construction, I fear they must bear the consequences.

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LORD KINNEAR and LORD MACKENZIE concurred.

THE COURT pronounced the following interlocutor:—"Answer the first question of law in the negative: Find in answer to the second question that the duties mentioned therein fall to be paid by the second parties, and decern: Find the second parties liable to the first parties in expenses, and remit," &c.

J. & F. ANDERSON, W.S.—STRATHERN & BLAIR, W.S.—Agents.

JOHN ELLIOT MURRAY AND ANOTHER (Charles Burgess's Trustees), No. 63.

Pursuers and Real Raisers and Claimants (Respondents).—

M'Kechie, K.C.—R. S. Brown.

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WILLIAM G. CRAWFORD AND OTHERS, Claimants (Reclaimers).—

M'Lennan, K.C.—Kemp.

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JAMES LEONARD AND OTHERS, Claimants (Reclaimers).—Dykes.

Charitable and Educational Trust—Legacy for charitable object—Failure of object—Cy près—Lapse of legacy.

A testator directed his trustees in a certain event to apply the residue of his estate "in founding, erecting, and endowing in Paisley an industrial school for females." At the date of the testator's death it was open to a private individual to found or to contribute to an industrial school, but when the residue became available the effect of supervening legislation (which established industrial schools chargeable on the rates) had been to make such individual foundation or contribution impossible. The trustees accordingly brought an action of multiplepinding, in which they lodged a claim to be ranked and preferred to the residue in order that they might administer it under a *cy près* scheme.

Held (rev. judgment of Lord Cullen) that, as the terms of the bequest did not disclose any general charitable intention but only the favouring of the particular object that had failed, there was no room for the application of the doctrine of *cy près*; and that the bequest had accordingly lapsed.

ON 4th July 1910 the trustees of the late Charles Burgess, manufacturer in Paisley, brought an action of multiplepinding in which the fund *in medio* consisted of the residue of the trust-estate administered by them.

1st DIVISION.
Lord Cullen.

Mr Burgess died in 1860, leaving a trust-disposition and settlement, dated 14th April in that year, whereby he bequeathed his whole estate, which consisted entirely of moveables, to trustees, now represented by the pursuers and real raisers, for certain trust purposes. *Inter alia*, he directed his trustees to pay to his wife, in the event of her surviving him, the free annual rents and proceeds of the residue of his estate, under the declaration that if this free liferent annuity

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should not amount to the sum of £500 his trustees should add as much from the capital of the estate as should make up the annuity to that sum. He then directed the payment of certain legacies, and gave the following directions for the disposal of residue:—"And I leave and bequeath the whole rest and residue of my means and estate heritable and moveable to Helen Gilchrist presently residing in my family and niece of my said wife in liferent for her liferent use allenerly she receiving from my said trustees the interest during her lifetime and I leave and bequeath the principal sum at her death to her lawful children equally and I hereby exclude the *jus mariti* or right of administration of any husband she may marry in regard to said provision and in the event of her dying without leaving lawful issue I direct the said residue at her death to be applied by my said trustees in founding erecting and endowing in Paisley an industrial school for females under such rules and regulations as my trustees may see fit to make; with power to them to name their successors and to take the writs and title-deeds to themselves and such successors in such form and with such powers and conditions as they shall judge expedient and to do every act and deed for the permanency and management of the institution which they may see cause to adopt as fully and freely as I could do myself declaring that if the said residue on a final apportionment and scheme of division of my estate shall not amount to the sum of two thousand pounds then the principal sums of the legacies bequeathed as aforesaid to" twelve named legatees "shall suffer a proportional diminution of their respective amounts, which shall be added to the said residue so as to bring up the same to the sum of two thousand pounds."

The total value of the estate left by Mr Burgess was £7900, a sum which was insufficient to yield the annuity of £500 directed to be paid to his widow. The capital of the estate was accordingly encroached upon, under the provisions of the settlement, and it amounted, at the death of the widow in 1869, to £4900. At that date the various legacies, amounting in all to £5600, fell to be paid, but the funds available were only sufficient to pay a dividend of 17s. 4d. in the £1 upon the whole legacies, without leaving any residue. The legatees, other than the twelve referred to in the clause quoted above, received this dividend as in full of their legacies, but, as the sum of £2000, designated as residue, had to be made up at the expense of these twelve, their legacies had to suffer further abatement, and the dividend which they received was only at the rate of 7s. 4½d. in the £1.

The liferent of the residue was paid to Miss Helen Gilchrist. She died without issue in 1903, and the free residue, including accumulations of interest since her death, amounted at the date of the action to £2125. This sum was the fund *in medio* in the action.

The pursuers and real raisers averred:—(Cond. 12) "The amount provided by his settlement was, at Helen Gilchrist's decease, found quite inadequate to carry out the directions of the testator. In point of fact, owing to the Government regulations regarding industrial schools, the sum at the disposal of the trustees would not have been sufficient even to purchase the necessary site for the school, far less to erect and maintain a suitable building." (Cond. 13) "At the date of Helen Gilchrist's death there existed in Paisley an association whose objects were to reclaim the neglected or profligate children of Paisley of both sexes, by providing for the education,

lodging, maintenance, and industrial and moral training of such children. With the view as far as possible of carrying out the directions of the testator, the trustees approached the directors who carried on with the above object the Paisley Industrial School, to see if they could possibly come to some arrangement with them, but after prolonged negotiations the matter has completely failed. The directors of said industrial school in addition, with the approval and on the advice of His Majesty's Chief Inspector of Industrial Schools, have now abandoned their school for girls and confined themselves to a school for boys. They have sold their present school, and have erected a new one designed for boys only, and the same is now in occupation." (Cond. 14) "As it has become impossible to carry out to the letter the directions of the testator, and, further, as the trustees are advised that in view of the terms of the Children Act, 1908, by which the objects contemplated by the testator are made chargeable on public rates, the funds could not now be devoted to the purposes directed, certain of the legatees mentioned in condescendence 5 hereof, and certain of the testator's next of kin, have intimated to the pursuers and real raisers claims that, the special charitable object contemplated by the testator having failed, the said sum in the pursuers' hands either (a) falls to be divided among those legatees mentioned in condescendence 5, who suffered diminution of their legacies, or their representatives; or (b) falls to be divided among the heirs *ab intestato* of the testator. The pursuers and real raisers have therefore found it necessary to bring the present action."

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Claims were lodged in the multiplepinding for (1) the pursuers and real raisers, (2) the twelve legatees above referred to, and (3) Mr Burgess's heirs *ab intestato*. The contentions of these various sets of claimants appear sufficiently from their pleas in law, which were, *inter alia*, as follows:—

For the pursuers and real raisers;—The claimants, as trustees foresaid, being unable through the circumstances condescended on to carry out the testator's wishes in the terms expressed in his trust-disposition and settlement, and the terms of said bequest showing a general charitable intention to apply the residue for charitable purposes, are entitled to be preferred to the whole fund *in medio*, with a view to their applying to the Court to have the fund administered under a *cy près* scheme.

For the legatees;—(1) The foresaid bequest for the purpose of founding, erecting, and endowing in Paisley an industrial school for females having become incapable of fulfilment and having lapsed, the sum provided by the testator for said purpose reverts to the trust-estate, and falls, with all income accrued thereon, to be divided among these claimants, in terms of their respective claims, by virtue of the directions contained in the foresaid trust-disposition and settlement. (2) The testator, on a sound construction of his said settlement, not having dedicated said sum to the purposes of charity generally, or preferred the general object of charity to the legatees named by him, the doctrine of *cy près* is inapplicable.

For the heirs *ab intestato*;—(1) The said bequest for the purpose of founding an industrial school having become impossible of execution, the sum so bequeathed falls into intestacy, and is payable to these claimants as next of kin of the testator.

On 20th June 1911 the Lord Ordinary (Cullen) pronounced the following interlocutor:—"Finds (1) that it is admitted that it is

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impossible to give effect to the direction of the truster, the late Charles Burgess, relating to the fund *in medio* by applying it towards founding, erecting, and endowing in Paisley an industrial school for females; and (2) that the bequest of the fund has not thereby failed as a bequest for charitable purposes of a kind cognate to the aforesaid particular purpose prescribed by the testator: Remits to Mr Stair Agnew Gillon, advocate, to consider the cause and whole proceedings, and to meet with the parties or their agents, and to adjust the draft of a scheme for the administration and application of the fund with a view to the same being reported to the Inner House in terms of section 16 of the Trusts (Scotland) Act, 1867.*

* "OPINION.—[After a narrative of the facts]—On the death of Helen Gilchrist without issue, the directions for applying the residue in founding, erecting, and endowing in Paisley an industrial school for females came into force. In consequence, however, of the provision which, since 1860, has been made by statute for the institution of industrial schools, it is not practicable to give effect to the truster's wish for the institution of such a school to be carried on by his trustees, and in any case the sum of £2000 would have been inadequate for that purpose. This is common ground. In these circumstances the question raised is whether the residue of £2000 falls to be devoted to some proximate object of charity under a scheme to be approved by the Court, or whether, on the other hand, it falls either (1) to the legatees whose legacies were abated in order to provide it, or (2) to the heirs *ab intestato* of the truster. The discussion which I recently heard was limited to the question whether the charitable bequest had altogether failed; the subordinate controversy between the legatees and the heirs *in mobilibus* being left over for the present.

"A great number of cases, English and Scottish, were cited in regard to the scope of the *cy près* principle, as illustrating the rule that to admit of its application it is necessary that the testator shall have evinced, expressly or by implication, an intention to dedicate his money to charity independent of the particular *modus* in which he has directed it to be applied. I think it may be said generally that the Courts have favoured the maintenance of charitable bequests. Some of the earlier English cases went to a very great extreme in this direction, further, indeed, than the more modern practice of the Courts reflects. The general rule above mentioned has been stated by Lord M'Laren to be 'that unless there be an absolute dedication of the fund to the purposes of charity generally, or unless it can be affirmed that the truster has preferred the general object of charity to his residuary legatees, there is no room for the application of the principle of *cy près* or approximation. I understand by the "general object of charity" here referred to, not the mere word charity as denoting any beneficent purpose, but some definite general object at least. That would be quite sufficient. The indication of a definite general object, such as education or moral instruction, which could be carried out in another way, would be sufficient to let in the principle of approximation.'—(*Young's Trustee v. Deacons of the Eight Incorporated Trades of Perth*, (1893) 20 R. 778.)

"The difficulty is as to what is to be regarded as sufficient in the way of an indication of a definite general object or the dedication of the fund to the purposes of charity generally. It is not often that a testator, in addition to specifying a particular scheme for the application of his money which finds favour with him, explicitly says that he wishes his money to be applied to charity in any event. I gather from the cases that if the particular form prescribed for the application of the fund bequeathed represents only one mode of furthering a well-recognised branch of charitable effort which may be promoted in a variety of ways, the particular mode may be regarded as non-essential and only the most favoured method in the testator's

The legatees and heirs *ab intestato* reclaimed, and the case was heard before the First Division on 31st October 1911. Jan. 31, 1912.

Argued for the reclaimers;—The Lord Ordinary was wrong in remitting for the preparation of a *cy près* scheme. The object of the bequest had failed, and there was no indication that the testator had a predilection in favour of devoting the fund to charity generally, or for the benefit of the class of persons whom an industrial school would benefit. In these circumstances there was no room for the application of the doctrine of *cy près*. The mode in which the fund was to be applied, *i.e.*, in the foundation of an industrial school, was of the essence of the bequest, and there was no question that the mode had failed.¹ Industrial schools were definite and well-known creations of statute from 1854 onwards.² It was admitted that the fund in question was not sufficient to found or endow an industrial school, even were it admissible, in view of subsequent legislation, to apply private

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eyes of furthering the general object which it subserves. Thus, in the present case, the spring of the bequest may be said to have lain in a desire on the part of the testator to benefit, morally and materially, the permanent class of the community he had in view, the mode of doing so which he selected as most to his mind being the institution of an industrial school. But it is not disputed that the class of persons in question may be similarly benefited otherwise than through the medium of an industrial school carried on by the testator's trustees.

"I may refer to two authorities, one Scottish and one English, which, of those cited, seem to me to be most nearly parallel to the present case.

"The first of these is the case of *Grant v. Macqueen, &c.*, 4 R. 734. A testator, who died in 1870, bequeathed a sum to trustees directing them to pay the 'clear annual interest or produce to the person officiating for the time as schoolmaster in connection with the Established Church' in a particular parish. After the passing of the Education Act of 1872 the school in question ceased to be maintained, and the question arose whether the bequest had lapsed, as was maintained by the residuary legatee under the will. It was held that it had not, because it was conceivable that the money might be required at some future period when there might be someone answering to the description of a schoolmaster in connection with the Established Church in the parish. Opinions were expressed to the effect that even in the absence of this future possibility the bequest would not have been regarded as lapsed, but that the money would have fallen to be applied to some proximate object. In the sequel of the case (*M'Dougall*, (1878) 5 R. 1014) the Court approved of a scheme whereby the funds were to be applied to the founding of a bursary for promoting the higher education of the natives of the parish, so long as there should be no person answering to the description of 'the person officiating for the time as schoolmaster, &c.' This temporary element, formally qualifying the scheme, does not seem to me to affect the bearing of the case on the present question, because the scheme, so long as it lasted, deprived the residuary legatee of the benefits of the fund, while applying it otherwise than to the specific purpose prescribed by the testator. No indication of an intention on the testator's part to

¹ *In re Ovey*, (1885) 29 Ch. D. 560; *In re White's Trusts*, (1886) 33 Ch. D. 449; *In re Rymer*, [1895] 1 Ch. 19; *In re University of London Medical Sciences Institute Fund*, [1909] 2 Ch. 1; The Lord President referred to *Loscombe v. Wintringham*, (1850) 13 Beav. 87, and *Marsh v. Attorney-Gen.*, (1860), 2 J. & H. 615, cited by Herschell, L. C., in *In re Rymer*.

² Reformatory Schools (Scotland) Acts, 1854 (17 and 18 Vict. cap. 74) and 1856 (19 and 20 Vict. cap. 28); Youthful Offenders Act, 1854 (17 and 18 Vict. cap. 86).

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funds for such a purpose. The provisions of the Children Act, 1908,¹ making the maintenance of such institutions a charge upon the rates, precluded such application of private funds,² and the fundamental condition of the trust was therefore incapable of fulfilment.³ The cases of *Grant v. Macqueen*⁴ and *Biscoe v. Jackson*,⁵ relied on by the Lord Ordinary, were distinguishable, for in each of these cases the terms of the bequest disclosed a general charitable intention which a scheme might be framed to fulfil.

Argued for the respondents;—It was admitted that it was no longer possible to give effect to the bequest in the manner directed by the testator. But in this case the mode was not of the essence of the bequest, and if, in such circumstances, it could be shown that the testator had a general charitable intention, the bequest did not lapse, and the doctrine of *cy près* might be applied.⁶ Industrial schools were well known at the date of the will and at the death of the

devote the money to a more general purpose of charity is to be found in the words of his bequest, except that the money was put permanently in trust for subserving an object (education) so general as to be capable of advancement in many modes other than the particular one which he prescribed.

“The other case above referred to is that of *Biscoe v. Jackson*, 35 Ch. D. 460. There the testator directed his trustees to set apart a sum of money out of such part of his personal estate as might by law be applied for charitable purposes, and to apply it in the establishment of a soup-kitchen and cottage-hospital for the parish of Shoreditch, in such manner as not to violate the Mortmain Acts. The bequest was held to be a valid one, so far as the Mortmain Acts went, but thereafter it was found to be impossible to apply the fund to the specific purposes prescribed by the testator, and the question then arose whether the bequest had failed. It was decided that it had not, and that the Court would execute the trust *cy près*, and a scheme was directed accordingly. The ground of the decision was that the will showed a general intention to benefit the poor of the parish of Shoreditch.—[The Lord Ordinary here referred to passages in the judgments of Kay, J., and Cotton, L.J., and continued]—In this case the testator did not expressly say that he intended to benefit the poor of Shoreditch in any event, and not only by providing a soup-kitchen and cottage-hospital, and the general intention of charity seems to have been found in the general nature of the object of benefiting the poor, which might be promoted in many other ways. It is true that the testator directed the money to be set apart out of such part of his personal estate as might by law be bequeathed for charitable purposes. But this apparently referred to the Mortmain Acts or other restrictions imposed by law on the powers of testamentary disposition, and did not, so far as I can see, bear on the question as to the area of the field of charity within which the testator desired his money to be applied. The decision in the case of *Biscoe* is referred to in subsequent English cases, but, so far as I can find, without criticism of its soundness.

“Taking these two cases together as being the nearest to the present one, I think this result may be derived from them, that where a testator has prescribed for the application of his money one particular mode of promoting

¹ 8 Edw. VII. cap. 67.

² *Governors of Jonathan Anderson Trust*, (1896) 23 R. 592.

³ *In re Randall*, (1888) 38 Ch. D. 213; *Marquess of Bute's Trustees v. Marquess of Bute*, (1904) 7 F. 49.

⁴ (1877) 4 R. 734.

⁵ (1886) 35 Ch. D. 460.

⁶ *M'Laren on Wills*, 3rd ed., p. 926; *Biscoe v. Jackson*, 35 Ch. D. 460, at p. 462; *Kirk-Session of Prestonpans v. Prestonpans School Board*, (1891) 19 R. 193.

testator as institutions which provided persons of the vagrant class with an education, and taught them a means of earning their livelihood. It could not be said that the present bequest did not disclose a charitable intention to females of this class. The Lord Ordinary was therefore right in ordering a remit to prepare a scheme which would, as nearly as possible, carry out this charitable intention. The cases of *Randall*¹ and *Marquess of Bute's Trustees*² were distinguishable, because in these cases, as in that of *Walsh v. Secretary of State for India*³ there was a destination-over on the failure of the immediate trust purpose, to which the Court gave effect. In the cases of *Rymer*⁴ and *Ovey*,⁵ as in that of *Fisk v. Attorney-General*,⁶ the institution which it was sought to benefit had ceased to exist before the death of the testator, while in the present case the bequest could properly have been carried out in 1860, the year of Mr Burgess's death.⁷

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At advising on 31st January 1912,—

LORD PRESIDENT.—The question for determination arises in an action of multiplepinding brought by the trustees of Charles Burgess. Mr Burgess left certain provisions to his widow, and various legacies to various people,

a recognised object of charity which is capable of being furthered in other modes, and has not used restrictive words excluding these, and where the testator's mode is found to be impracticable, the Court will make a *cy près* application of the money, on the view that this course, rather than the failure of the bequest and the diversion of the money from charity altogether, is most in accordance with the testator's intention. A favour shown to charity no doubt underlies this rule, but favour shown to charity is a familiar aspect of the law relating to charitable bequests both in Scotland and in England.

"Apart from the fact that the testator here has cast his charitable purpose in one particular form only, so far as his express words go, there is nothing of a restrictive character to be found in his will. He prefers his charitable purpose so conspicuously that he provides for the £2000 being raised, if necessary, by abating special pecuniary legacies. He makes no provision against a lapse, but directs the institution of a trust for the application of the money which is to be a permanent trust, thus showing that it was not within his contemplation that the money should ever revert either to his heirs *ab intestato* or to his legatees.

"The claimants, who are heirs *ab intestato*, and legatees, presented an argument derived from the fact that there has here been an original and not a subsequent failure of the testator's scheme. This, however, was so in *Biacoe's* case. I confess I do not see why, if a general intention of charity will support a bequest against a subsequent failure of the testator's scheme, it should not equally do so when that scheme has failed at the outset.

"I am accordingly of opinion that the bequest in question has not lapsed in consequence of the scheme prescribed by the testator having been found to be impracticable. In these circumstances I shall give the pursuers and real raisers the opportunity of putting forward a scheme for the administration of the fund *cy près*."

¹ 38 Ch. D. 213.

² 7 F. 49.

³ (1863) 10 H. L. C. 367.

⁴ [1895] 1 Ch. 19.

⁵ 29 Ch. D. 560.

⁶ (1867) 4 Eq. 521.

⁷ The following cases were also referred to:—*In re Slevin*, [1891] 2 Ch. 236; *Attorney-General v. Bishop of Oxford*, (1867) 7 Brown, C. C. 444, note; *Corbyn v. French*, (1799) 4 Ves. 418; *In re Geikie*, (1910) 27 T. L. R. 484; *Caird, &c.*, (1874) 1 R. 529; *Ironmongers' Company v. Attorney-General*, (1844) 10 Cl. & F. 908.

Jan. 31, 1912. and then made a special provision as regards the residue. He directed the residue to be put aside to be liferented by Miss Helen Gilchrist, but he made a special provision that the residue was to amount to £2000—in other words, if there was not enough to leave £2000 after all else was paid, the special legacies he had left were to be docked so that the residue should be £2000. As a matter of fact the legacies had to be docked. Then comes the provision upon which the question arises: the testator provided that if Miss Helen Gilchrist died without leaving lawful issue, which is the event that has happened, the said residue at her death should be applied in founding, erecting, and endowing in Paisley an industrial school for females under such rules and regulations as his trustees might see fit to make. The only other matter I need refer to is that of the dates. The date of the will was in 1860, and the testator died in the same year, and the will was registered immediately after. Miss Gilchrist survived him, and eventually died on 10th December 1903.

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Now the state of affairs is this: At the date of the will and at the date of the testator's death it would have been possible to found an industrial school under the provisions of an Act of 1854. But during the period by which Miss Gilchrist survived that date, matters have changed, and it is now impossible to found an industrial school, because the matter has been entirely taken in hand by the authorities, and they will only permit industrial schools upon certain conditions. Even supposing then that the sum were adequate, which it is not, it is taken as common ground between the parties that the authorities would not permit an industrial school to be founded in Paisley by these trustees. In these observations I am assuming, or am quite ready to decide, that there is no question but that the term "industrial school" is used in what I may call a technical sense. It does not mean a school where you may be taught a trade, but it means an institution known as an industrial school, and that is common ground between the parties.

The question is whether or not the bequest must be held to have failed, or whether the Court will arrange some scheme under which the money is to be administered. The latter is the view that was taken by the Lord Ordinary. His interlocutor which is under review finds that it is admitted that it is impossible to give effect to the direction of the truster, the late Charles Burgess, relating to the fund *in medio* by applying it towards founding, erecting, and endowing in Paisley an industrial school for females. His second finding is that the bequest of the fund has not thereby failed as a bequest for charitable purposes of a kind cognate to the aforesaid particular purpose described by the testator. Accordingly he remits to Mr Stair Agnew Gillon, advocate, to consider the cause and whole proceedings and to meet with the parties or their agents, and to adjust the draft of a scheme for the administration and application of the fund; it is against this finding that the present reclaiming note is taken.

There is a most exhaustive and instructive judgment given by a very eminent Lord Chancellor, Lord Herschell, in the case of *Rymer v. Stanfield*,¹ and I think, in view of that, it would be quite useless for me to go through

¹ [1895] 1 Ch. 19.

the cases. His Lordship divides the cases into three categories. The first Jan. 31, 1912. class is where there undoubtedly is a gift for a charitable purpose, but where the means are not indicated, and where the Court will supply the means owing to the favour that the Court has always shown to charitable bequests. The second class he takes are cases where bequests are given to a society or institution of some sort which does not and never has existed, and where from the mere fact of its non-existence the charitable intention of the testator in that direction is spelled out, and there again the Court will denominate the institution or means by which the charitable purpose should be carried into effect. Last of all he comes to the third class of case, and he there quotes with approbation the language used by Vice-Chancellor Kindersley in the case of *Clark v. Taylor*,¹ which I think is well worthy of quoting in this case, and it is as follows: "There is a distinction well settled by the authorities. There is one class of cases in which there is a gift to charity generally, indicative of a general charitable purpose, and pointing out the mode of carrying it into effect; if that mode fails, the Court says the general purpose of charity shall be carried out. There is another class, in which the testator shows an intention, not of general charity, but to give to some particular institution; and then if it fails, because there is no such institution, the gift does not go to charity generally: that distinction is clearly recognised; and it cannot be said that wherever a gift for any charitable purpose fails, it is nevertheless to go to charity. In many cases it is difficult to see to which particular class the case is to be referred, and this is, to a certain extent, one of such cases."

I think that is admirably put. When you come to the concrete, the application, no doubt, in some cases may be difficult, and when one goes through the very large number of decided cases on this subject, no doubt there are some of them in which, speaking for oneself, perhaps one might not have found it easy to spell out of the particular bequest the general charitable intention. None the less the remark I think remains true. It cannot be said that wherever a gift for a charitable purpose fails, the bequest is nevertheless to go to charity, and one must do one's best in each individual case. I do not think it is a right way of treating the authorities to argue that because in one decided case there was what appears to be very little indication out of which a general charitable intention has been spelled, therefore one is necessarily bound in every case to spell a general charitable intention out of very little. I think one is bound to consider each case by itself.

Taking this view of the effect of the decision to which I have just referred, I come in this case to a different conclusion from the Lord Ordinary. I do not think you can spell out a general charitable intention. This man had a perfectly definite view. He knew what an industrial school was; he knew as a matter of fact that at that time a private individual, if he gave the money, could found an industrial school. He wished to do this for Paisley, and he wished the school to be confined to girls and not to embrace boys. That is the thing he wanted, and that has come to be a thing impossible to attain. The bequest seems to me therefore to be in precisely the same situation as if the money had been given to a particular

¹ (1853) 1 Drew. 642.

Jan. 31, 1912. existing institution, and that institution had disappeared before the time
Burgess's when the will came into operation. This seems to me to be giving the
Trustees v. money to an existent institution in potentiality, and when the will comes
Crawford. into operation there is no longer an existent institution in potentiality. I
Ld. President. think here it is out of the question to say that the testator had a general
charitable intention to girls in Paisley who had temptation to fall—because
I think this is the only way in which you could describe the class that
would be benefited by such an industrial school—and therefore you are in
some way or other to make a scheme for the benefit of this class of person.
In other words, although I am perfectly certain that the learned advocate to
whom it was remitted by the Court would have done his best, it would
have been the will of Mr Stair Gillon and not that of Mr Charles Burgess.
Therefore I am of opinion that the bequest has entirely failed.

There is a question raised in the pleadings upon which I give no opinion,
because I think it must be decided by the Lord Ordinary—that is, whether
the effect of this judgment will be to give the money to the persons who
had the docked legacies, or whether it will go to the heirs *ab intestato*; but
this question cannot be decided by us now.

LORD KINNEAR.—I agree with your Lordship.

LORD JOHNSTON.—If this bequest is to be carried out *cy près*, as the
Lord Ordinary thinks that it should be, I agree with him that it is neces-
sary that we should be able to find that the testator has evinced expressly
or by implication an intention to dedicate his money to charity, independ-
ently of the particular *modus* in which he has directed it to be applied.
But I do so with this qualification, that by charity I mean, and understand
the Lord Ordinary to mean, not charitable purposes generally, but some
charitable purpose in the concrete, definitely, however generally, defined.
But I differ from him, in that I do not think that the testator has evinced
any such intention.

It is impossible to conceive of any charitable bequest, however restricted
in the *modus*, of which it cannot be said that the granter had the intention
of benefiting a class or furthering a charitable object. But it does not
follow that he had any such intention apart from the particular object.
However benign a construction it may be proper to give to a charitable
bequest, still I think that the Court is not entitled to depart from the recog-
nised principles of construction of a testamentary deed, and must find the
testator's intention in his words, and not in any speculation as to what he
would have done, or intended, in emerging circumstances which he did not
and could not foresee.

The present testator has very definitely directed the residue of his estate
to be applied in “founding, erecting, and endowing” in Paisley a definite
institution, with power—which I think imposes a duty—to make rules and
regulations for its conduct, to perpetuate the trust, and particularly “to do
every act and deed for the permanency and management of the institution
which they may see cause to adopt as fully and freely as I could do myself.”
The institution is to be an industrial school, and the objects of the charity
are to be females, impliedly of the class and in the circumstances to whom
upbringing in an industrial school would be a benefit. Nothing could be

more definite or limited in its *modus*, and it is, I think, impossible, even on the terms of the bequest itself, to find a general intention to benefit the particular class of female children, to whom the training of an industrial school is appropriate, in the way pointed out if possible, but if not in that way, at least in some way.

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But I am confirmed in this view, first, by the consideration of the particular class of institution proposed to be established, viz., an industrial school. When the testator wrote, an industrial school was already a well-defined institution. Reformatory and industrial schools existed prior to 1854, and they are referred to in the Act of that year, which was passed to render them, as already established by parochial boards and associations of individuals, more available for the benefit of vagrant children. They have since become State-aided, and correspondingly under State control. But, though in a very different way, they filled then, as they do now, a felt need. It was an institution of this class which the testator intended to found in Paisley, and he was specially solicitous about its permanency. *Quomodo constat* that if he had found himself forestalled, had found that the effect of supervening legislation had been to make such a private foundation neither possible nor necessary, he would have made or continued his bequest for the benefit generally of the class for whom industrial schools are provided. Neither the expression nor the scope of his bequest justifies any such conclusion. Second, by the consideration that the testator had so pointedly before him his conception of an institution, that he declared that if the residue, on a final scheme of division, should be found not to amount to £2000, the legacies which he had appointed to be paid should abate so as to bring up the residue to £2000. He thus shows that he prefers his scheme of an institution to his legatees. But it is impossible, except on mere speculation, to say that the testator would have fixed the same sum of £2000 as the minimum for a *cy près* application of his funds by the Court, and would have docked his legacies to secure that amount of residue for that purpose. And if, therefore, there is no justification for trenching upon the legacies,—or indeed, as I think, no power either in the trustees or in the Court for so doing,—to make up the £2000 for a *cy près* application, it follows that there is no justification for so applying the residue itself, which happens to be much less than £2000.

I think that the Lord Ordinary has been misled by the case of *Biscoe v. Jackson*.¹ The language used there by the learned Judges is, I think, far too wide for the case before them, and I question whether it was really intended by them to be taken in its wider sense, and not as restricted *secundum subjectam materiam*. The testator's purpose was to establish a soup-kitchen and cottage-hospital for the parish of Shoreditch, and the form of his bequest indicated that he intended land free from the restrictions of the law of mortmain to be acquired for the purpose. This proved impossible, for reasons which I do not pretend to understand, but it was clearly not impossible either to find the necessary land in the neighbourhood of Shoreditch or to establish the hospital and soup-kitchen without acquiring the fee-simple of the site. The wide language used about general intention to benefit the

¹ 35 Ch. D. 460.

Jan. 31, 1912. poor of Shoreditch to the effect of entitling the Court to direct a scheme for that purpose seems to me to be somewhat beyond the mark. All that was really necessary for judgment is contained in the last few words of the opinion of Kay, J., where he says: "But also I am not satisfied that because land cannot be found to build a cottage-hospital or soup-kitchen upon it, there may not be other modes of establishing a cottage-hospital or soup-kitchen within the parish of Shoreditch, which may carry out the testator's intention." To reach that eminently reasonable conclusion, and such very modified application of the doctrine of *cy près*, I do not think that the general exposition of the law on that subject was necessary, and I do not think that it would be at all safe to take it in its wide generality and to apply it to the present case.

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If I might venture to express my opinion in terms borrowed from the service of heirs, I should say that there was here no general bequest for charity; that there was here no general special bequest for charity; that there was here a special bequest for charity, limited by the mode dictated; and that, the mode having proved impracticable, the bequest has failed.

LORD MACKENZIE.—The testator's direction to his trustees is that the residue of his estate is to be applied by them "in founding, erecting, and endowing in Paisley an industrial school for females under such rules and regulations as his trustees might see fit to make." In the event of a deficiency, the residue was to be made up to £2000 by the special legatees suffering a proportional diminution of their legacies. As the Lord Ordinary states, it is common ground between the parties that it is not practicable now to institute such a school as the testator contemplated. This was the footing upon which the case was argued. In any view the sum of £2000 would not have been adequate for the purpose. At the date of the will in 1860 it would have been possible under the then existing legislation for voluntary contributions to be received in aid of an industrial school. This is no longer possible. A reference to the terms of the Act 8 Edward VII. cap. 67 shows that such voluntary contributions, if received, would merely go to relieve the rates.

The bequest of the testator being in its terms impracticable the question is whether the case is one for the application of the *cy près* principle. The principle is stated in the passage of Lord M'Laren's opinion in *Young's Trustee v. The Deacons of the Eight Incorporated Trades of Perth*¹ quoted by the Lord Ordinary in his opinion. If there is an absolute dedication of the fund to the purpose of charity generally, or if it can be affirmed that the testator has preferred the general object of charity to his residuary legatees, the principle of *cy près* may be applied—otherwise not. Was the testator's object here to establish a charity for the benefit of a certain class, with a particular mode of doing it? or was the mode of application such an essential part of the gift that it is not possible to distinguish any general purpose of charity? I am unable in the present case to put the same construction on the bequest as the Lord Ordinary. I think the terms of the bequest exclude the idea that the testator intended his trustees to give

¹ 20 R. 778.

effect to a general charitable object. In 1860 an industrial school was a quite well-known definite entity, brought into prominence by recent statutes. At the time the testator made his will the field was not fully occupied—now it is. Therefore the only mode of doing a charitable act which the testator contemplated is no longer possible; he had no general intention of giving his money to charity, and the Court cannot, because the particular mode has failed, apply the *cy près* principle. The case founded upon in the Lord Ordinary's note of *Grant v. Macqueen*¹ does not appear to me to be analogous. There the sum was left in order that the interest might be paid to the person officiating for the time as schoolmaster in connection with the Established Church in a certain parish. Some years after the testator's death there ceased to be a schoolmaster answering the description. The fund was then claimed by the residuary legatee, who was himself the successor of the person who had closed the school. As Lord Deas pointed out, it would have been odd if the result of closing the school had been to put money into the pocket of his successor. The view upon which the Court proceeded was that the bequest had not lapsed, because there might at some future date be a person answering the description of a schoolmaster in connection with the Established Church; and in the succeeding stage of the case—*M'Dougall*²—the Court approved of a scheme dealing with the fund in question so long as there should be no schoolmaster. There are cases closer to the present, of which I may take as an example *In re Rymer*.³ There the testator bequeathed a legacy of £5000 "to the rector for the time being of St Thomas' Seminary for the education of priests in the diocese of Westminster for the purposes of such seminary." At the date of the will St Thomas' Seminary was carried on at Hammer-smith, but shortly before the testator's death the seminary ceased to exist, and the students who were being educated there were removed to another seminary near Birmingham. It was held by the Court of Appeal, consisting of Lord Herschell, L.C., and Lindley and A. L. Smith, L.JJ., affirming the decision of Chitty, J., that the bequest was for the benefit of the particular institution, and that institution having ceased to exist in the testator's lifetime, the legacy could not be applied *cy près*, but lapsed and fell into the residue. That case is very like the present, and affords a contrast to *Biscoe v. Jackson*,⁴ where a testator directed his trustees to set apart a sum of money out of such a part of his personal estate as might by law be applied for charitable purposes, and to apply it in the establishment of a soup-kitchen and cottage-hospital for the parish of S. in such manner as not to violate the Mortmain Acts. There it was held that the will showed a general charitable intention to benefit the poor of the parish of S., and that although the particular purpose of the bequest had failed the Court would execute the trust *cy près*; and a scheme was directed accordingly.

I am accordingly of opinion that the bequest has failed, and that this is not a case for the application of the *cy près* principle. The case ought therefore, with findings to this effect, to go back to the Lord Ordinary to determine the further matters in dispute between the parties.

¹ 4 R. 734.

³ [1895] 1 Ch. 19.

² 5 R. 1014.

⁴ 35 Ch. D. 460.

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THE COURT pronounced this interlocutor:—"Recall the second finding and the remit contained in said interlocutor: In place thereof find that the testator's bequest of the fund *in medio*, so far as it applies it towards founding, erecting, and endowing in Paisley an industrial school for females, has failed: *Quoad ultra* adhere to the said interlocutor: Remit to the Lord Ordinary to proceed as accords, and decern."

J. & J. Ross, W.S.—MURRAY LAWSON & DARLING, S.S.C.—Agents.

No. 64. JOHN PORTER, Petitioner (Appellant).—*Horne, K.C.—M. P. Fraser—H. P. Macmillan.*

Jan. 20, 1912.

THOMAS NISBET, Respondent.—*Clyde, K.C.—A. Crawford.*

Porter v.
Nisbet.

Burgh—Building regulations—Public Health—Glasgow Building Regulations Act, 1900 (63 and 64 Vict. cap. cl.), secs. 4 and 38—"Enclosed space of back ground" in "hollow square."

The Glasgow Building Regulations Act, 1900, sec. 38, prohibits the erection of buildings other than those of a specified class "within the enclosed space of back ground in any hollow square," and by sec. 4 defines a hollow square as including certain geometrical figures enclosed by buildings and streets.

Circumstances in which the site of proposed buildings was held to be within the enclosed space of back ground in a hollow square.

Observations, per the Lord President, as to what constitutes a "hollow square," and what constitutes "back ground," within the meaning of the Act.

Burgh—Building regulations—Public Health—Dean of Guild—Lining—Discretion of Dean of Guild to sanction erection of buildings within enclosed space of back ground in hollow square—Glasgow Building Regulations Act, 1900 (63 and 64 Vict. cap. cl.), sec. 38.

The Glasgow Building Regulations Act, 1900, sec. 38, which prohibits the erection of buildings within the enclosed space of back ground in a hollow square, contains a proviso that, where the hollow square exceeds certain dimensions, "the Dean of Guild may, if satisfied that the arrangements for ingress and egress, drainage, cleansing, lighting, and ventilation are adequate, suitable, and satisfactory, grant decree for the erection in such enclosed space of back ground of buildings not exceeding two storeys in height, on condition that such buildings shall not be used for purposes which may be injurious or offensive to the inhabitants of the surrounding or adjacent buildings. But no such building shall be authorised by the Dean of Guild unless an entry not less than ten feet in width be provided leading from a street to such building."

The Dean of Guild refused to sanction the erection of one-storey buildings (which were not to be used for an offensive or injurious purpose) within a hollow square that exceeded the required dimensions, and that was provided with an entry of not less than ten feet in width. He did not find that the proposed buildings failed to satisfy any of the requirements as to ingress, egress, drainage, cleansing, lighting, and ventilation specified in sec. 38 of the said Act.

Held, on appeal, that the effect of the section was to put it entirely within the discretion of the Dean of Guild, in the case of buildings which satisfied these requirements, to grant or to refuse the lining; and appeal *dismissed*.

On 23rd August 1911 John Porter presented a petition to the Dean of Guild Court in Glasgow, in which he craved a decree of lining for certain buildings, to be used as public halls, which he proposed to erect on a piece of ground belonging to him situated behind a row of tenements fronting on the Dalmarnock Road, Glasgow, which were also his property.*

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On 14th September 1911 the Dean of Guild pronounced the following interlocutor :—" Having inspected the *locus* in question and heard parties, and having also heard the arguments stated at the bar on this date for the petitioner, and considered the whole matter, the Dean of Guild, for the reasons assigned in the annexed note, refuses the lining craved, and decerns." †

* The Glasgow Building Regulations Act, 1900 (63 and 64 Vict. cap. cl.), enacts :—

Sec. 4. " . . . 'Hollow square' means any square, parallelogram, triangle, polygon, circle, or other regular or irregular figure formed by one or more streets or buildings or streets and buildings in such a manner as to contemplate the erection or continuance of buildings (other than wash-houses and offices) enclosing or nearly enclosing a space of back ground, and includes—

"(1) The buildings enclosing or nearly enclosing such space of back ground ; and

"(2) The buildings (if any) erected within such space of back ground."

Sec. 38. "No building other than the usual one-storey washhouses and offices shall be erected within the enclosed space of back ground in any hollow square the buildings of which, or any of them, are or may be used, or are intended to be used, as dwelling-houses: Provided that in the case of any hollow square in which the enclosed space of back ground exceeds the dimensions specified in the immediately preceding section the Dean of Guild may, if satisfied that the arrangements for ingress and egress, drainage, cleansing, lighting, and ventilation are adequate, suitable, and satisfactory, grant decree for the erection in such enclosed space of back ground of buildings not exceeding two storeys in height on condition that such buildings shall not be used for purposes which may be injurious or offensive to the inhabitants of the surrounding or adjacent buildings. But no such building shall be authorised by the Dean of Guild unless an entry not less than ten feet in width be provided leading from a street to such building."

† "NOTE.—When this case was called on 31st August the Master of Works stated that the proposed building would be a building within the enclosed space of back ground in a hollow square. This statement was not called in question by the petitioner, nor did he at the inspection suggest that the site was not an enclosed space of back ground in a hollow square. When the case was called on this date, however, an agent appeared on his behalf and contended in the first place that section 38 of the Glasgow Building Regulations Act, 1900, was not applicable, as this site was not an enclosed space of back ground in a hollow square. If the Dean of Guild comprehended the argument for the non-application of section 38 it was this, that when the tenements erected by the petitioner on the Dalmarnock Road side of this ground were sanctioned by the Court there was no provision made for through ventilation and other things contemplated by sections 34, 35, and 36 of the Act of 1900, and that therefore at that time the Court did not regard the ground behind these tenements, that is, the ground upon which the petitioner now asks for authority to build, as an enclosed space of back ground in a hollow square. It does not seem to the Dean of Guild that there was any omission on the part of the Court at the time when the tenements were sanctioned, but in any event it seems to him that the point taken is quite irrelevant. In view of the definition given

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The petitioner appealed to the First Division of the Court of Session, and the appeal was first heard on 27th October 1911, when the case was continued for the appellant to lodge a statement of the facts on which he relied and of their legal results.

On 10th November the appellant lodged a minute which contained the following statements:—“(1) The appellant is the proprietor of a considerable area of ground in Dalmarnock Road, Glasgow. Upon the front portion of his land he has erected a series of five-storey tenements facing Dalmarnock Road. The ground floor of these tenements is occupied as shops and the upper storeys as dwelling-houses. Behind these tenements there are enclosed spaces of back ground, 40 feet or thereby in depth, which is much more than sufficient to provide the extent of open space required in front of the windows of sleeping apartments by section 40 of the Glasgow Building Regulations Act, 1900. (2) Behind the said enclosed spaces of back ground in the rear of the appellant's said five-storey tenements there is a large plot of unbuilt-on ground belonging also to the appellant. On a portion of this ground the appellant proposed to erect buildings to be used as public halls. He applied to the Dean of Guild Court in Glasgow for the necessary lining, which was refused, in consequence of which the present appeal was taken. (3) The proposed halls, which are much needed in the district, are designed as a building of one storey in height, with suitable internal accommodation. Access from Dalmarnock Road will be obtained by an entry 10 feet 7 inches

by the Act as to hollow square, the Dean of Guild has no difficulty in holding, both as a matter of fact and law, that the ground in question is an enclosed space of back ground in a hollow square, of which hollow square some of the buildings are used as dwelling-houses, and that accordingly section 38 of the Act of 1900 applies.

“The second argument seemed to be to this effect: assuming that section 38 applied, the Dean of Guild might nevertheless, under the proviso in that section, sanction this building, and that if he declined to do so, it could only be on the ground that he was not satisfied with the arrangements (a) for ingress and egress, (b) drainage, (c) cleansing, (d) lighting and ventilating, or (e) that the purposes of the building were injurious or offensive to the surrounding inhabitants. Section 38 provides that no building is to be authorised unless an entry of not less than 10 feet be provided leading from a street to the proposed building. Reference was made to section 99 (4) of the Act, which provides that the exits from public buildings shall be not less than 1 foot in width for every 70 persons who can be seated within the building, and it was pointed out that this building was constructed to seat 660 people, and that an exit of 10 feet, as provided by the petitioner, was more than the statutory requirement. The Dean of Guild does not think that the contention is sound. The section reads that the Dean of Guild may, if satisfied that certain things are satisfactory, grant certain linings, but the contention would make the section read that the Dean of Guild must, unless satisfied that certain things are not satisfactory, grant certain linings. The proviso in section 38 seems to the Dean to confer a discretion on him. He looked at the ground in question so as to be able to exercise that discretion. He is not satisfied that the ground in question is a proper place for public halls, and the whole disposition of the ground would not, in his opinion, justify a lining with only an access of the minimum of 10 feet. Having seen the place for himself, the Dean has no hesitation in saying that, in his judgment, halls for the accommodation of over 600 people should not be sanctioned in circumstances like the present.”

in width, and the buildings of the halls will be separated from the back walls of the enclosed back ground behind the appellant's tenements by a passage of the same width, so that the proposed buildings will be 52 feet distant from the said tenements. No objection was taken by the respondent to any of the details of the plans of the proposed buildings lodged by the appellant in the Dean of Guild Court. These plans, which conform in every respect to the Glasgow Building Regulations, are referred to. (4) The plot of ground belonging to the appellant on which it is proposed to erect the said halls forms part of a large area of ground belonging to various proprietors, and bounded by the following streets, viz., by Dalmarnock Road on the south-west, along which it extends 476 feet or thereby; by Dunn Street on the north-west, along which it extends 481 feet or thereby; by Baltic Street on the north-east, along which it extends 405 feet or thereby; and by Nuneaton Street on the south-east, along which it extends 490 feet or thereby. The total area bounded by these streets amounts to 23,720 square yards or thereby. The frontages to Dalmarnock Road and Nuneaton Street are occupied by tenements of three, four, and five storeys, and are continuously built upon. The frontage to Dunn Street is chiefly occupied by one-storey sheds in connection with the works of Messrs Andrew Muirhead & Son, and is not continuously built upon. The frontage to Baltic Street is occupied partly by a range of four-storey tenements and partly by a one-storey shed occupied as a cab-hiring establishment. (5) The portions of the said area behind the buildings facing the streets are to a large extent occupied by a great variety of buildings, including tenements, stables, offices, and sheds. The one-storey sheds of Messrs Andrew Muirhead & Son extend backwards from Dunn Street more than half way across to Nuneaton Street. A plan is produced herewith showing the existing state of occupation of the said whole area. (6) Since the passing of the Glasgow Building Regulations Act, 1900, linings have been granted by the Dean of Guild Court of Glasgow for the construction of various buildings on the said area behind the buildings fronting the streets. [Reference was then made to certain of the linings which had been granted, one of them being for a factory three and a half storeys in height. Reference was also made to the size of the area of back ground, which exceeded the dimensions specified in section 37 of the Act.] (8) The plot of ground on which the appellant proposes to erect the said halls is not part of a hollow square within the meaning of sections 4 and 38 of the Glasgow Building Regulations Act, 1900, and has not been so treated by the Dean of Guild Court of Glasgow in the past. The buildings fronting the streets are not so arranged as to effect or contemplate the enclosing of the ground behind, and the space of ground surrounded by said streets has been laid out and built upon, with the sanction of the authorities, in a manner inconsistent with the applicability thereto of section 38 of the said Act. The said section was not intended to, and does not, apply to an area of the extent and character of the area presently in question, and occupied as that area is. The Dean of Guild Court has not made any provision for ventilating spaces such as should have been done under sections 34 to 36 of said Act if the said area is a hollow square within the meaning of said Act, and has permitted the erection of buildings contrary to said section 38 if the Dean of Guild has correctly interpreted that section in the note to the interlocutor appealed against.

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There are ample enclosed spaces of back ground behind the appellant's five-storey tenements facing Dalmarnock Road, and it is not proposed in any way to interfere with or encroach thereon by the erection of the said halls. (9) Assuming but not admitting that the said whole area of ground constitutes a hollow square within the meaning of the said Act of 1900, it is submitted that the Dean of Guild has no discretion conferred upon him by section 38 of the said Act, except in relation to the arrangements expressly mentioned in said section, and that, in any event, he has not reasonably exercised his discretion, and has not assigned any adequate or sufficient reasons for refusing the lining craved by the appellant, although he is required by section 134 to specify distinctly the several facts material to the case which he finds to be established, and to state how far his judgment proceeds on the matter of fact so found or on matter of law, and the several points of law which he means to decide. The primary object of the said section 38 is to secure thorough ventilation in enclosed areas, and it was not intended by it to increase the free space for which provision is made by section 40 of the said Act. The appellant's proposed halls will not in any way obstruct the ventilation of the backs of the dwelling-houses in the tenements fronting the streets. In point of fact there are no dwelling-houses on the ground floor of the appellant's five-storey tenements behind which the said halls are proposed to be built, and the same would not obstruct in any way the ventilation of the dwelling-houses situated on the first and higher floors. There are halls elsewhere in Glasgow situated on ground behind dwelling-houses, and such a site is in no way objectionable for the purpose, where, as here, there is direct and adequate access from the street. The proposed buildings satisfy in every respect the requirements to which the Dean of Guild is, by section 38 of the said Act, directed to have regard in exercising his discretion. The refusal of the lining craved is tantamount to the confiscation, without compensation, of a valuable area of building ground belonging to the appellant, for the benefit of proprietors who have never suggested that the lining should not be granted, and some of whom have been permitted to erect within the said area other buildings which are contrary to said section 38 as interpreted by the Dean of Guild. The appellant being desirous of meeting the views of the Dean, offered at the bar to consider any suggestions by the Dean, but none were made.

"The appellant accordingly respectfully submits on the whole matter that his appeal should be sustained, and the case remitted to the Dean of Guild, with instructions to grant the lining craved, in respect that (1) The said area is not a hollow square within the meaning of the Glasgow Building Regulations Act, 1900. (2) The plot of ground on which the said halls are proposed to be erected is not an enclosed space of back ground in a hollow square, or part of such an enclosed space, within the meaning of section 38 of the said Act. (3) *Separatim*, and assuming the said Act to be applicable, the Dean of Guild has not exercised his discretion fairly and reasonably in refusing the lining craved. (4) *Separatim*, the section under which the Dean of Guild has refused the lining being incapable of reasonable interpretation should, as a restrictive section, be disregarded."

Answers were lodged for the respondent, Thomas Nisbet, the Master of Works for the city of Glasgow, which were in these terms:—" (1) The spaces referred to as enclosed spaces of back ground are open spaces required by the provisions of section 40 of the said Act,

and as such are sufficient for their purpose. *Quoad ultra* admitted. Jan. 20, 1912.

(2) Admitted, under reference to answer 1, and subject to the explanation that the proposed buildings would almost entirely cover the portion of unbuilt-on ground referred to in statement 2 for the petitioner and appellant. The unbuilt-on ground referred to is comprised within an enclosed space of back ground in a hollow square, within the meaning of sections 4 and 38 of the said Act. (3) The local need for the halls referred to is not known. *Quoad ultra* admitted. (4) Admitted subject to the explanations following. The entire frontage to Dalmarnock Road is occupied by five four-storey tenements, four five-storey tenements, one three-storey tenement, and one one-storey tenement. The entire frontage to Nuneaton Street is occupied by four-storey tenements. The frontage to Dunn Street is occupied as stated under the qualification that it is almost wholly built upon. (5) Admitted under reference to the plan. (6) The linings, plan, and cross section are referred to for their terms, beyond which no admission is made. Explained that the buildings referred to as numbers 2 and 5 [on the plan] are extensions of formerly existing buildings fronting Dunn Street and Dalmarnock Road respectively, and are not buildings within an enclosed space of back ground. The building referred to as number 4 is an extension of the building erected immediately to the south-east prior to the passing of the Glasgow Building Regulations Act, 1900. . . . (8) The interlocutor of the Dean of Guild is referred to for its terms. *Quoad ultra* denied. . . . Reference is made to section 4, which contains the definition of hollow square. (9) Admitted that no suggestions were made by the Dean of Guild at his Court. The sections enumerated are referred to for their terms. *Quoad ultra* denied. The whole area above referred to, that is the area enclosed by the streets enumerated in statement 4, is a hollow square within the meaning of section 4 of the said Act, and the unbuilt-on ground within it, upon a portion of which the appellant desires to erect the said building, forms part of the enclosed space of back ground in said hollow square within the meaning of section 38 of the said Act. The respondent respectfully submits on the whole matter that the appeal should be refused, on the ground (1) that in respect the buildings fronting Dalmarnock Road, and situated between said road and the site of the proposed halls, exceed four storeys in height, the Dean of Guild properly refused the lining craved; (2) that in any event the Dean of Guild reasonably exercised the discretion conferred upon him by section 38 of the Glasgow Building Regulations Act, 1900."

Counsel were again heard before the First Division on 12th December 1911. The arguments of parties sufficiently appear from the minute and answers quoted above.

At advising on 20th January 1912,—

LORD PRESIDENT.—This appeal is against an interlocutor of the Dean of Guild of Glasgow, in which he refused a lining which was craved by the appellant for the erection of certain proposed halls in a part of Glasgow which is situated upon Dalmarnock Road. After the first discussion that was held before your Lordships, it became apparent that the appellant wished to raise a general question upon the construction of the Glasgow Building Regulations Act, 1900, and that your Lordships were really not in possession of the facts with sufficient clearness to appreciate intelligently

Jan. 20, 1912. the argument that might be raised, and accordingly the appellant was allowed to put in a minute in which he set forth quite clearly the state of affairs under which he asked for the decree of lining. An answer was lodged to that minute, and then the parties came together and furnished your Lordships with a plan which shows very clearly the exact position of the buildings at this place.

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The Dean of Guild has refused the lining, upon the ground that it is struck at by the enactment contained in section 38 of the Glasgow Building Regulations Act, and that he does not see his way to grant an exemption from that enactment in terms of the proviso to the same section. Section 38 of the Glasgow Building Regulations Act of 1900 is in these terms:—
“No building other than the usual one-storey washhouses and offices shall be erected within the enclosed space of back ground in any hollow square the buildings of which or any of them are, or may be, used, or are intended to be used, as dwelling-houses.” And then comes the proviso to which I shall afterwards advert. Now, it is no matter of controversy, and it cannot be matter of controversy, that the building for which the lining was craved was a building not of a one-storey washhouse and offices, and therefore it is quite clearly a building which is struck at by the section, assuming it to be true that the place where this building is proposed to be erected is (first) within a hollow square, and (secondly) upon an enclosed space of back ground; and your Lordships have had an argument upon both of these matters.

The clause that I have just read is obviously of the most drastic character, and one cannot look at this Act, especially at this part of it, without seeing that its provisions generally are of the most drastic character. In many ways they are not perhaps models of draughtsmanship, and they have, I think, this peculiar result, that some are clearly unworkable, and that others (of which this is one) will press with extraordinary hardship upon certain individuals; it will fall on some and practically make them, at their own expense or by confiscation of their ground, subscribe for a general benefit, whereas others, who are more fortunate and who have possibly done more to obstruct ventilation and so on than their less fortunate neighbours, will go scot free. But while that is so, I am afraid that state of affairs is the fault of the wisdom of Parliament, as that wisdom of Parliament has been embodied in an Act promoted by the Corporation of Glasgow, and if the Corporation of Glasgow, which represents its citizens, choose to have legislation of this sort, it is quite certain that, so long as the words are clear, your Lordships, whatever you may think of it, have no option but to apply the words as you find them.

Upon the question whether this is a hollow square, one naturally turns to the definition, and the definition certainly begins upon the *lucus a non lucendo* principle, because it describes “hollow square” as meaning “any square, parallelogram, triangle, polygon, circle, or other regular or irregular figure”—that may not be a very good definition, but one can see perfectly what it means; it goes on—“formed by one or more streets or buildings, or streets and buildings in such a manner as to contemplate the erection or continuance of buildings (other than washhouses and offices) enclosing or nearly enclosing a space of back ground, and includes (1) the buildings

enclosing or nearly enclosing such space of back ground, and (2) the buildings (if any) erected within such space of back ground." Now, I am not going to exhaust myself upon criticisms of that definition, because it is obviously full of expressions which it is very easy to criticise. But I think one sees that one of the difficulties that assailed the draughtsman was this, that he wished to have an expression which could be applied equally to a completed hollow square and to one which was only in the course of construction, to one of which you could not say that it was a hollow square now, but could only say that in time it would probably become so. He also wished the expression to apply to an actual hollow square, even although that actual hollow square was in many respects not hollow, and no wonder he found it rather difficult to frame a definition to cover these rather different states of affairs. But again I say that I do not think that the actual meaning is very difficult to see, and I think that the essence of the hollow square is that it has to be formed by streets, no doubt streets with buildings, the fronts of those buildings being to the streets and the backs of them to the space of what is called back ground; and the square need not be a square at all, but simply means any continuous geometrical figure—a figure the containing line of which is formed by a set of streets which meet without any street piercing that geometrical figure. (By the latter qualification I mean that I think that as soon as you have a street which goes through what would otherwise be a hollow square, that street prevents it being a hollow square.)

It is probably inconvenient to take illustrations from the particular localities in some one town, with which all those who read the reports may not be familiar. I think the easiest illustration of what I want to express could be taken from what I understand to be the laying out of the new part of New York, where the streets are all parallel and are cut by other sets of streets at right angles. Well, if you have a set of parallel streets, one above the other, which I will denominate 1, 2, 3, 4, and then have another set of streets perpendicular to the former set, which I denominate A, B, C, D, you have a sort of gridiron of streets. If then you take the outside of all those streets, you will have a geometrical figure which, in one sense, would form a hollow square. But I do not think it would form a hollow square in the sense of the Glasgow Act, because I think it would be prevented being a hollow square by these other intersecting streets which are inside the figure. Accordingly, I think that the essence of the Glasgow hollow square is that it must be a closed compartment, so to speak, with this great peculiarity that it need not, as a matter of fact, be quite finished; because although it does not in fact become a hollow square until all the buildings are finished, yet the definition certainly covers a hollow square which is partially constructed.

That being my view, I have really no doubt that, upon the Act, the Dean of Guild was perfectly right when he found that this piece of ground formed a hollow square—that is to say, the piece of ground which is delimited by Baltic Street on the north, Dunn Street on the west, Dalmar-nock Road on the south, and Nuneaton Street on the east—(I am not taking the exact points of the compass, but those I quote are near enough).

The second question is whether this ground on which the buildings are

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Jan. 20, 1912. to be placed is back ground. Well there the provisions of the Act are very
Porter v. vague and difficult to understand, and it is there particularly, I think, that
Nisbet. the extraordinary fortuity of the matter comes to light—a fortuity coupled
Ld. President. with what, I think, in individual cases becomes great injustice. There is
no definition of back ground, and I think one has in the end to come to the
suggestion of Mr Clyde, namely, that all you can say about the back ground
is that it is whatever is not front ground. Well, front ground in a building
sense is familiar enough. It is that portion of the ground which is used in
connection with buildings—I mean which serves to support the buildings
which enter from the front, that is to say, from the street; and, accordingly,
I think front ground means that class of ground. It is an expression
which I do not think has any legal meaning, but it is an expression with
which an actual practitioner, if he has had a certain class of business, is not
unfamiliar. Certainly, I myself met it very often at the bar, and there are
several gentlemen facing me who must have met it often too—I mean in
valuation trials. It was a very common thing for a valuator to come in and
say, “Oh, this ground is worth so much an acre,” or “a yard,” or “a foot,”
as the case might be, “I value so much of it as front ground and I value so
much of it as back ground.” I think that idea was probably what was in
the head of the person who drafted this Act.

The true fact of the matter is that there is absolutely no limit, except
the view of the particular individual, as to what should be front ground
and what should be back ground; and, consequently, the result seems to
me to come to this, that as soon as the buildings are really put up you have
a condition—I will not say a stereotyped condition, because I am not
deciding that—you have a condition of occupation which shows that some-
thing is front ground and something is back ground. It is perfectly evident
that if A puts up a very large building upon his ground—a building which
stretches far back from the street—he will not leave upon his portion of the
ground very much back ground. B, on the other hand, puts up a small
building, and the result, which certainly seems very inequitable, is that A,
who has done his best to block the ventilation of the neighbourhood, is not
really in any way penalised; whereas B, who has not blocked the ventilation,
is penalised by not being allowed to put up any other building. I am not
deciding whether B may not, by reconstruction of his buildings, practically
use as large a bit of his land as front ground as A has done. But I do
decide this, that, in my opinion, when you look at a square, as here, and
find it in a certain state of occupation, it is possible to say according as the
buildings are there whether a particular piece of ground within that square
is front ground or is back ground.

Taken by that test, I think there is no question that the ground of the
appellant here is back ground. He has put up five-storeyed tenements of
dwelling-houses facing the street; these buildings have their backgreens
behind them, and then there is an unoccupied space extending to the
boundary of his property. I have no doubt that these backgreens and
unoccupied space are the back ground. It is very hard upon him, because I
find that his next-door neighbour in Dunn Street has practically covered the
whole of his ground with one-storey sheds, and has, in other words, utilised
his ground in such a way as to make it all front ground. That means

that this class of legislation is, I should not say inappropriate, but Jan. 20, 1912.
 extraordinarily hard upon an unfortunate individual who happens to have
 a house and ground behind it in a square which is partially occupied by industrial buildings. But there it is, and that is the only way in
 which I think the Act can be construed. I therefore think that here again
 the Dean of Guild was perfectly right and that here again this particular
 ground is struck at by the prohibition, that is to say, that it is proposed to
 erect this building "within the enclosed space of back ground" of a "hollow
 square" referred to in section 38.

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Ld. President.

Well, then, that only leaves the question of the proviso. The proviso goes on to say that "in the case of any hollow square in which the enclosed space of back ground exceeds the dimensions specified in the immediately preceding section"—I need not go into that as there is no question that the square in question exceeds these dimensions: there is a difficulty about what the dimensions precisely are, because there are two sets of dimensions mentioned, but this square exceeds either set—"the Dean of Guild may, if satisfied that the arrangements for ingress and egress, drainage, cleansing, lighting, and ventilation, are adequate, suitable, and satisfactory, grant decree for the erection in such enclosed space of back ground of buildings not exceeding two storeys in height on condition that such buildings shall not be used for purposes which may be injurious or offensive to the inhabitants of the surrounding or adjacent buildings."

Now, the Dean of Guild has refused a lining here, and he has explained quite frankly in his note that the reason he has done so is that he does not think that this is a proper place for a hall. He does not say that the arrangements for "drainage, cleansing, lighting, and ventilation" are inadequate. But I do not think he is bound to. I think that this proviso puts the matter entirely in the discretion, if he choose to exercise it, of the Dean of Guild. If the Glasgow Corporation wish to put this entirely in the hands of the Dean of Guild, I think they are entitled to do so. Of course the Dean of Guild himself cannot get out of the provisions that the statute puts upon him, that is to say, the building cannot exceed two storeys in height, "and shall not be used for purposes which may be injurious or offensive to the inhabitants." And then again, "no such building shall be authorised by the Dean of Guild unless an entry not less than ten feet in width be provided leading from a street to such building." But provided these two things are done, then I think the Dean of Guild may simply give a decree of lining if he likes. He cannot be forced to give a decree, and here he does not propose to give it, and I do not think we can make him. It is a question very much of one-man government, but there is the Act of Parliament, and I think your Lordships must apply it.

On the whole matter, therefore, I am of opinion that the Dean of Guild's interlocutor was right and that we cannot interfere with it to the effect of ordering him to grant a lining which I do not think he was bound to grant.

LORD JOHNSTON.—I concur, and have nothing to add, unless it be respectfully to endorse what your Lordship has said as regards the legislation of which this is an example. It is not because it involves an oppressive invasion of private right at the fiat of a public official that it appears to me

Jan. 20, 1912. to be so objectionable—to that the citizens of Glasgow may be prepared to submit; it is their affair,—but because it is so uneven in its operation that it may amount, in the particular case of which this is an example, to confiscation of the property of one individual for the benefit of others, who are greater sinners against the assumed public interest than he is.

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LORD MACKENZIE.—I agree with your Lordship. It is useless to endeavour to construe the sections to which we were referred with reference to any preconceived ideas of equity; and therefore the only thing that this Court can do is to give effect to the language of the statute, although the result of that is to deprive a man of his property for the public benefit without giving any compensation for it.

The Lord President intimated that LORD KINNEAR, who was absent at advising, concurred.

THE COURT affirmed the interlocutor of the Dean of Guild, dated 14th September 1911, and dismissed the appeal.

MORTON, SMART, MACDONALD, & PROSSER, W.S.—CAMPBELL & SMITH, S.S.C.—
Agents.

No. 65.
Feb. 6, 1912.
Maguire v. Smith's Trustees.

THE REVEREND JOHN ALOYSIUS MAGUIRE (Trustee for the Roman Catholic Archdiocese of Glasgow), Petitioner (Respondent).—
Sol.-Gen. Hunter—Hon. W. Watson—Carmont.
WILLIAM SMITH AND OTHERS (William Smith's Trustees),
Respondents (Appellants).—*Horne, K.C.—Moncrieff.*

Burgh—Building regulations—Public Health—Dean of Guild—Lining—Title to object—Statutory prohibition of certain class of buildings—Title of individual objector to plead statutory prohibition—Glasgow Building Regulations Act, 1900 (63 and 64 Vict. cap. cl.), sec. 38.

In a petition for lining presented to the Dean of Guild in Glasgow, objection was taken by the proprietors of subjects adjoining those of the petitioner on the ground that the buildings which it was proposed to erect would be in contravention of the statutory restrictions on the erection of buildings in the back ground of a hollow square, contained in section 38 of the Glasgow Building Regulations Act, 1900. The Dean of Guild found that the objectors' property would not be injuriously affected in any way by the proposed buildings, repelled the objection, and granted the lining.

In an appeal, the Court, accepting this finding as a finding in fact, held that, as the objectors had no interest, they had no title, to enforce the restrictions of the Glasgow Building Regulations Act; and refused the appeal.

Opinion that the decision of the Dean of Guild as to the effect of the proposed buildings on the adjacent property was not necessarily final, but might, in certain circumstances, be open to review by the Court.

1ST DIVISION. ON 8th November 1910 The Most Reverend John Aloysius Maguire, Dean of Guild Court, Glasgow. Roman Catholic Archbishop of Glasgow, trustee for the Roman Catholic Archdiocese of Glasgow, presented a petition in the Dean of Guild Court there, craving a lining for certain proposed additions to, and alterations on, the buildings of the St Andrew's School, situated in Ropework Lane, Glasgow.

Objections to the petition were lodged by William Smith's trustees, who were the proprietors of subjects situated immediately to the south of the site of the proposed buildings. The objectors stated, *inter alia*, that these buildings, if erected, would be only 32 feet distant from the back of a row of tenements and shops which were erected upon their property, and would interfere materially with the lighting and ventilation thereof. They also averred that the piece of ground on which it was proposed to erect the school buildings and the buildings surrounding the same formed a hollow square within the meaning of the Glasgow Building Regulations Act, 1900,* and pleaded that, as the proposed buildings would be in contravention of that Act, the decree of lining should be refused.

On 21st February 1911 the Dean of Guild pronounced the following interlocutor:—"Having considered the closed record and inspected the properties in question in presence of the parties and heard parties, the Dean of Guild *finds in fact* (1) that the petitioner is proprietor of St Andrew's Roman Catholic School in Ropework Lane, Glasgow, and proposes to erect an addition to the said school as shown upon the plans No. 2 of process; (2) that the respondents are proprietors of subjects situated at and forming Nos. 10 to 18 Great Clyde Street, Glasgow, on which are erected three tenements of shops and dwelling-houses; (3) that the petitioner's property is situated immediately to the north of the subjects belonging to the respondents, and that his proposed building, if erected, will be distant about 32 feet from the back wall of the respondents' tenements; (4) that the respondents do not claim any right of servitude over the petitioner's property, but maintain that the petitioner's proposed operations are a contravention of the Glasgow Building Regulations Act, 1900, and that as they will be injuriously affected by the erection of the proposed building, they are entitled to plead the provision of the said Act; and (5) that the respondents will not be prejudiced nor will the property belonging to them be in any way injuriously affected by the erection of the petitioner's proposed building: *Therefore finds in law* that the respondents have no interest and therefore no right or title to object to the petitioner's proposed operations: Repels the objections stated for the respondents; and grants the lining as craved."†

The objectors appealed to the Court of Session, and the case was first heard before the First Division (without Lord Johnston) on 17th March 1911, when the Court, *in hoc statu*, recalled the interlocutor of the Dean of Guild, dated 21st February 1911, and remitted to him to state the grounds on which he held and the way or ways in which he held that the respondents would not be prejudiced nor their property be injuriously affected by the erection of the petitioner's proposed building, and to report.

On 3rd June 1911 the Dean of Guild lodged the following report:—

* The material sections of the Glasgow Building Regulations Act, 1900, are quoted *supra*, p. 401.

† "NOTE.—The Dean of Guild made a careful inspection of the properties belonging to the parties, and is perfectly satisfied that the property belonging to the respondents will not be prejudiced or injured in the slightest degree by the erection of the petitioner's proposed building. No other objection has been stated to the petitioner's proposed operations, and the Dean has therefore granted the lining."

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Trustees.

"Parties having intimated that they did not desire to be further heard, the Dean of Guild, in obedience to the remit contained in the interlocutor of the First Division, dated 17th March 1911, states the grounds on which he held and the way or ways in which he held that the respondents would not be prejudiced nor their property injuriously affected by the erection of the petitioner's proposed building.

"Before doing so he thinks it right to say this. In pronouncing the decision in question the Dean of Guild regarded it as settled law that neighbouring proprietors having interest as such proprietors are entitled to plead those provisions of the Glasgow Building Regulations Act of 1900, which deal with or affect proprietary interest in the proximity. Further, the Dean of Guild thinks it right to say that the decision in question was given on the assumption that the particular section of the Act in question (section 38) was applicable to the circumstances of this case,—that is to say, that the proposal of the petitioner involved a building 'within the enclosed space of back ground in a hollow square.' The site of the proposed building may or may not be capable of being defined 'as an enclosed space of back ground in a hollow square.' It forms at present a portion of the playground of a public school. If the proposed building is held not to be 'within the enclosed space of back ground in a hollow square,' it is not material whether the objectors' building will be injuriously affected. They have no common law servitude, and must depend on section 38. Section 38 applies only to erections 'within the enclosed space of back ground in a hollow square,' and the Dean assumed in favour of the objectors that the section was applicable.

"Taking it on the assumption that the proposed building is a building 'within the enclosed space of back ground in a hollow square,' the Dean of Guild inspected the properties in question in presence of the parties, and reached the conclusion embodied in his judgment of 21st February 1911. A question of this kind is, of course, to a considerable extent a matter of impression. The Dean reached the conclusion expressed in his judgment because of the general impression produced upon his mind at and by the inspection; but among the various things which went to form that impression he may mention the following points, namely:—

"1. Commercially, that is, as a marketable subject, the objectors' property will not, in the Dean's judgment, be depreciated in the very slightest degree. The erection of the proposed building in a locality such as this will not keep away any possible tenants who wish or require to reside there, and it will not keep away any possible buyers. It will thus not affect in any way the marketable value of the objectors' property.

"2. The objectors' tenement and the back buildings which have been attached to it cover the whole of the ground belonging to the objectors, excepting a very small area of back ground wholly surrounded by the objectors' own buildings. These back buildings are only one storey high. The whole of the objectors' ground, however, so far as it abuts on the petitioner's property, is covered with buildings. The proposed building of the petitioner's is about 32 feet from the objectors' tenement, and of that 32 feet the petitioner is leaving open and unbuilt upon, except for some latrines, a belt of 11 feet of ground. In the Dean's judgment, neither the light nor the air of the objectors' tenement will be affected in any way that will entitle the objectors to say that they will be prejudiced, or to say that in

any proper use of the expression or in any substantial way the objectors' property will be injuriously affected by the erection of the proposed building. (a) The proposed building is to the north of the objectors' property, and will not exclude sunlight. Again, it is not of such a height as to exclude the sky line from any back window of the objectors' tenement. The objectors have themselves covered their background with buildings hard up to the petitioner's boundary, and these back buildings are roofed to some extent with glass. From the second storey of the objectors' tenement and the storeys above that storey the sky line will not be excluded. (b) As regards air and ventilation, the Dean is of opinion that the proposed building will not injuriously affect the objectors' property. The objectors' property is situated on the north side of Great Clyde Street, a street of about 75 feet in breadth, and that again has as its south boundary the River Clyde. The proposed building is at the rear of the objectors' property, and between the proposed building and the objectors' tenement a space of about 32 feet is left free. The proposed building is lower in height than the objectors' tenement, and lower in height than the other tenements or the theatre surrounding this 'hollow square.' The space thus left free is wider than the lane which lies to the west of the 'hollow square,' and that lane seems to be sufficient for the ventilation of the properties abutting on it. The objectors' premises have plenty of air on the south, and the space of 32 feet to be left at the north boundary is perfectly ample for through ventilation of their tenement.

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"3. It is to be kept in view that the proposed building is to be used as a school and not for residential purposes. For the height of the first storey it is carried on pillars and stands open. The building will only be occupied during school hours, and it will not carry with it the sources of annoyance to neighbours frequently associated with dwelling-houses closely built together. It is also to be kept in view that if the proposed building had been regarded as objectionable in the locality, the Master of Works would have appeared and objected. He has not done so. The only other adjoining proprietor who appeared at the first calling did not persevere in his opposition."

Counsel were again heard before the same Court on 16th June 1911.

Argued for the appellants;—If the site of the proposed buildings was "within the enclosed space of background in a hollow square"—and it was on this assumption that the Dean of Guild had proceeded—then there was a positive provision in the statute which forbade their erection. The height of the proposed buildings (and the dimensions of the area in which they were to be placed) excluded the operation of the exception provided for in the latter part of section 38. The objectors had a right to be heard whether or no the Master of Works or other public official or body objected. This was a general statutory provision which these objectors could qualify an interest, and therefore a title, to plead.¹ The restriction imposed by the statute was clearly in the interest of those whose property abutted on the hollow square, particularly of those whose subjects immediately adjoined and, as here, looked out on the area on which it was pro-

¹ Summerlee Iron Co., Limited, v. Lindsay, 1907 S. C. 1161, *per* Lord President Dunedin, at p. 1165, and 1908 S. C. 754, *per* Lord President Dunedin, at p. 758; Lyon v. Fishmongers' Company, (1876) 1 App. Cas. 662.

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posed to build. These objectors therefore had qualified the interest from which it had been decided that the title to object flowed.

Argued for the respondent;—(After submitting an argument to the effect that the area in question was not within the enclosed space of back ground of a hollow square.) Assuming that section 38 of the Glasgow Building Regulations Act applied, it was clear, from the findings of the Dean of Guild, that the interest of the objectors was too remote to found in them a title to object.¹ Indeed his findings showed that the objectors had no material interest at all. This was a finding in fact which the Court should take from the Dean of Guild as being a finding to the effect that these objectors had not qualified an interest to enforce the restrictions of section 38, such as the objectors in the *Summerlee* cases² had qualified with regard to section 60 of the same Act.

The case was first advised on 20th January 1912, directly after that of *Porter v. Nisbet*,³ when, in view of certain statements made by counsel as to the height of the proposed buildings, the Court intimated that they would give the case further consideration.

At advising on 6th February 1912,—

LORD PRESIDENT.—In this case of William Smith and others against the Most Reverend John Aloysius Maguire, on the occasion when the case was last before the Court, I made a statement to your Lordships in which I said, first of all, that, in accordance with the views which we had just expressed in the case of *Porter v. Nisbet*,³ I thought there was no question that the ground here was, in the sense of the Glasgow Building Regulations Act, a hollow square. I then proceeded to assume that there was a right of challenge upon the objectors' part, but to say that, inasmuch as the Dean of Guild had held that the arrangements for lighting and ventilation were suitable, he could grant a dispensation in terms of the proviso in section 38.

I did so—and I say this to make it quite clear—I did so under a complete misapprehension in my mind as to the height of the buildings. Undoubtedly it is the case—and, indeed, I called attention to it in *Porter's* case³—that the dispensing power of the Dean of Guild under the proviso in section 38 is limited by the statute, and that the only buildings he can, if he choose, grant authority to erect are buildings not exceeding two storeys in height, with certain other conditions. Now, I was under the misapprehension that these buildings were only two storeys in height. It appears—and parties very rightly drew our attention to it—it appears that while they, in one sense, consist of only two storeys, that is to say, while there are only two storeys of habitable buildings proposed to be put up, yet these two storeys are, so to speak, put upon legs, there being below them on the ground floor an open space, of the character of a cloister.

Now, I am bound to say that I think the expression “not exceeding two storeys in height” means the height which two ordinary storeys would be; and, therefore, I should not be prepared to hold that this building did not

¹ The Lord President referred to *Pitman v. Burnett's Trustees*, (1882) 9 R. 444.

² 1907 S. C. 1161, and 1908 S. C. 754.

³ Reported *supra*, p. 400.

exceed two storeys in height. I think it does. Accordingly, I think it Feb. 6, 1912.
 was obviously necessary that the case should be reconsidered to see what
 should be the result of the objection, in view of the fact that this building
 cannot be brought under the Dean of Guild's dispensing power.

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This makes it necessary to examine the title of the objectors. Now, I I.d. President,
 have already said something on that matter in the case of *Summerlee
 Iron Company v. Lindsay* which was twice before the Court, and is
 reported in Session Cases 1907¹ and 1908.² In that case, at the initial
 stage, the Dean of Guild had pronounced a judgment in which he found
 as a bald proposition that no private person had a title to plead the restric-
 tions of the Glasgow Building Regulations Act, but that it was the Cor-
 poration only that had right to do so. The first time the case was before
 us I said that I should hesitate to adhere to such a proposition. In the
 second case³ I went further into the matter, and, speaking of the neigh-
 bour's right to object, said (at p. 759),—"I think he has got a right to say
 so" (that is to say that it is going to affect him in a peculiar way), "and I
 think it falls within the province of the Dean of Guild to consider his
 objection in an appeal under section 60, subsection (3), but I think he
 must show his hurt, not upon any ground of private injury—for that he
 must do in the lining—but upon what I may call the public ground which,
 he says, presses upon him more severely than it would do upon other
 people."

Now, I retain that opinion, though I do not say that it appears very
 clearly from the Act. This Act, as I have already had occasion to say, is
 a very drastic Act; and I think we are here under what I may call the
 somewhat painful necessity of deciding between two alternatives, either of
 which has much to be said against it, but one of which must be taken if
 any meaning at all is to be given to the Act.

The first alternative would be to say that the prohibition being absolute
 no building other than the usual one-storey washhouses and offices shall be
 erected within the enclosed space of back ground in any hollow square.
 In that view there would be nothing more to decide than the two ques-
 tions, was this a hollow square, and was it proposed to erect on back
 ground? If the answer to these questions were in the affirmative, the axe
 of the statute, so to speak, would fall, and it would be open to anyone to
 plead the statute to prevent the erection of the proposed building. That
 is evidently exceedingly drastic, and exceedingly hard on the individual
 who builds late instead of building early.

The other alternative is to distinguish, as I did in the *Summerlee* case,³
 between the cases in which a private individual will have a title to plead
 the Act and those in which he will not. Though I say "title," this is
 really one of those cases—and there are many others familiar to your
 Lordships—where title and interest run into each other; such cases are
 familiar in the chapter of law which deals with building restrictions
 enforceable at the instance of the superior or, it may be, of other people.

Now, I think here that the title does depend upon interest, and that the
 interest, as I have expressed it, must be an interest not actually of private

¹ 1907 S. C. 1161.

² 1908 S. C. 754.

Feb. 6, 1912. injury, because when a man builds upon his own ground he does not, in the ordinary case, invade any legal right of his neighbour, but there may be a private interest in a public prohibition, entitling an objector to say, "It hurts me more severely than it does other people."

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Ld. President. On this matter we have the second report of the Dean of Guild. I take it that this question is really a question of fact, and I think we are entitled to inform ourselves upon it through the Dean of Guild. Now, the Dean of Guild says quite distinctly in his report that in the matters of ventilation, of light, and of commercial value—the latter is not really, I think, a separate consideration, but one which flows from the two former—the property of these particular objectors is not going to be hurt by the building that he proposes to allow. That, I take it, is equivalent to a finding that these particular objectors are to be no more hurt than would be a man who is at the other side of Glasgow. Accordingly, their interest being swept away their title is swept away also.

I do not think that is a satisfactory state of things, because I think it puts the inhabitants of Glasgow very much in the power of the Dean of Guild. I will not say entirely in his power, because I wish to reserve my view as to whether the Court would criticise or review any opinion which the Dean of Guild may come to on such a matter; I think the Court would do so. But upon the lining as granted in this case I do not see anything either to criticise or to review.

On the whole matter, therefore, I think the Dean of Guild was within his powers in granting this decree of lining.

LORD KINNEAR.—I entirely agree, and I only add that I think, for the reason your Lordship has given, that the question comes to be one of fact, and upon that question of fact we ought to take the Dean of Guild's report as conclusive. I do not think his decision is final. There is no statutory finality given to it. But when the Dean of Guild's finding involves nothing but expert finding, we have been accustomed to accept it as conclusive in the absence of any strong ground for rejecting it and reopening the question. I do not think that any advantage would be obtained by substituting for the Dean of Guild's expert opinion the opinion on one side of half a dozen experts who might agree with him, and on the other side the evidence of half a dozen experts who might contradict him.

In this case we were not asked to take this course. I should not myself have thought it to be a case in which we ought to have done so, because, to my mind, the Dean of Guild's report is so clear and explicit that I should require very strong grounds indeed to persuade me to overturn it.

LORD MACKENZIE.—The section founded upon by the objectors here, section 38 of the Glasgow Building Regulations Act, 1900, is contained in Part III. of the statute, which deals with ventilation and free space. The preamble of the Act sets out that it is the Corporation of the City of Glasgow that is entrusted with various duties in connection with public and private streets and courts, and new and existing buildings within the city. Therefore anyone acting in the interests of the Corporation would have a title to plead section 38. No one representing the public interest offers any objec-

tion to what the petitioners here propose to do. The only objection taken Feb. 6, 1912. is by a body of trustees, who are proprietors of property adjacent to the ground upon which the petitioners propose to erect an addition to the existing school. In *Summerlee Iron Co., Limited, v. Lindsay*,¹ the Lord President deals with the question of the right of private persons who seek to enforce purely statutory restrictions. An individual has no right to plead a statutory restriction in order to obtain what are his private legal rights. These he can have safeguarded in the process of lining. Inasmuch, however, as one person may have from his local situation more interest than another in his neighbour's building, such a one has a right to plead a statutory restriction like that in section 38, but only upon public grounds, and if he is able to say the proposed operations will press more severely upon him than they would do upon other people. An illustration of the same principle is to be found in the case of *Lyon v. Fishmongers' Company*.² In the previous stage of the *Summerlee* case³ the Lord President referred with approval to Lord Shand's remarks in the case of *Pitman v. Burnett's Trustees*.⁴ Though a neighbour cannot be heard as a sort of general protector of the public health, yet in a question of excessive height the neighbour may have a title to bring forward and found upon the prohibitions of the statute. An adjoining proprietor has thus a *prima facie* title to plead that section 38, which is couched in absolute terms, gives him protection against the risk of being prejudiced. If, however, in the course of the proceedings it clearly appears that there is no possible prejudice to the objector, then the ground upon which his title rests is cut away. If he were allowed to insist in his objection, irrespective of any risk of prejudice, then this absurd result would follow, that a person upon the other side of the city would have a right to plead the statutory restriction, and further, whatever size the enclosed space of back ground in the hollow square might be, the statutory limitation would have to be enforced. The view I take of section 38 is that a person whose property may run the risk of being prejudiced as regards ventilation and free space (the matters dealt with in Part III. of the Act) by the proposed operations, has a title to appear in the process and object. If in the course of the proceedings it appears that his property will be prejudiced, in the way indicated above, then the leading provision of the section will apply, and the power of the Dean of Guild will be limited by the proviso. On the other hand, if it appears that his property will not be prejudiced, then there is not an obligation to enforce the leading part of the enactment.

It is clear from the report of the Dean of Guild that the conclusion he reached in the fifth finding of his interlocutor of 21st February 1911 was justified. That finding is "that the respondents will not be prejudiced nor will the property belonging to them be in any way injuriously affected by the erection of the petitioner's proposed building." In his report he states that commercially, that is, as a marketable subject, the objectors' property will not be depreciated in the very slightest degree; that the light of the objectors' tenement will not be affected in any way that will

¹ 1908 S. C. 754.³ 1907 S. C. 1161.² 1 App. Cas. 662.⁴ 9 R. 444.

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entitle the objectors to say that they will be prejudiced by the erection of the proposed building; and that as regards air and ventilation he is of opinion that the proposed building will not injuriously affect the objectors' property. The objectors did not move for inquiry to show that the Dean of Guild was wrong upon these points; if they had, the nature of this case shows that the Court would not have been disposed to grant it. Very specific averments would be required before the Court would inquire into matters that the Dean of Guild, who is an expert, had dealt with. In these circumstances I am of opinion that the objectors are not entitled to plead section 38, and that their objection should be repelled. Taking this view, it is unnecessary to consider what might be a difficulty in the way of the objectors' case, viz., whether the ground upon which it is proposed to erect the school is properly speaking back ground within the meaning of the statute. The judgment of the Dean of Guild should, in my opinion, be affirmed.

THE COURT refused the appeal, and remitted to the Dean of Guild of new to grant the lining craved.

CHARLES GEORGE, S.S.C.—CUMMING & DUFF, S.S.C.—Agents.

No. 66.

Feb. 3, 1912.

Simpson's
Executor v.
Simpson's
Trustees.

GEORGE KERR (William Simpson's Executor-Nominate), Pursuer (Appellant).—*M'Lennan, K.C.—W. T. Watson.*

DAVID SIMPSON AND OTHERS (William Simpson's Trustees and Next of Kin), Objectors (Respondents).—*G. Watt, K.C.—Cowan.*

Executor—Executor-nominate—Confirmation—Danger to estate—Judicial factor.

A master made a general settlement in favour of his servant, and appointed him to be his executor. On the servant applying for confirmation objection was taken by the trustees under a former settlement of the testator and by his next of kin, who averred that the testator was weak and facile, and that the servant obtained the settlement in his favour by fraud and circumvention. They also averred that they had already brought an action for reduction of the settlement on that ground, and that, as the servant was a person of no substance, there was danger of the estate being lost should he be confirmed as executor.

The Court *dismissed* the application for confirmation, and appointed a judicial factor on the estate, reserving right to the applicant to renew his application should the action of reduction be unsuccessful.

1ST DIVISION.
Sheriff of
Roxburgh,
Berwick, and
Selkirk.

ON 30th October 1911 George Kerr made application in the Sheriff Court of Roxburgh, Berwick, and Selkirk, at Duns, for confirmation in his own favour as executor-nominate to the late William Simpson, of Laverock Braes, Reston, under a disposition and settlement dated 18th June 1904. The initial writ bore that this application was necessary in respect of certain caveats which had been lodged on behalf of the late Mr Simpson's next of kin, and of the trustees named by him in an earlier settlement, dated 18th July 1892.

Objections were lodged by the trustees last mentioned, and by a sister of the deceased, who described herself as the deceased's sole next of kin and as a beneficiary under the will of 1892.

The objectors averred that the deceased was a man of weak mind and character, and that the pursuer, who had entered his employment

as his valet a number of years prior to 1904, gradually obtained an influence over his master, and taking advantage of his weak and facile condition, obtained from him the settlement of 1904 by fraud and circumvention. This settlement purported to convey the whole of the testator's property to the pursuer, with the exception of a legacy of £50 bequeathed to his housekeeper.

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The objectors further averred that the petitioner "is a person of no credit and substance, and is of dissipated habits. There is, therefore, serious risk of the deceased's estate being lost if confirmation is granted in the petitioner's favour." It was also averred that the objectors had raised an action of reduction of the settlement in question. The objectors submitted that the proceedings should be sisted pending the result of the action of reduction, undertaking, in the event of the sist being granted, to apply to the Court of Session for the interim appointment of a judicial factor on the estate.

On 2nd January 1912 the Sheriff (Chisholm), reversing a decision of the Sheriff-substitute (Macaulay Smith), who on 8th December 1911 had granted confirmation, pronounced this interlocutor:—"Sists proceedings in this case pending a decision in the action of reduction of the disposition and settlement founded on by the petitioner, which has been raised by the objectors in the Court of Session: Reserves to the petitioner right to apply to the Sheriff for recall of said sist in the event of undue delay on the part of the objectors in prosecuting said action of reduction, or in an application to the Court of Session, which they have undertaken to make for the appointment of a judicial factor to hold and administer the estate until the rights of parties are determined." *

* "NOTE.—In this case the petitioner is the executor-nominate under a disposition and settlement dated in 1904. The objectors have raised in the Court of Session an action for reduction of that deed. The petitioner craves confirmation as executor foresaid; the objectors ask the Court to sist the confirmation proceedings on the ground that, pending the decision in the action of reduction, there is risk of the estate being dissipated in consequence of the alleged financial position, and the alleged habits and character of the petitioner.

"I gather from the authorities that, in deciding such a question as this, it is to the averments of the objector that one must look. In the decided cases it is the objector's averments that are founded on where confirmation is refused, and it is on the absence or insufficiency of these that comment is made where confirmation is granted. Such averments, of course, are made at the risk of the objector; if they be not established ultimately by proof, he must suffer the consequences.

"The question, therefore, is whether, in the light of the reported decisions, the objectors have made averments sufficient to entitle them to a sist of confirmation. Not altogether without difficulty, I have come to be of opinion that they have done so. In the allegations (set forth in the objections), which form the grounds on which the action of reduction has been raised, there is a good deal which cannot fairly be left out of sight as relevant averment in this process. The objectors further aver that the petitioner 'is a person of no credit and substance, and is of dissipated habits. There is, therefore, serious risk of the deceased's estate being lost if confirmation is granted in the petitioner's favour.' This is bald. It does not come up to the amended averment in the case of *Campbell v. Barber* (23 R. 90), but it seems to me just to amount to what was desiderated in the case of *Hamilton v. Hardie* (16 R. 192, e.g., per Lord Shand, at p. 198), when taken along with the consideration, there also indicated, that an action of

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The pursuer appealed to the Court of Session, and the case was heard before the First Division (without Lord Johnston) on 3rd February 1912.

Argued for the appellant;—The executor-nominate was *prima facie* entitled to confirmation, and the onus of showing cause to the contrary was on the respondents. Their averments were not relevant to instruct such cause. The Sheriff had misinterpreted the effect of Lord Shand's remarks in *Hamilton v. Hardie*.¹ The Court required specific averments that the estate was in danger, and of the conduct and intentions of the person seeking confirmation in that regard.² No such specific averments had been made by the respondents in the present case, and the mere bald averment that the estate was in danger was not sufficient.

Counsel for the respondents were not called upon to reply.

LORD PRESIDENT.—I think there should be interim management of this estate by someone who is not connected with any of the parties to the case.

I intend to say very little because I wish it to be understood that I make no imputation upon anybody, and that nothing that is averred in the case has made an impression on my mind that is unfavourable to any of the parties.

The relations between the deceased gentleman and the appellant were admittedly those of a master with his servant—his confidential servant. When you find such a relation to exist and when there is a universal settlement by the master in favour of his servant, when the nearest relations of the deceased come forward with an action of reduction already raised and aver that there is danger of the estate being lost, I think it is clearly in the best interests of all concerned that the estate should be put under neutral management.

I think, therefore, that the learned Sheriff is right. But inasmuch as, though he could not have appointed a judicial factor in the Sheriff Court, we can do so here, I do not propose that we should affirm his interlocutor and leave it to the respondents to make an application for such an appointment, but I think we should recall his interlocutor and appoint Mr George A. Robertson to be judicial factor on the estate.

LORD KINNEAR and LORD MACKENZIE concurred.

THE COURT pronounced this interlocutor:—" . . . Sustain the appeal, recall the interlocutor of the Sheriff-substitute, dated 8th December 1911, and subsequent interlocutors: Appoint Mr George A. Robertson, C.A., Edinburgh, to be judicial factor on the executry estate of the deceased William

reduction has actually been raised in the present case, and not merely indicated or threatened.

"The objectors undertake to make application for the appointment of a judicial factor to safeguard the estate pending the determination of the rights of parties.

"For these reasons I think I am warranted in sisting the proceedings in the confirmation."

¹ (1888) 16 R. 192.

² *Campbell v. Barber*, (1895) 23 R. 90, at p. 92; *Grahame v. Bannerman*, (1822) 1 S. 362.

Simpson, and in respect of the said appointment dismiss the initial writ, reserving right to the pursuer to present such other application as he may be advised, in the event of the action of reduction, now pending, being dismissed or absolute pronouncement therein, and the factory being recalled, and decern."

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MACPHERSON & MACKAY, S.S.C.—R. R. SIMPSON & LAWSON, W.S.—Agents.

ARCHIBALD MACNAB AND JAMES B. MACNAB, Petitioners
(Reclaimers).—*J. R. Christie.*

No. 67.

PETER MACNAB, Respondent.—*Morison, K.C.—J. Macdonald.*

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Partnership—Dissolution—Process—Petition to Court—Expediency of procedure by petition—Partnership Act, 1890 (53 and 54 Vict. cap. 39), sec. 35. Macnabs v. Macnab.

Two partners of a firm presented a petition to the Junior Lord Ordinary for an order dissolving the firm in terms of sec. 35 of the Partnership Act, 1890, in which they averred that the remaining partner's conduct was calculated to affect prejudicially the carrying on of the business, and that, in the circumstances, it was just and equitable that the partnership should be dissolved. Answers were lodged by the remaining partner in which he denied generally the averments as to his conduct contained in the petition.

The Court, *holding* that procedure by petition, while competent, was, in the circumstances, inexpedient, in respect that the parties were at variance on matters requiring investigation by means of a proof which would be more suitably conducted in an ordinary action, *dismissed* the petition.

Observations in *Wallace v. Whitelaw*, (1900) 2 F. 675, as to the suitability of procedure by petition, *approved*.

ON 8th January 1912 Archibald Macnab and James B. Macnab, 2D DIVISION.
partners of Archibald Macnab & Sons, packing box makers, presented Lord Hunter.
a petition to the Junior Lord Ordinary under the Partnership Act, 1890, and in particular section 35 thereof,* craving the Court to declare the copartnership between them and Peter Macnab, the remaining partner of the firm, to be dissolved from and after 10th October 1911.

* The Partnership Act, 1890 (53 and 54 Vict. cap. 39), enacts:—

Sec. 35. "On application by a partner the Court may decree a dissolution of the partnership in any of the following cases:— . . .

"(c) When a partner, other than the partner suing, has been guilty of such conduct as, in the opinion of the Court, regard being had to the nature of the business, is calculated to prejudicially affect the carrying on of the business:

"(d) When a partner, other than the partner suing, wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable for the other partner or partners to carry on the business in partnership with him: . . .

"(f) Whenever in any case circumstances have arisen which, in the opinion of the Court, render it just and equitable that the partnership be dissolved."

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The petitioners averred that by the contract of copartnership between the parties, dated 10th February 1905, it was provided that the partnership should continue until 30th November 1909, and that it should not then be dissolved except on notice given as provided in the contract; and further, that it should not be in the power of any of the partners thereafter to dissolve the copartnership, unless he should give at least six months' notice to his copartners of his intention to dissolve it at the date of the first yearly balance that should occur six months after such notice. It was also provided by the fourth article of the contract that "the said Peter Macnab and the said James Baird Macnab shall devote their full time and attention to the business, and declaring that if either of the said Peter Macnab and James Baird Macnab shall absent himself or themselves from work, or shall not devote their whole time and attention to the business, or shall in the opinion of the arbiters in the order hereafter named act in any way detrimental to the successful carrying on of the business, he or they shall cease to be a partner or partners as if he or they had died." The copartnership books were to be balanced on the 1st of April in each year. Arbiters were also named to whom all disputes in all matters relating to the copartnership, whether during its subsistence or at and after its dissolution, were referred.

The petitioners averred further that Peter Macnab (the respondent) was of intemperate habits; that he had absented himself from business for considerable periods from time to time, and had neglected his duties in connection with the firm; and that when under the influence of drink he had been violent in conduct and language to the petitioners, and had assaulted both of them. Owing to his conduct the petitioners on 10th October 1911 intimated to the respondent that they intended to terminate the copartnership in terms of the fourth article of the contract, and, as the respondent did not admit that his conduct was in breach of that article, they proposed to submit that question to the arbiters. The arbiters, however, declined to act; and, accordingly, as the contract was in normal circumstances terminable only on six months' notice before the 1st of April in each year, the petitioners would be unable to terminate it before 1st April 1913. The petitioners maintained that the respondent had committed a breach of the partnership agreement; that his conduct was such as, regard being had to the nature of the business, was calculated prejudicially to affect the carrying on of the business; that owing to his conduct it was not reasonably practicable for the petitioners to carry on business with him; and that the circumstances were such as to render it equitable that the partnership should be dissolved before that date.

The respondent lodged answers in which he admitted that notice of their intention to dissolve the firm had been given to him by the petitioners, as averred, and that the arbiters had declined to act, but denied the averments as to his conduct.

On 24th January 1912 the Lord Ordinary (Hunter) dismissed the petition.*

* "OPINION.— . . . The respondent maintains that the application, being in the form of a petition to the Junior Lord Ordinary, is incompetent, and that the proper remedy for the petitioners in such circumstances as set forth would have been by action of declarator.

"The Act of 1890 does not prescribe any form of procedure by which

The petitioners reclaimed, and the case was heard before the Second Division (without Lord Salvesen) on 3rd February 1912.

Argued for the reclaimers;—Where a partner sought, as a matter of legal right, to have the partnership dissolved, as, *e.g.*, where he desired to enforce a term of the partnership contract, he must proceed by way of an ordinary action, and a petition would not be competent. But where, as here, the partner appealed to the discretionary power of the Court, and sought to invoke its equitable jurisdiction, a petition was the proper form of application.¹ In applications of this nature expedition was of importance; and the most expeditious form of process was procedure by petition. The fact that a proof would have to be taken did not make such procedure inappropriate; for proofs were frequently taken in petitions, *e.g.*, in petitions for the custody of children. There were many instances of petitions for the dissolution of partnership (either with or without a crave for the appointment of a judicial factor) at common law or

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application may be made to the Court in a case coming within the provisions of that statute. In the case of *Wallace v. Whitelaw*, (1900) 2 F. 675, to which I have been referred, the Lord President (page 678) said, 'The term "application" may be held to include any competent proceeding for attaining that object in Scotland, and prior to 1890 this Court repeatedly entertained petitions, presented to the Junior Lord Ordinary, for dissolution of partnerships, and the appointment of judicial factors.'

"The question in this case is whether summary application is the proper procedure or not. No instance of such an application having been made to dissolve a partnership without any application for the appointment of a judicial factor—and there is none in this case—was cited at the Bar. Although I was to some extent impressed by Mr Christie's argument in favour of entertaining the present application, I do not see my way to disregard what was said in the case of *Wallace v. Whitelaw*, to which I have just referred. There is no doubt that the circumstances in that case were different from the circumstances in the present, and that the question there decided was that the petition was incompetent as it had not been presented to the Junior Lord Ordinary; but from the opinions delivered in the Inner House, it is manifest that the Judges there considered what, under the Act of 1890, was the appropriate form of procedure to be adopted, and, in particular, considered whether it was proper to proceed by way of summary application or to bring a formal declarator. For instance, the Lord President says, 'It appears to me that an action of declarator would be the proper form wherever the parties are at variance with respect to matters requiring investigation or inquiry.' Lord M'Laren at the end of his judgment says, 'Where there is a dispute between the parties to a contract of co-partnery as to the necessity for dissolution, it is according to all the traditions of our practice that it should be decided in an ordinary action where there is an opportunity of appealing on the relevancy or as to the form in which a proof is to be taken.' The remarks so made by these two Judges in that case appear to me to be directly applicable to the circumstances of the present case. The averments here made are not of such a character that they can be instantly verified, but must of necessity involve, so far as I can at present see, a somewhat protracted inquiry into the conduct of the respondent extending over a considerable period of time. Looking to that circumstance, therefore, in view of the opinions to which I have just referred, I do not see that I can do other than dismiss this petition as incompetent."

¹ Reference was made to Lindley's Law of Partnership (7th Ed.), Lorimer's Notes, p. 869.

Feb. 3. 1912. under the Partnership Act, 1890, in which the circumstances were similar to those founded on in this petition.¹ *Wallace v. Whitelaw*² was not in point. The actual decision in that case did not touch the present question; and the dicta in the opinions referred to the petition before the Court, which was founded on the terms of the contract of copartnership, and was not an application to the Court's equitable jurisdiction. In section 45 of the Partnership Act "Court" was defined as including every Court having jurisdiction in the case; in section 35 dissolution might be decreed on "application" by a partner, and "application" meant "petition."³

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Counsel for the respondent were not called on.

LORD JUSTICE-CLERK.—The question raised in this case is whether application by petition is or is not the proper procedure. There is, indeed, no question of competency, because I have no doubt that the petition is competent, and, if there was nothing pointing to the inexpediency of procedure by petition, I should be prepared to hold that the case might proceed in its present form. But I have formed a very strong opinion that that form of procedure is not expedient here, and my opinion is based on the reasons which were expressed in the case of *Wallace v. Whitelaw*,⁴ and which are directly applicable to the present case. In that case the Lord President, with reference to a petition which was founded, as is the present one, on section 35 of the Partnership Act, observed: "I do not say that in all, or probably in most, cases under section 35 of the Act of 1890 such a petition would be the appropriate, or even a competent, proceeding; on the contrary, it appears to me that an action of declarator would be the proper form wherever the parties are at variance with respect to matters requiring investigation or inquiry—but having regard to the practice which has prevailed both prior and subsequent to the passing of the Act of 1890, I do not think it should now be held that the procedure by summary petition in suitable cases is incompetent, provided that the petition is presented to the Junior Lord Ordinary." And Lord M'Laren put the matter quite as strongly: "While I do not wish to say anything tending to exclude the summary jurisdiction of the Lord Ordinary in a plain case, I may say that where there is a dispute between the parties to a contract of copartnership as to the necessity for dissolution, it is according to all the traditions of our practice that it should be decided in an ordinary action, where there is an opportunity of appealing on the relevancy or as to the form in which a proof is to be taken."

Now, I think that if these dicta are to be given effect to at all, this is as strong a case for their application as I could conceive. It was quite evident that, unless the petitioners' averments had remained undisputed, there was an absolute necessity for a proof—and one of considerable difficulty and anxiety. Therefore, on the whole matter, I have come to the conclusion

¹ *Macpherson v. Richmond*, (1869) 41 Scot. Jur. 288; *Eadie v. Macbean's Curator Bonis*, (1885) 12 R. 660; *Russell v. Russell*, (1874) 2 R. 93; *Thomson*, (1893) 1 S. L. T. 59.

² (1900) 2 F. 675. *C.f.* *Logan v. Cunningham*, (1903) 11 S. L. T. 327.

³ Court of Session Act, 1857 (20 and 21 Vict. cap. 56), secs. 4 and 5.

⁴ 2 F. 675.

that we cannot sanction procedure by petition in this case, and I would move your Lordships to sustain the Lord Ordinary's interlocutor. Feb. 8, 1912.

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LORD DUNDAS.—I am of the same opinion. I am not for interfering with the view of the Lord Ordinary, which seems to me sensible and suitable. The question is not so much what is competent, as what is appropriate and expedient. The pith of the reclaimers' argument was the alleged greater dispatch under this form of procedure, and a plea of urgency. I am not sure that there need be much difference in regard to dispatch between procedure by petition and a properly conducted ordinary action, which may, if necessary, be expedited, on cause shown, by the Lord Ordinary. I think that in a matter of this sort the Court ought to consider, in determining the procedure, not only the averments of the petitioner and the questions raised thereby but also the averments of the respondent. Taking such general view as one can of the sort of inquiry that may be necessary here, I think the petitioners ought to bring an ordinary action. I agree with, and do not repeat, what was said by the Lord President and Lord M'Laren in the case of *Wallace v. Whitelaw*,¹ to which reference has been made.

LORD GUTHRIE.—I agree. I think that the Lord Ordinary's interlocutor is right, but in the last sentence of his opinion he seems to put the ground of dismissal on competency. Now, as your Lordships have said, the question really is not one of competency at all, but simply whether, in this case, procedure by petition is appropriate. In my opinion the suitable procedure in the special circumstances of this case is not by petition, but by ordinary action. There are here specific averments of fact by the petitioner, but these are met merely by a general denial in the answers, whereas I cannot doubt that in a record, with articulate condescendence and answers, the respondent would require to make a much more specific statement of his case, and the question would then go to proof in proper shape.

THE COURT adhered.

R. H. CHRISTIE, S.S.C.—A. S. WATT, W.S.—Agents.

JOSEPH PATRICK, C.A. (D. A. Mactavish's Judicial Factor), Pursuer No. 68.
(Appellant).—*Constable, K.C.—D. P. Fleming.*

THE REVEREND QUINTIN WHYTE AND OTHERS (Mrs Michael's Trustees), Feb. 6, 1912.
Defenders (Respondents).—*Munro, K.C.—W. T. Watson.*

Bill of Exchange—Liability of endorser—Waiver of statutory requirement as to presentment and notice of dishonour—Onus of proof—Bills of Exchange Act, 1882 (45 and 46 Vict. cap. 61), secs. 46 (2) (e), 50 (2) (b). Mactavish's Judicial Factor v. Michael's Trustees.

A bill, which had been endorsed, was not presented for payment at maturity nor was notice of dishonour given to the endorser, as required by statute to avoid discharge of the endorser's liability. After the bill was due a payment to account was made by the endorser, under the erroneous belief, as she alleged, that she was not an endorser, but a joint acceptor and so liable in payment.

In an action for payment of the balance due under the bill, *held*

¹ 2 F. 675.

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that the presumption, arising from the payment to account, that the endorser had waived the statutory requirements had been rebutted by proof that that payment had been made in error; and that, in consequence of the failure of the holder to observe these requirements, the endorser was freed from liability.

Observations as to the presumptions and the onus of proof with regard to waiver of the statutory requirements.

2D DIVISION.
Sheriff of Ren-
frew and Bute.

IN September 1909 Joseph Patrick, C.A., judicial factor on the trust-estate of the deceased Dugald Alexander Mactavish, writer in Johnstone, brought an action in the Sheriff Court at Paisley against (1) Matthew Whyte; (2) the Rev. Quintin Whyte and others, trustees and executors of the deceased Mrs Robina Dick or Whyte or Michael; and (3) Ninian Glen, C.A., trustee on the sequestrated estates of Alexander Whyte.

The claim of the pursuer was for payment of £150, being the balance of a loan, as evidenced by a bill at six months, dated 14th May 1904, for £400 and arrears of interest thereon.

Mrs Michael's trustees were the only defenders who entered appearance and lodged defences, and throughout this report they are referred to as "the defenders."

The facts of the case, as ascertained by proof, were as follows: *—

On 4th November 1897 a bill for £400 at three months' date was drawn by Alexander Whyte upon and accepted by his brother, Matthew Whyte, and endorsed blank by Mrs Michael, their mother. The bill was for the accommodation of Matthew, and the drawer and endorser lent their names as accommodation parties. The bill was not retired at maturity, but, at the request of Matthew, Mr D. A. Mactavish advanced the money to take up the bill, and, with the consent of all the parties, this advance was treated as a loan by Mr Mactavish to Matthew, on which he paid interest regularly, and for which Mr Mactavish held the bill as security. The loan not having been repaid by February 1904, when the bill prescribed, Mr Mactavish prepared a second bill, dated 14th May 1904, for £400 at six months' date, which was signed in July 1904 by Alexander as drawer, by Matthew as acceptor, and by Mrs Michael as endorser, the amount for which the bill was drawn representing the sum already lent to Matthew by Mr Mactavish. The bill was not discounted, but was kept by Mr Mactavish as security for the loan, upon which Matthew continued regularly to pay interest, and of which he repaid £100 in 1907. At Martinmas 1904 Mrs Maclaine, a client of Mr Mactavish, gave value for the bill, and it was subsequently held by Mr Mactavish, as agent on her behalf, till his death in 1907. Thereafter the pursuer gave value for the bill to Mrs Maclaine, and thus became the holder for value.

The bill was not presented for payment at maturity and was not dishonoured, and no notice of dishonour was sent to Mrs Michael, the endorser. On 12th May 1908 Messrs Holmes, Mactavish, Mackillop, & Company wrote to Mrs Michael in these terms:—"Dear Madam,—We are asked on behalf of Mrs Maclaine, the holder of the joint acceptance for £400 by you and Mr Alexander Whyte and Mr Matthew Whyte, to intimate that payment of the balance of £300

* This narrative is in substance taken from the findings in fact pronounced by the Second Division.

remaining due thereunder is now required. We shall be glad, therefore, if you will make arrangements for early settlement. Meantime you might kindly acknowledge receipt and mention when we may expect payment.—Yours faithfully.” On 4th August 1908 Holmes & Company wrote to Mr Stirling, Mrs Michael’s agent, whom she had consulted, in these terms:—“Dear Sir,—We refer to our letters to Mrs Michael requesting payment of the balance due under joint acceptance. A considerable time has elapsed, and we shall be glad if you will now assign a date when payment will be made.—Yours faithfully.” Mr Stirling was not shown, and did not ask to see, the bill, and he deposed in evidence that he accepted the statement of Holmes & Company that Mrs Michael was a joint acceptor, and under the error so induced, advised her that she had no defence to the claim. Relying on his advice, and in the belief that she was liable, Mrs Michael authorised Mr Stirling to make a payment of £150 to account, which he did on 2nd November 1908, at the same time asking for a copy of the bill. On 3rd November Holmes & Company wrote to Mr Stirling acknowledging receipt of the £150, “being a payment to our client Mrs Maclaime, the holder, by your client Mrs Michael, towards the sums due under acceptance by Mr Matthew Whyte at six months, due 14th November 1904 for £400, reduced on 19th July 1907 to £300, on which Mrs Michael is liable as endorser,” and enclosing a copy of the bill. On seeing how matters stood, Mr Stirling, at an interview with Mrs Michael on 4th November 1908, advised her that he did not think she would require to pay the balance. On 5th December 1908 and on 9th January 1909 Holmes & Company wrote to Mr Stirling pressing for payment of the balance from Mrs Michael. Mr Stirling made no reply to Holmes & Company’s letter of 3rd November 1908, nor to their subsequent letters of 5th December 1908 and 9th January 1909, and never, until by a letter dated 30th July 1909, stated to them either that Mrs Michael claimed repetition of the £150, or that she repudiated liability for any further payment. Meanwhile Mrs Michael had died on 10th March 1909. There was no evidence to show what instructions, if any, Mrs Michael gave to Mr Stirling on 4th November 1908 or subsequently, or to show that she knew he had received the letters of 5th December 1908 and 9th January 1909.

The pursuer pleaded, *inter alia* ;—(2) The pursuer being the holder of the said bill for £400 on which the defender Matthew Whyte and the said Alexander Whyte and Mrs Robina Dick or Michael were parties liable, is entitled to decree for payment of the balance remaining due thereon against the defender Matthew Whyte and the defenders the trustees and executors of the said Mrs Robina Dick or Michael, jointly and severally. (3) The late Mrs Michael having recognised her liability on the bill by making a payment to account thereof in November 1908, and thereby impliedly waiving presentment and notice of dishonour, the defences should be repelled.

The defenders pleaded, *inter alia* ;—(1) In respect of the failure of the holder of said bill to observe the provisions of the Bills of Exchange Act, 1882, relative to the presentment thereof for payment and notice of dishonour for non-payment, the said Mrs Robina Michael was thereby discharged.

On 19th July 1910 the Sheriff-substitute (Lyell) repelled the pleas stated for the compearing defenders, and decerned against them in terms of the conclusions of the initial writ.

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The defenders appealed to the Sheriff (Kennedy), who on 24th February 1911 recalled the interlocutor appealed against, repelled the third plea in law for the pursuer, sustained the first plea in law for the defenders, and assoilzied them from the conclusions of the initial writ.

The pursuer appealed to the Court of Session, and the case was heard before the Second Division (without Lord Guthrie) on 12th, 16th, 17th, 18th, and 19th January 1912.

Argued for the appellant;—The bill in question was a mere acknowledgment of debt, and was not intended to be put into circulation. In any case, by authorising the payment to account of £150 on 2nd November 1908, Mrs Michael admitted her liability under the bill after it was due, and at a time when she might have founded upon non-fulfilment of the statutory requisites as to presentment for payment and notice of dishonour.¹ *Prima facie* this implied a waiver of these requisites.² A promise to pay—and *a fortiori* an actual payment—might operate either as evidence of presentment or notice of dishonour, or as a prior dispensation, or as a subsequent waiver.³ The defence put forward was that the payment could not be founded on as an act of waiver since it was made under essential error. This might be a relevant defence, but the whole burden of proving it fell on the defenders, and the burden was specially heavy when, as here, the question at issue was the state of mind of a person, and matters had been allowed to drift until that person was dead. The defenders must prove misrepresentation or ignorance of an essential fact as the cause of the act of waiver. Ignorance of the law of bills in general and of the difference between the position of an endorser and that of an acceptor was not enough; it must be ignorance or error regarding a particular right or a particular fact.⁴ It was enough for the pursuer to prove an act which *prima facie* inferred waiver, and it was not necessary for him further to prove that Mrs Michael had acted in full knowledge of her legal rights. The case of *Carrick*,⁵ the passage in Bell's Commentaries,⁶ and the other authorities relied on by the defenders in support of the proposition that essential error of law *per se* was a sufficient defence, were no longer good law, and proceeded on the exploded fallacy that error of law had the same effect as error of fact.⁷ Ignorance might possibly include forgetfulness of a fact once within a person's knowledge: thus Mrs Michael might have forgotten that she signed the bill as an endorser. But very clear proof of this would be required, for the Court would not readily admit an excuse which might so

¹ Bills of Exchange Act, 1882 (45 and 46 Vict. cap. 61), secs. 45 and 48.

² Bills of Exchange Act, 1882, secs. 46 (2) (e), 50 (2) (b); *Allhusen & Sons v. Mitchell & Co.*, (1870) 8 Macph. 600; *Shepherd v. Reddie*, (1870) 8 Macph. 619; *Lundie v. Robertson*, (1806) 7 East. 231; *Taylor v. Jones*, (1809) 2 Campbell, 105; *Campbell v. Webster*, (1845) 15 L. J., C. P. 4; *Woods v. Dean*, (1862) 3 B. & S. 101, 32 L. J., Q. B. 1; *Killby v. Rochussen*, (1865) 18 Scott, C. B., N. S. 357.

³ *Cordery v. Colville*, (1863) 32 L. J., C. P. 210, *per* Byles, J., at p. 211.

⁴ *Cooper v. Phibbs*, (1867) L. R., 2 H. L. 149, *per* Lord Westbury, at p. 170; *Scholfield v. Earl of Londesborough*, [1896] A. C. 514, *per* Lord Watson, at p. 533; *Beauchamp v. Winn*, (1873) L. R., 6 H. L. 223.

⁵ *Carrick v. Carse*, (1778) M. 2931.

⁶ 7th ed., vol. i., p. 445.

⁷ Bell's Prin., sec. 534; *Wilson & M'Lellan v. Sinclair*, (1830) 4 W. & S. 398; *Stewart v. Kennedy*, (1890) 17 R. (H. L.) 25.

easily be made in bad faith. Further, it was not enough merely to prove ignorance, for it might be that Mrs Michael had waived all inquiry into her legal rights, in which case the position was just the same as if she had made the payment in full knowledge.¹ Applying these propositions to the facts of the case it was clear that the defence had not been substantiated. The case of misrepresentation had not been made out. There was no proof that either Mr Stirling or Mrs Michael were misled by Messrs Holmes' letters: there was merely the suggestion that they might have been. Apart from the inference to be drawn from these letters and their possible effect on Mrs Michael, there was no evidence that she was ever mistaken in fact as to her position under the bill. Assuming that she paid unwillingly, and that she would not have paid had she known that her liability was discharged, that amounted to no more than evidence of ignorance of law,—which, for the reasons stated, did not suffice to excuse her. What happened subsequently to 2nd November was of importance as throwing light on the state of mind in which Mrs Michael authorised the payment on that date. She was informed by her agent that she was not liable for the balance, and though that might have suggested to her that she had paid the £150 in error, she did nothing to obtain repetition or to repudiate further liability, and the inference was that the payment of the £150 was deliberate.

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Argued for the respondents;—It was clear that Mrs Michael's liability under the bill had been discharged by non-fulfilment of the statutory requisites. The respondents were willing to admit that such an admission of liability as a payment made under the bill after it was due might in certain cases operate as a waiver. But it had not that effect in the present case, because it was not "an intentional act with knowledge," as a true act of waiver must be.² What was said by Erskine with regard to homologation applied equally to waiver, namely, that "the approbatory acts must be so strong and express that no reasonable construction can be put on them other than that they were performed by the party from his approbation of the deed homologated, for no man is *in dubio* presumed to have an intention of obliging himself."³ The waiver must be of a known right, and there was no evidence of this in the present case. Mrs Michael authorised the payment on 2nd November under the erroneous belief that she was liable to pay, and there was evidence to show that but for this belief she would not have paid. If it were necessary for their case, the respondents had proved misrepresentation inducing error. But it was enough to show that the payment had been made in error, and in certain cases a mere error of law was enough.⁴ Even on the strictest view Mrs Michael's error was one of

¹ Balfour v. Smith & Logan, (1877) 4 R. 454, *per* Lord Shand, at p. 462; Kelly v. Solari, (1841) 9 M. & W. 54, *per* Abinger, C.B., at p. 57; Great Western Railway Co. v. M'Carthy, (1887) 12 App. Cas. 218, *per* Lord Watson, at p. 234; Bell's Com., 7th ed., vol. i., p. 446, note 1.

² Earl of Darnley v. London, Chatham, and Dover Railway, (1867) L. R., 1 H. L. 43, *per* Lord Chancellor Chelmsford, at p. 57.

³ Ersk. Inst. iii. 3, 48.

⁴ Carrick v. Carse, (1778) M. 2931; Miller v. Anderson, (1831) 9 S. 542; Johnston v. Johnston, (1857) 19 D. 706; Douglas v. Douglas' Trustees, (1859) 21 D. 1066; Mercer v. Anstruther's Trustees, (1871) 9 Macph. 618.

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fact, namely, that she was liable when she was not. It was no argument to say that because Mrs Michael had signed the bill, therefore she must have known that she was an endorser and not an acceptor. She knew she had signed the bill, but she had forgotten in what capacity, and forgetfulness of a fact once known was equivalent to ignorance.¹ Her position was not affected merely by the fact that investigation would have disclosed the truth. It was not enough to make her liable that she had the means of knowledge, unless it could be shown that she had acted intentionally and had chosen not to investigate.² Nothing which happened after 2nd November could alter the legal character of the payment made on that date. Therefore it was immaterial that there was no repudiation, though in fact there could be no repudiation till a demand for payment was made, and there was no evidence that Mrs Michael personally knew of any of the demands made after 2nd November.

At advising on 6th February 1912,—

LORD DUNDAS.—This is a curious and, in some aspects, a difficult case. The action is for recovery of the unpaid balance alleged to be due under a bill of exchange, with some arrears of interest. The pursuer represents the holder of the bill. The defenders called are the acceptor, Matthew Whyte, the executors of his deceased mother, Mrs Michael, who endorsed the bill, and the trustee on the sequestrated estate of Alexander Whyte, the drawer, brother to Matthew. Only Mrs Michael's executors have appeared to defend the case. The bill was one for £400 at six months, dated 14th May 1904. A sum of £100 was repaid by Matthew Whyte in July 1907; and a further payment of £150 was made on Mrs Michael's behalf on 2nd November 1908, under circumstances to be referred to; the balance sued for is, therefore, £150. The bill is the sequel of an earlier one, dated 4th November 1897, at three months, drawn by Alexander Whyte on his brother Matthew and endorsed by their mother, which was admittedly for the accommodation of Matthew, and became prescribed in February 1904. The history of the new bill, so far as material, is summarised in the findings of the Sheriff-substitute's interlocutor of 19th July 1910. It seems that, in the Courts below, some objections to the pursuer's title were stated, or "reserved" (whatever that may mean); but there is no plea to title; no objection of the kind was stated at our bar; and it must be taken that none such exists.

I do not think there is any serious difficulty or dispute as to the general law applicable to such a case as this. At all events, we are fortified in that respect not only by the Sheriff's learned disquisition, ranging from Ulpian to modern times, but also by a copious citation of authorities at the bar. The difficulty arises rather upon the facts, and in regard to the inferences to be drawn from them, and the presumptions of law as affecting the *onus probandi*, as it shifts from one party to the other. The position and obliga-

¹ Lucas v. Worswick, (1833) 1 M. & R. 293; Kelly v. Solari, (1841) 9 M. & W. 54; Kerr on Fraud and Mistake, 4th ed., p. 475.

² Kelly v. Solari, 9 M. & W. 54, *per* Abinger, C.B., at p. 57; Hood of Avalon v. Mackinnon, [1909] 1 Ch. 476; Brownlie v. Miller, (1880) 7 R. (H. L.) 66, *per* Lord Blackburn, at p. 80; Bell v. Gardiner, (1842) 4 M. & G. 11.

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to mislead anyone ignorant of the exact position of Mrs Michael in regard to the bill. Mr Stirling says he was misled, and assumed at once, and without thought of further inquiry, the accuracy of Messrs Holmes' assertion (as he considered it) that Mrs Michael was liable as an acceptor. It does seem strange that he should not have taken the trouble to see the bill for himself, or to ask Holmes & Company for further details about it. His office and their office are in the town of Johnstone; he was in correspondence with them, and on perfectly good terms with them; and quite a number of meetings between Mr Stirling and members of the firm are spoken to in the proof during the period from May to the end of October 1908. But I do not say that Mr Stirling neglected his duty in taking the matter for granted, as he says he did, without further ado. Mr Stirling and Mrs Faulds—Mrs Michael's daughter—tell us that Mrs Michael, on receiving Holmes & Company's letters, was "much put about," and said she would not pay because she thought the bill "had been discharged and out of the way," but that, on Mr Stirling's pressure, and his advice that she was undoubtedly liable to pay, Mrs Michael consented to the realisation of some heritable property, and to the payment of £150 to account on 2nd November 1908. Down to this point, the defenders' case wears a very plausible aspect, for I think one is bound, upon the evidence, to believe that the payment of £150—which of itself afforded *prima facie* evidence of waiver—was authorised by Mrs Michael only because her agent advised her that she was bound to pay. The Sheriff-substitute takes the view that neither she nor her agent was in fact misled at all by the words "joint acceptance." He thinks she "must have known quite well what that meant." This is matter of opinion and conjecture, but I cannot hold it proved as matter of evidence. Accordingly, I think that at this important stage the onus shifts back to the pursuer to establish his plea of waiver by something occurring after the payment, and apart from the intrinsic weight of that fact. There is no doubt that what happened later gives him ground for a serious argument.

On 3rd November, Messrs Holmes acknowledged receipt of the £150, and sent Mr Stirling, in answer to his somewhat tardy request, a copy of the bill. From that document, as well as from the terms of the letter, it was made perfectly clear to Mr Stirling that Mrs Michael's liability, if any, was as an endorser. Mr Stirling says he saw his client next day. "I reported to Mrs Michael on 4th November that I did not think she would be called upon to pay the balance. By that time I presumed that the statutory requisites had not been given. That was the day I got the letter of 3rd November. I told Mrs Michael that at once." Mrs Faulds is under the impression that she was present at this interview. Mr Stirling does not say so; and his business account does not mention Mrs Faulds as being present on this occasion. The discrepancy, if it be one, is not perhaps of much importance. Mrs Faulds's evidence is that "Mr Stirling reported to her" (Mrs Michael) "then that he thought she would not require to pay any more. Mr Stirling asked me and my mother if we had got any notices in regard to this bill. I said no, that she had not got any. He then told me that I would require to go and make a search for notices in regard to this bill. I made a search for notices, but found none." Mr Stirling says that Mrs Faulds told him on 12th November that she could find no trace

of notices of any kind. Now, the amazing fact is that, although Mr Stirling Feb. 6, 1912. was, as he says, made aware on 4th November that he had been misled (wilfully, as he maintains) by Holmes & Company, and had in consequence induced his client wrongfully and needlessly to pay them £150, he left their letter absolutely unanswered, making no protest against the deceit he alleges had been practised on him, no demand for repayment of the £150, and no repudiation of further liability on the part of his client. His silence remained unbroken, even when he received from Holmes & Company a letter dated 5th December, with a demand for interest due down to 11th November; though he sent the letter on to Alexander Whyte on 7th December, saying, "I shall be pleased to have your instructions. If you think that I should communicate with your mother, I shall do so." On 9th January 1909 Messrs Holmes wrote to Mr Stirling that they were instructed "to press for an immediate settlement of the balance." Mr Stirling made no reply. On the 12th he had a meeting with Mr Mackillop (of Holmes & Company), but gave no hint of repudiation, or of any error induced in his mind, fraudulently or otherwise. Mrs Michael died on 10th March 1909. On the 16th, Holmes & Company once more wrote to Mr Stirling for a "settlement of the claim." His reply, on the 17th, is in curiously non-committal terms, ending "I cannot convene a meeting" (of the trustees) "until next week. Meanwhile, no creditor can now be prejudiced in any way." It was not till 27th July that Mr Stirling indicated any suggestion of non-liability. He wrote, "I shall be pleased to know if there is any intention to prosecute a further claim against Mrs Michael's estate. In such an event, I shall be pleased to have an opportunity of considering any evidence which you may have of notice of dishonour for non-payment having been given to the endorsers." Holmes & Company in reply sent a statement of their claim for £150 and interest, and added, "No question of notice of dishonour, so far as we are aware, arises. Mrs Michael knew the nature of the loan transaction, and recognised her liability for repayment, and we do not suppose that you suggest any question about this." Mr Stirling's answer on 30th July was in effect a declaration of war. It is a curious document. He states that the letter of 12th May 1908 "came as a surprise to" Mrs Michael; but that, "accepting unhesitatingly as accurate your statement that she was a joint acceptor, I advised that she could not repudiate her obligations under her 'joint acceptance,'" and she was prevailed upon to pay the £150. Mr Stirling adds that "the question of repetition considered and postponed before Mrs Michael's death will now be dealt with." I may observe that there is no trace in the evidence that any such consideration ever took place. On the contrary, Mr Stirling (from whatever motive) seems never to have suggested repetition; and the case was argued (as I gather) in the Courts below, and certainly at our bar, on the footing, which is probably correct, that repetition could not, in any view, be enforced, looking to Mr Stirling's course of acting or of non-acting.

One must carefully consider the effect of this correspondence, and of the action (or rather want of action) of Mrs Michael's accredited agent. I think, as already said, that the defenders must, on the evidence, be taken to have proved that the payment of £150 was authorised by Mrs Michael,

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owing to Mr Stirling's advice that she was legally bound to pay. But the question at the moment is not as to recovery of the £150—that was treated in the argument on both sides as past praying for—but as to her further liability for the unpaid balance. I cannot doubt that if Mr Stirling had been himself the endorser, or if we had only to consider his state of knowledge, the defenders' case would fail. It is clear that, on and after 4th November, Mr Stirling was under no error at all as to his client's position. He knew she was an endorser; he presumed (and rightly) that the statutory requisites had not been complied with, and that Mrs Michael was *ex hypothesi* discharged. Yet he maintained an unbroken silence, in spite of the payment to account, and of Messrs Holmes' repeated demands for settlement of principal and interest. I confess that Mr Stirling's attempted explanations of his attitude leave me in bewilderment. They are really not explanations at all. As given both in cross-examination and in various replies to the Sheriff-substitute, they seem to me to be inadequate, inconsistent, and, I must add, far from candid. And, if this were a case where a pursuer was dealing with the defender's accredited agent, and relying on the faith of his actions, or it may be of his silence, the agent's conduct might well be held to bind his principal. But that is not the kind of case we have here. The question is not as to Mr Stirling's conduct, or what Messrs Holmes were entitled to infer from his silence, but whether or not the Court is to infer from his silence a tacit waiver by Mrs Michael, and her acceptance of a liability which she was in a position by law to dispute. It is her state of knowledge, after all, and not Mr Stirling's, that is in issue.

Mrs Michael is unfortunately dead; and the evidence as to her state of knowledge and of mind is extremely scanty. I think we must take it that Mr Stirling advised her on 4th November that he thought she would not require to pay any more. What is there to show that, after that date, when the embargo of his previous advice was removed, she decided to pay the balance of the bill, knowing she might in law object to do so? There is Matthew Whyte's evidence; but it seems to be in parts exaggerated and lacking in precision; and, while I see no reason to characterise it as untrue, it would not, I think, be enough by itself to prove waiver on his mother's part. There is really nothing else. The fact of Mr Stirling's silence loses weight, in this aspect of the case, when one considers that there is no evidence that Mrs Michael was aware of Messrs Holmes' demands for payment after 4th November. His silence thereafter is not, therefore, necessarily her silence. Nor is it proved what instructions (if any) Mrs Michael gave to Mr Stirling on that day. I do not think there is room for any inference that she instructed him that, whether legally bound or not, she was desirous to pay the balance of the bill. There is no evidence of this; it would have been contrary to what we must suppose was her attitude of mind previous to 4th November; and no further steps were in fact taken, prior to her death, towards payment, by way of realisation of property or otherwise. It is true, on the other hand, that there seems to be equally little room, when one considers the fact of Mr Stirling's silence, for an inference that Mrs Michael instructed him to intimate to Messrs Holmes her refusal to make any further payment. We are left to suppose that she gave no instructions at all. But the presumption is, I apprehend, *in dubio* adverse to waiver;

and having done my best to scrutinise the evidence, and to follow the Feb. 6, 1912. shifting burden of the proof, my conclusion is that waiver has not been proved, and that the pursuer's case must fail. I think we should recall the interlocutors of the Sheriff and of the Sheriff-substitute, repeat the first eleven findings contained in the latter interlocutor, and make additional findings in fact and in law upon the lines and to the effect I have indicated.

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LORD SALVESEN.—This action is brought for payment of £150, the balance of a sum of £400 contained in a bill. The bill is dated 14th May 1904. It is drawn by Alexander Whyte upon and accepted by Matthew Whyte, and is endorsed by the late Mrs Michael who was the mother of the other parties. Alexander Whyte has become bankrupt; Matthew Whyte is in financial difficulties; and although the action is also directed against the trustee on the sequestrated estates of Alexander and against Matthew, no defences have been lodged on their behalf. The dispute therefore narrows itself to this: whether the trustees of Mrs Michael, who are the other defenders, are liable for the unpaid balance of the bill.

The bill of 14th May 1904 took the place of an earlier bill, to which the same persons had been parties, but which at that date had prescribed. The first bill was granted to secure a loan made to Matthew Whyte by the late Mr Mactavish, on whose estate the pursuer is judicial factor. Mrs Michael endorsed it in order to provide the holder with her obligation as cautioner for her son in the event of his not being able to meet the bill. While the bill is dated 14th May, it was not granted till some four months later and within two months of its due date. It was not presented for payment to Matthew Whyte; but he continued to pay interest upon it at the rate of 4 per cent for some years; and he also paid a sum of £100 towards its extinction.

On 12th May 1908 Messrs Holmes & Company who acted on behalf of the then holder of the bill, wrote to Mrs Michael intimating that payment of the balance of £300 remaining due thereunder was required. At that date Mrs Michael's liability had been discharged by the holder's failure to present the bill in due course to the acceptor; but after some correspondence Mr Stirling, writer, Johnstone, who acted on Mrs Michael's behalf, on 2nd November 1908 made a payment of £150 to Holmes & Company in part payment of the bill. This payment is founded on as a waiver of presentment to the acceptor, and as reconstituting the obligation which Mrs Michael had originally incurred as an endorser. While a great many authorities were cited on both sides of the bar and are referred to by the learned Sheriff, the difficulties which the case admittedly presents do not arise from any uncertainty as to the law. A part payment by an endorser of a bill, after his liability has been discharged by failure to present it to the acceptor and to give notice of dishonour if payment has not been made when presented, is presumed to operate as a waiver of due presentment and notice, but if such payment is made under a mistake in fact it cannot be founded upon as reconstituting the original obligation. This is the defence which the executors of Mrs Michael now make to the claim. The onus of establishing it in the face of a payment made by or on

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behalf of the endorser, which must be presumed to have been made in the knowledge of the facts connected with the bill, lies upon the person alleging the mistake. The difficult question in this case is whether that onus has been discharged.

In considering this question regard must be had to the position of the parties and the whole circumstances. In November 1908, when the payment was made on Mrs Michael's behalf, she was a woman about seventy-six years of age and possessed only some small heritable property, on the income of which she depended for her subsistence. She had carried on business as a grocer for many years in a small way, but was illiterate in the sense that she could not read or write, except that she could sign her name. The proof does not disclose whether her inability to read applied only to handwriting and not to print, but this is of small consequence. Her relations with Matthew, for whose benefit she had originally become a party to the bill, had ceased to be of a cordial nature. Subsequently to the granting of the bill now sued on she had at his request signed a bill for £200 for the benefit of the Globe Gas Engine Company, to which Matthew had sold his business and of which he was managing director. She had been told by Matthew, or at all events understood, that on signing that bill she would not be called upon to meet any obligation under the prior bill for £400. The Globe Company had gone into liquidation prior to 1st May 1908, and Mrs Michael was called upon to provide the £200, for which she had become an obligant, by the bank which then held the bill. When on 12th May 1908 a claim was made on the old bill for £400, she was much perturbed, and she showed in a very conclusive manner her displeasure at the deception which she believed had been practised upon her by Matthew by executing a codicil on 22nd May 1908 cutting him out of any share in her succession. It may be assumed, therefore, that, if she had known that the bill of 1904 was no longer a good document of debt against her, she was in no mood to undertake any new obligation for Matthew's benefit. Nor does it appear that she had any special knowledge or regard for the then holder of the bill, Mrs Maclaine, although she was prepared to meet whatever legal obligation she had undertaken.

These being the circumstances, I think it is plain that Mrs Michael would not have undertaken liability for the sum of £300, which represented a considerable part of her means unless she believed that she was legally liable. That she might waive inquiry as to whether she was liable or not in order to prevent the whole sum being demanded from her, is of course possible, although I cannot regard it as probable in the circumstances in which she was placed.

The case, however, does not stop there. The letter from Holmes & Company of 12th May was most unfortunately expressed. In demanding payment from Mrs Michael they described the bill as "the joint acceptance for £400 by you and Mr Alexander Whyte and Mr Matthew Whyte." These words are free from ambiguity, and represent that Mrs Michael had signed the bill as a joint acceptor along with her two sons. This misdescription by writers of high standing who actually had the bill in their possession at the time was, I think, most misleading. The bill was again referred to on the 4th of August as "a joint acceptance," and it was not

until after the payment had been made that Mr Stirling, who acted for Feb. 6, 1912. Mrs Michael, ascertained that her position on the bill was not that of an acceptor at all but that of an endorser. Messrs Holmes & Company's letter also proceeded upon the footing that there was no question of the liability of Mrs Michael to the holder of the bill, and Mr Mackillop, by whom the correspondence was conducted, says that it did not occur to his mind that any objection was possible or likely with regard to the form of Mrs Michael's obligation. If that were so, then it must have been on the footing that there had been due presentment and notice of dishonour given to the endorser, a matter upon which apparently Mr Mackillop had no information at the time.

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The evidence of Mr Stirling, who conducted the negotiations on Mrs Michael's behalf, is to the effect that he accepted the statement of Holmes & Company that Mrs Michael was a joint acceptor; that under the error so induced he advised her that she had no defence to the claim, and obtained her authority to settle it. His statement is corroborated by Mrs Faulds, a daughter of the deceased Mrs Michael, who was in the confidence of her mother, and who says she was cognisant of all the transactions that took place at the time. She says:—"She [Mrs Michael] would not allow Mr Stirling at first to arrange for payment under the £400 bill. As time went on, Mr Stirling took up the position that it must be paid; and it was only on the pressure Mr Stirling brought to bear on my mother that she consented to pay it. She ultimately consented to Mr Stirling raising money by bond for paying this £150, the £200, and some obligations which we got a note of." I see no reason to doubt this evidence, whatever may be said of some of the other statements which Mr Stirling made, and to which I shall afterwards have occasion to refer. Mr Stirling had no conceivable motive, but quite the contrary, to advise his client to meet an obligation which had long since been discharged, and for which that client (although on other grounds) considered herself not liable. That he should have urged her to pay £150 out of regard to the holder of the bill is, to my mind, in the circumstances unthinkable; and there is not a fragment of evidence pointing in that direction. Had the matter therefore stopped there I think there would have been only one conclusion on the evidence, namely, that Mrs Michael authorised her agent to make the payment on which the plea of waiver is founded, under the advice of her agent, who gave that advice because he erroneously believed, in consequence of Messrs Holmes & Company's representations, that she was liable on the bill as an acceptor. Had he ascertained that her true position was that of an endorser I entertain no doubt that he would have first made inquiry as to whether there had been presentment of the bill to the debtor and notice of dishonour to Mrs Michael; and had he learned that there had been no such presentment, I feel satisfied that he would have given the opposite advice, and that his client would only have been too glad to act upon it.

In Mr Stirling's letter of 2nd November containing the remittance of £150, he asked Messrs Holmes & Company to annex to their letter of acknowledgment a copy of the bill, "as I have not seen it at any time." This letter was answered next day, and a correct copy of the bill was annexed. It was then brought home to Mr Stirling's mind that his client

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Lord Salvesen. was merely an endorser, and on the same day that he received the letter he had an interview with Mrs Michael and Mrs Faulds, and learned from them that, so far as they knew, no notice of dishonour had ever been received. It is matter of great surprise and of some reflection on Mr Stirling that he did not at once communicate with Messrs Holmes, and point out that he had sent the payment of £150 on the footing that Mrs Michael was a joint acceptor of the bill, and asked them how her liability as an endorser still continued. He gives various more or less inconsistent explanations of his silence. None of them, I think, satisfactorily explains it. I think it was Mr Stirling's plain duty to have intimated that he had advised his client to make the payment on an erroneous footing, and to have asked that the money be returned. The pursuer desires us to infer from his silence that he was not in fact misled; and if the obligation contained in the bill had been Mr Stirling's own, I think the inference would have been that as Mr Stirling presumably knew in what capacity he had signed the bill and took no objection to the footing on which payment had been demanded of him, he could not be heard to say that he believed himself to be an acceptor at the time when he made the payment. But it is a different question whether Mrs Michael's estate has to suffer because of his failure in his duty towards her. There is no suggestion that she was ever made aware of the difference between an acceptor's and an endorser's liability; or that the soundness of her agent's advice to her depended on her being an acceptor. Her ignorance of the general law would not have excused her; but if the advice upon which she acted proceeded on an error in fact on the part of her adviser, it is just the same as if she had herself made the payment under the same mistake. The true explanation of Mr Stirling's silence I believe to be that he felt that he might be charged with carelessness in not ascertaining what Mrs Michael's true liability on the bill was before advising her to pay it, and remitting £150 to account of it. I do not think that he could have been seriously blamed, looking to the precise way in which the bill was described in Messrs Holmes' letter of 12th May; but it was obvious that trouble might be incurred in recovering the payment of £150, and that reflections might be made on Mr Stirling for having acted precipitately without full knowledge of the facts. Whether this be the true explanation or not, I do not think it can be inferred that Mrs Michael, who acted on the advice of her agent, and who, I have no doubt, had completely forgotten all about the bill except that she had signed it, was not misled; and if so, the payment of £150 was authorised by her under an error, and therefore was not a waiver of her rights as an endorser. Mr Stirling's conduct after he had discovered the truth cannot be treated as a new waiver by his client. I admit the cogency of the inference to be drawn from his conduct as bearing on the question whether he and his client were in fact misled and paid the £150 under error; but I do not think it is sufficient to displace the positive evidence of Mr Stirling and Mrs Faulds, or to convict Mr Stirling of perjury as regards the crucial parts of his testimony.

The pursuer founded strongly on the evidence of Matthew Whyte to the effect that his mother constantly recognised her liability for Mrs MacLaine's bill. That, however, does not in the least conflict with the view that she

did so because that was the advice she had received from Mr Stirling, pro- Feb. 6, 1912.
ceeding, as I hold, on essential error as to the facts. The cross-examina-
tion of Matthew Whyte also tends to show that he is far from being a
reliable witness.

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I have therefore come to the same conclusion as the learned Sheriff, and
although the matter is not properly before us, I should like to state that as
at present advised I agree with him that the claim for repayment of the
£150 is probably barred by the delay in putting it forward. There can be
little doubt that Messrs Holmes & Company allowed time for the further
payment of the bill in respect of the part payment which they had received,
and they may have been prejudiced in their remedies against Matthew
Whyte by the belief which had been induced that Mrs Michael accepted
liability on the bill. To that extent Mr Stirling's conduct may have
resulted in a loss to his client's estate, but it does not at all follow that that
estate is to be subjected to a further claim for £150, of which it had at
that time been discharged.

Lord Salvesen.

LORD JUSTICE-CLERK.—I will confess that I had for some time consider-
able doubt as to this case. I did not feel myself able in all respects to
follow the reasoning of the Sheriff. But I have in the end come to the
same conclusion as that at which your Lordships have arrived. Your Lord-
ships' opinions so clearly bring out the points of the case, that anything I
could say would be mere repetition. I content myself, therefore, with
expressing my concurrence in these opinions, and accordingly I am for
adhering to the Sheriff's judgment in effect. The interlocutor proposed
by my brother Lord Dundas is, I think, the suitable one in the circum-
stances.

THE COURT pronounced this interlocutor:—[After findings in
fact, which are embodied in the foregoing narrative]—"Find
in law that Mrs Michael was discharged of liability as
endorser of the said bill, in respect of non-fulfilment of the
said statutory requisites, and that it is not proved that she
waived her right to found upon said non-fulfilment: There-
fore repel the pursuer's third plea in law and sustain the
defenders' first plea in law: Assoilzie the defenders from the
conclusions of the initial writ, and decern: Find the pur-
suer liable in expenses in this and in the inferior Court
(including the employment of counsel before the Sheriff),
and remit," &c.

N. B. CONSTABLE & Co., W.S.—MACPHERSON & MACKAY, S.S.C.—Agents.

No. 69.

ALLAN MACLACHLAN, Pursuer (Respondent).—*Malcolm.*JOHN W. BRUCE, Defender (Appellant).—*J. A. Christie.*

Feb. 6, 1912.

Maclachlan v.
Bruce.*Process—Appeal—Competency—Sentence in Sheriff Court for breach of interdict—Appeal to Court of Session.*

A judgment of the Sheriff, imposing a sentence of fine or imprisonment in a petition and complaint for breach of an interdict granted in the Sheriff Court, can competently be appealed to the Court of Session.

2D DIVISION.
Sheriff of
Lanarkshire.

ALLAN MACLACHLAN presented a petition and complaint in the Sheriff Court at Glasgow against John W. Bruce & Company, accountants, Glasgow, and John Wilson Bruce, the only known partner of the firm, for breach of interdict.

On 20th December 1911 the Sheriff-substitute (Thomson), after a proof, found that on 19th February 1909 the defenders were interdicted by decree pronounced in the Sheriff Court of Lanarkshire from intromitting with certain property, and that the defender, John Wilson Bruce, had committed a breach of the interdict. He imposed a fine of £5 and, failing payment thereof within fourteen days, sentenced the defender to twenty days' imprisonment.

The defender, J. W. Bruce, appealed to the Court of Session.

When the case was called in the Single Bills of the Second Division on 18th January 1912, counsel for the respondent objected to the competency of the appeal, and argued;—The Court whose authority had been violated was the proper forum to decide the complaint for contempt.¹ This was a summary process of a *quasi*-criminal nature, and there was no appeal from the Sheriff's decision. If, however, an appeal were competent, it should be taken to the High Court and not to the Court of Session. In none of the cases referred to by the appellant had this objection to the competency been brought to the notice of the Court.

Argued for the appellant;—The competency of the appeal was settled by authority. An appeal from a judgment of the Court of Session, imposing a penalty for breach of an interdict pronounced by that Court, had been entertained by the House of Lords and no doubt had been suggested as to its competency,² and similar appeals had frequently been taken from the Sheriff Court to the Court of Session.³ A petition and complaint for breach of interdict was not a criminal proceeding⁴ as suggested by the respondent.

At advising on 6th February 1912, the opinion of the Court (consisting of the Lord Justice-Clerk, Lord Dundas, and Lord Salvesen) was delivered by the

LORD JUSTICE-CLERK.—This is an appeal by the defender in a petition presented in the Sheriff Court of Lanarkshire at Glasgow to have him fined £50, or such other sum as the Court might think fit, for breach of interdict; or, failing payment of the fine, to have him committed to prison. The Sheriff-substitute imposed a fine of £5, and, failing payment thereof

¹ *Monro v. Robertson's Trustees*, (1834) 12 S. 788.

² *Caledonian Railway Co. v. Hamilton*, (1850) 7 Bell's App. 272.

³ *Henderson v. Maclellan*, (1874) 1 R. 920; *Stark's Trustees v. Duncan*, (1906) 8 F. 429; *Wallace*, Sheriff Court Practice, pp. 453 to 455.

⁴ *Christie Miller v. Bain*, (1879) 6 R. 1215.

within fourteen days, a sentence of twenty days' imprisonment. An objection to the competency of the appeal was taken for the pursuer in Single Bills, to the effect that, as a petition for breach of interdict is of a criminal nature, an appeal (if there be one) must lie to the Court of Justiciary, and not to the Court of Session.

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It is true that, in the words of Lord President Inglis (*Christie Miller v. Bain*¹), "in one sense a petition for breach of interdict is a criminal proceeding. But one cannot help seeing that in many ways it is a civil proceeding. Civil interests are often largely concerned, and therefore it is often called a *quasi*-criminal proceeding." But the procedure in the Sheriff Court seems to be by way of petition in ordinary form, and there are numerous instances in the books of appeals taken to the Court of Session in such cases—*e.g.*, *Henderson*,² *Brown*,³ and *Stark's Trustees*.⁴ In the last of these cases some objections of a special kind were stated to the competency of the appeal, and were repelled; but it seems to have been assumed that an appeal to the Court of Session was, in the general case, competent. An instance of an appeal in such a matter from this Court to the House of Lords is to be found in *Caledonian Railway Company v. Hamilton*.⁵ The objection to the competency of this appeal seems, therefore, to be counter to a strong current of practice; and, as we were not informed of any contrary authority, we think it must be repelled. The cases referred to were all prior to the recent Sheriff Courts Act of 1907, but, as counsel did not suggest that any ground of objection to the competency of this appeal is to be found in its manifold provisions, we assume that none such exists.

The Court pronounced an interlocutor finding the appeal competent, and appointing the cause to be put to the Summar Roll.

Thereafter, on 10th February 1912, the appeal was heard on the merits, when the Court, on a consideration of the evidence, sustained the appeal, recalled the interlocutor of the Sheriff-substitute, and dismissed the petition.

CARMICHAEL & MILLER, W.S.—STURROCK & STURROCK, S.S.C.—Agents.

JOHN ADAM LILLIE (James Deans's Judicial Factor), Pursuer and Real Raiser, (Respondent).— <i>M'Lennan, K.C.—Wilton.</i>	No. 70.
JAMES DEANS AND OTHERS, Claimants (Reclaimers).— <i>Morison, K.C.— T. G. Robertson.</i>	Feb. 6, 1912.
CHARLOTTE HOWARD BELL AND OTHERS, Claimants (Respondents).— <i>M'Lennan, K.C.—Wilton.</i>	Deans's Judicial Factor v. Deans.
WILLIAM CARRICK ANDERSON AND OTHERS, Claimants (Respondents).— <i>Mercer.</i>	

Husband and Wife—Proof of marriage—Parent and Child—Presumption of legitimacy—Presumption where parents have not enjoyed status of married persons and the de quo quæritur is existence of marriage.

In a competition for the distribution of an intestate estate certain of the claimants averred that a marriage had taken place in 1819 between Lieutenant D., an officer in a Highland regiment, and A., a milliner in

¹ 6 R. 1215, at p. 1216.

⁴ 8 F. 429.

² 1 R. 920.

⁵ 7 Bell's App. 272.

³ (1882) 9 R. 1183.

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Glasgow, and that their father was the legitimate offspring of that marriage. The existence of the marriage was denied by the other claimants. At a proof no direct evidence of the marriage, either documentary or otherwise, was adduced, nor was it shown that Lieutenant D. or any of his family had ever acknowledged the marriage, or made any allusion thereto, or that the parties had ever lived publicly together or enjoyed the status of married persons. The claimants relied mainly on hearsay evidence as to statements made by A. and her sisters, and on an unbroken tradition in A.'s family to the effect that Lieutenant D. and A. had been married persons. They maintained that, in the circumstances, there was a presumption of legitimacy which had not been displaced, and that the marriage was proved.

Held that the marriage had not been proved, the Lord President observing that the presumption of legitimacy applied only where persons were living more or less in the married state, and did not apply where the *de quo quæritur* was whether there was a marriage or not.

Proof—Hearsay—Admissibility—Statements made by deceased person at date when his evidence would not have been admissible.

Opinion reserved by the Lord President as to the accuracy of the dicta of Lord Watson and Lord Blackburn in the *Dysart Peerage* case, (1881) 6 App. Cas. 489, to the effect that if a person at the time of an alleged marriage would not have been a competent witness to speak to the fact of the marriage, it was not possible afterwards to take his hearsay testimony, although, in the meantime, the law had been altered and he had become a competent witness.

1ST DIVISION. ON 24th August 1910 John Adam Lillie, judicial factor on the estate of the late James Deans, brought an action of multiplepointing for exoneration and for the distribution of the estate under his administration.

Lord Dewar.

James Deans died in 1908, leaving a will in favour of a sister, who had predeceased him, and so in effect he died intestate; and his immediate next of kin not being known at the date of his death the pursuer was appointed judicial factor on his estate, which amounted in value to £7000.

As the result of the pursuer's inquiries and advertisements several parties came forward representing themselves to be among the next heirs of the deceased, and, *inter alia*, a claim was lodged in the action for James Deans and others, the children of the late James Adam Deans, at one time Supervisor of Excise in Edinburgh.

These claimants (hereinafter referred to as "the claimants") averred that they were directly descended from the grandfather of the deceased, William Deans, Adjutant of the North British Recruiting District at Glasgow, who died there in 1835. They averred that this William Deans had two sons, one of whom was the father of the deceased, and the other was Lieutenant James Deans, of His Majesty's 92nd Regiment of Foot. They averred that this Lieutenant Deans in or about the year 1819 married Hannah Andrews, who was employed as a straw-hat maker in Glasgow, and that the son of this alleged marriage, James Adam Deans, was the father of the claimants.

The other claimants, whose kinship to the deceased was more distant than that claimed by James Deans and his brothers and sisters, denied that such a marriage had taken place.

A proof was allowed and led. The following statement of the case sought to be made by the claimants James Deans and others, and of

the character of the evidence adduced in support of it, is taken from Feb. 6, 1912.
the opinion of the Lord Ordinary (Dewar):—

"The substance of the claimants' case is this:—That when Lieu-^{Deans's}
tenant James Deans was a young officer on half pay, he came home ^{Judicial}
to reside with his father, Adjutant William Deans, in Glasgow. ^{Factor v.}
He there became acquainted with and ultimately married a straw-^{Deans.}
hat maker called Hannah Andrews, one of the daughters of a
stage-coach driver, who at one time resided at Langholm. The pre-
cise date of the marriage—which is alleged to have been regular—is
not known, and there is no documentary evidence of it, but it is
explained that this is probably because the records of St Andrew's
Episcopal Church, Glasgow, where it is believed to have been cele-
brated, were destroyed by fire. No one is known to have been present
at the marriage ceremony, but that, it is explained, is because it is
believed to have been a secret marriage; that a child of the marriage
(the said James Adam Deans) was born on 7th July 1820; that about
that date Lieutenant James Deans was summoned back to his regi-
ment, which was then stationed at the Isle of Wight; that he remained
there for some time, and then went to Jamaica, where he died of
yellow fever at Up Park Camp, on 2nd August 1825. Up to this
time the marriage had not been disclosed to Adjutant Deans, but it is
said that some time after Lieutenant Deans's death, Hannah Andrews
and her sister Margaret called upon the Adjutant and divulged the
secret; that he received them with much kindness, and thereafter
paid for the child's education, and when he met him on the street
gave him small sums of money. Then the claimants produced the
baptismal record of St Andrew's Church, Glasgow, which shows that
James Adam, son of Hannah and James Deans (*sic*), who is described
as a soldier in the 92nd Regiment, was baptised on 13th September
1829. It is alleged that this entry has reference to the baptism of the
pursuers' father, and that the form in which it is made shows that he
was regarded by the officiating clergyman as legitimate; that Hannah
Andrews continued to reside in Glasgow and to carry on her business
as a straw-hat maker until the year 1831 or 1833, when she died; that
her son was then removed by his maternal grandmother to Langholm,
where he resided for two years, and then went to Linlithgow, where
he carried on business as a shoemaker; that he married and had six of
a family, five of whom (the claimants) are still alive; that he always
regarded himself as the legitimate son of Lieutenant Deans; and that no
doubt as to his legitimacy had ever been raised until the present time.

"The claimants' case is largely founded on family tradition, and
the main source of that tradition was James Adam Deans and his
two aunts, Margaret and Jane Andrews, Hannah's sisters. These
three parties—who are all dead—had made statements, partly from
their own knowledge and partly from what they had heard from
others, regarding the reputed marriage to their children, and the
children appeared in the witness-box and re-told the story."

The nature of the evidence given by the witnesses is summarised
in the opinion of the Lord President.

On 10th March 1911 the Lord Ordinary found that the claimants
James Deans and others had failed to prove their averments, and
repelled their claim.*

* "OPINION.—[After the passage quoted *supra*, and after analysing the
evidence of the witnesses to family tradition, his Lordship continued]—In

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James Deans and others reclaimed, and the case was heard before the First Division (consisting of the Lord President, Lord Johnston, and Lord Guthrie) on 28th, 29th, and 30th December 1911, and 27th January 1912.

Argued for the reclaimers ;—It was established as the result of the proof that James Adam Deans was the son of Lieutenant Deans and Hannah Andrews. It must further be held that he was their legitimate son. The evidence showed an unbroken family tradition that Lieutenant Deans and Hannah Andrews were man and wife,¹ that Adam Deans had throughout his life enjoyed the status of legitimacy, and that this status had never, up till now, been called in question.² In these circumstances there was a presumption in favour of his legitimacy, the onus of displacing which was upon the other claimants,³ and had not been discharged by them.

Argued for the respondents ;—Neither paternity nor legitimacy

addition to this, the claimants proved and found upon an extract from the register of baptisms of St Andrew's Episcopal Church, Glasgow, which shows that on 13th September 1829 a boy called James Adam, the son of James and Hannah Deans (*sic*), was baptised by the Rev. William Routledge. The parents' abode is given as Langholm, and the father's profession 92nd Regiment ; and the pursuers proved in evidence that the entry is in the form in which legitimate children are usually registered, and that the rules of the Church require clergymen to satisfy themselves that the child is in truth legitimate before he is registered in this way. The custom appears to be to require documentary evidence of the marriage, if it exists, but if it does not, then the clergyman must satisfy himself in any way he can. . . . It is no doubt an important factor, but at the highest, and taken in conjunction with the other evidence, it amounts to no more than this, that the Rev. Mr Routledge, like Margaret and Jane Andrews, believed that Hannah had been married. . . ."

[His Lordship then summarised the effect of the whole evidence as follows]—"What is the proof of marriage offered ? There is the certificate of baptism which proves that the Rev. Mr Routledge believed that there had been a marriage, and that he had some reason to believe it. There are the statements of Margaret and Jane Andrews that Hannah had been married, and I shall assume that they also had some reason for making them, and the statement, spoken to by one witness only, that Hannah and Lieutenant Deans had been to a ball. Then there are the facts that some of the records of St Andrew's Church were destroyed by fire (and, of course, the record of the marriage may have been lost in this way, although there is no evidence of that), and that Adjutant Deans's two sons were both baptised in that church, and that certain persons named Andrews and Deans had sittings there (see Minute of Admissions No. 149 of process) ; that Hannah and Margaret Andrews called upon the old Adjutant after the Lieutenant's death, and that he afterwards paid the boy's school fees, and occasionally gave him small sums of money when he met him on the street ; that Hannah Andrews left a box of papers to her son James Adam ; that they

¹ Lauderdale Peerage case, (1885) 10 App. Cas. 692, at pp. 759, 760 ; Barnet v. Barnet, (1873) 10 S. L. R. 452 ; Macphersons v. Reid's Trustees, (1876) 4 R. 132 ; Wallace v. Ross, (1891) 19 R. 233.

² Campbell v. Campbell, (1866) 4 Macph. 867, at p. 929 (1867) 5 Macph. (H. L.) 115, at p. 126 ; Smith v. Dick, (1869) 8 Macph. 31, at p. 33 ; Gifford v. Gifford, (1837) 15 S. 592, 12 Fac. (8vo) 563, and App. p. 49.

³ Stair, iii. 3, 42 ; Dickson on Evidence, 3rd ed., secs. 27 and 35 ; Hirpet v. Scott, (1618) M. 2197 ; King's Advocate v. Craw, (1669) M. 2748 ; Crawford v. Purcells, (1642) M. 12,636 ; Sommerville v. Stains, (1680) M. 12,638.

had been proved. There was no evidence that the parties had ever enjoyed the status of married persons; all that the evidence disclosed was certain facts from which it was said that marriage should be inferred, but which were insufficient to support that inference.¹ In such circumstances the presumption in favour of legitimacy did not arise.² The evidence of hearsay of Hannah, and of her sisters in so far as this represented statements made to them by Hannah, was not admissible, because at the date when these statements were made she would not have been a competent witness to prove the marriage; and this was still so, although, as the result of subsequent legislation,³ her evidence would now be admissible for that purpose.⁴

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At advising on 6th February 1912,—

LORD PRESIDENT.—The question between the parties in this case turns upon one fact and one fact alone, namely, whether James Deans, sometime

were destroyed after his death; that a ring, which is believed to be Hannah's wedding-ring, still exists. That, I think, is a fair summary of the claimants' case. But there is much to be said on the other side. It appears either from the evidence or the minute of admissions that there is no certificate of marriage; no evidence of proclamation in the parish church; no one knows when or where it took place, or who were present; there are no witnesses to it; there is no account of when or where or how Hannah Andrews and Lieutenant Deans became acquainted; no proof that they ever met at all (for the statement that they met at a ball was only spoken to by one witness, Miss Middlehurst, and she appeared to have an imperfect recollection of what she had been told regarding this incident); there was no family home; the parties never lived together. The presumption which the baptismal certificate raises in favour of legitimacy is, I think, displaced by other evidence. For example, the alleged marriage made no difference to Hannah's mode of life. She continued to earn her living as a straw-hat maker, and although in poor circumstances, her reputed husband did not send her any money. He left Glasgow about the time her child was born, but there is no family tradition—such as one might expect—about the parting, or that he asked anyone to care for her and the child in his absence. From the time he left till the date of his death he constantly corresponded with his father, mother, and sister, and the letters show that he was affectionate and considerate. On the theory that the marriage was secret, it is not surprising perhaps that no mention is made of the marriage in these letters; but it is surprising that he should never have written to his wife. But there is no evidence that he did. If the 'black box' had contained such letters, or any other evidence of the marriage, I think it is

¹ In support of this branch of the argument the following cases were referred to:—Crouch v. Hooper, (1852) 16 Beav. 182, at p. 184; Attorney-General v. Köhler, (1861) 9 H. L. Cas. 654; Alexander v. Officers of State, (1868) 6 Macph. (H. L.) 54, at p. 62; Dysart Peerage Case, (1881) 6 App. Cas. 489; Lauderdale Peerage Case, 10 App. Cas. 692; Lovat Peerage Case, (1885) 10 App. Cas. 692, at p. 736; Petrie v. Petrie, 1911 S. C. 360; Sheddon and Another v. Attorney-General, (1860) 30 L. J., P. & M. 217.

² Swinton v. Swinton, (1862) 24 D. 833.

³ Evidence Acts, 1840 (3 and 4 Vict. cap. 59); 1852 (15 and 16 Vict. cap. 27); 1853 (16 and 17 Vict. cap. 20); 1874 (37 and 38 Vict. cap. 64).

⁴ Dysart Peerage Case, 6 App. Cas. 489, *per* Lord Watson, at p. 505, and Lord Blackburn, at p. 515. On the effect of the child's certificate of baptism, Beattie v. Nish, (1878) 5 R. 775 was referred to.

Feb. 6, 1912. lieutenant and adjutant in the 92nd Regiment of Foot, did, or did not, marry Hannah Andrews in or about the year 1819. One set of claimants are undoubtedly descended from James Adam Deans, who is the son of Hannah Andrews; and if Hannah Andrews and James Deans, adjutant, were married, they are undoubtedly nearer relations to the intestate James Deans, retired Supervisor of Excise, than the other claimants. On the other hand, if that marriage is not proved, then the other claimants are bound to prevail.

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The Lord Ordinary has written a very careful note which not only shows, I think, that he has adverted to all the circumstances of the case, but shows that he had—if I may use the expression—quite a sympathetic interest in the view put forward by the claimants who are the reclaimers; but he has come to the conclusion that these claimants have failed to prove the marriage. I have come to be of the same opinion, and I really should

more than probable that James Adam Deans—who was said to be very proud of his parentage—would have shown them to his friends, or at least his sons. Then Lieutenant Deans was all his life described in his regimental papers as a bachelor, and a year after his death, his father, in applying for letters of administration, swore in the affidavit that his son had died a bachelor. He did not leave much money, but what he left his father took; he also obtained possession of all his personal belongings—things of no intrinsic value but which would have been valued by his wife. Yet she got none of them. She never applied for the pension due to an officer's widow. If the old Adjutant had believed that she was the widow of his son, and had been, as is alleged, anxious to assist, I think he would have seen to this. His own widow applied for, and received, a pension after his death. But I do not think that the alleged marriage was ever disclosed to the Adjutant at all. Everything points to a different conclusion. Hannah Andrews was never introduced to his wife, or daughter, or his other son—at least no one ever said she was. Her boy was never invited to the house—or he would have remembered that long after he had forgotten that his school fees had been paid. Then the Adjutant was alive when Hannah died; but there is no evidence that he took any interest in that event, and he certainly permitted the boy to be taken by his maternal grandmother to Langholm. He lived for two years longer, but he took no further notice of his reputed grandson—who became a shoemaker. All this appears to me to be so inconsistent with what one would naturally expect to find if the claimants' theory were correct, and the facts supporting the theory are so few and the evidence so slender, that I do not think it is possible, on any reasonable view of the case as a whole, to hold that the marriage has been proved.

“ But the claimants argued that as they had proved paternity, legitimacy must be presumed. But I doubt whether they have proved paternity. There is no evidence that Hannah ever said that Lieutenant Deans was the father of her child, and with the exception of the alleged meeting at the ball—with which I have already dealt—he was never seen in her company. In these circumstances I do not see how it is possible to hold that paternity is proved; but even if I am wrong in this I do not think that legitimacy is to be presumed in a case where the parents were never in possession of the status of married persons during the subsistence of the alleged marriage (*Gifford v. Gifford*, 12 Fac. (8vo.) 563, and App. p. 49). It is different when, as in the case of *Campbell v. Campbell*, (5 Macph. (H. L.) 115), on which the claimants founded, the parents had lived together as man and wife for a long period, and it was generally believed that they were married persons, and where there was an uninterrupted recognition of legitimacy

not think it necessary to add anything to what the Lord Ordinary has said, Feb. 6, 1912. had it not been that the case was very carefully and very ably pled before your Lordships, and that, naturally, it is one of great interest to the parties concerned.

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The first observation I would make of a general character is this—that in a case such as this, where the date is such that you cannot have direct testimony of eye-witnesses, the evidence must be of one of two characters, namely, either documentary or hearsay testimony. Now, in this case, leaving out of view the entry in the register of baptisms of St Andrew's Episcopal Church in Glasgow, to which I shall afterwards refer, there is no documentary evidence at all in the proper sense of the word, and by that I mean documentary evidence of the proper class to prove a marriage, such as, for instance, a certificate, or say, a proclamation of banns, or a reference to the marriage or to the status of the parties as married persons in contemporary letters or deeds or any other documents of the time. In this case that class of evidence is completely absent. Accordingly, we come next to hearsay evidence. Now, with regard to this class of evidence, one must make this remark: that multiplicity of witnesses is not equivalent to multiplicity of testimony. When you are inquiring as to the nature of any fact the more witnesses you have who can depone of their own knowledge that the fact was so-and-so the better. I do not mean to leave out of mind the old brocard *testimonia ponderanda sunt, non numeranda*. But still it is the case that, if A, B, C, and D all depone of their own knowledge to the same fact and give a consistent account of it, then you are a great deal further towards the conclusion that it was the fact, because you have got four witnesses instead of one. But when you come to hearsay, then the mere fact that B, C, and D all spoke to something that A said, does not multiply the testimony of A. Of course it does do one thing. There is, so to speak, a double chance of error in hearsay testimony. It is not only that A may be inaccurate or worse in the account which he gave of the fact; but B, C, and D may be inaccurate or worse in what they say that A said. Assuming, however, that B, C, and D are perfectly accurate and that all of them say that A said so-and-so, it does not make it any better than that A did say so.

I think it necessary to say that, because, when you apply that canon to this case, you will find that, if you take the witnesses, there are a great number who speak to what may be called the family tradition that Hannah Andrews had been married to James Deans; but when you analyse it you find that it comes down to three sources and three sources only. Through James Adam Deans, deceased, you find that he relates what his mother,

during the lifetime of the child's parents. The presumption of legitimacy then arose from the fact that possession of the status of legitimacy had been enjoyed for a long period, and had not been displaced, but confirmed, by the other evidence in the case. But in this case there are no ascertained facts which raise the presumption of legitimacy, except, perhaps, the certificate of baptism, and that presumption has not, I think, been confirmed but displaced by the other evidence in the case.

"I am accordingly of opinion that the claimants have failed to prove that they are the sole next of kin to the deceased James Deans, and that their claim should be disallowed."

Feb. 6, 1912. Hannah Andrews, had told him. And you also find from other witnesses the hearsay testimony of Margaret Andrews, who afterwards became Mrs Middlehurst, and of Jane Andrews, who afterwards became Mrs James Buchanan. So the hearsay evidence reduces itself to three sources and three sources alone.

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When I come to the next stage, I am afraid that one of these sources has to be discarded altogether. The marriage, if it occurred at all, occurred in 1819. The child, James Adam Deans, was born in 1820. Jane Andrews was only born on 1st March 1819. She was, therefore, not one year old when the marriage was celebrated, if ever it was celebrated, and James Deans, the adjutant, died of yellow fever in Jamaica five years afterwards. It is perfectly evident, therefore, that all that Jane could know about it would be simply a repetition of what (when she became somewhat older) she had heard from her older sisters. And therefore, really you do not get Jane as an independent source of testimony at all. Margaret was born in 1809, and therefore at the time of the supposed marriage she would be eleven years old. Of course, a child of eleven is perfectly able to remember such an event in the family as her sister being married. And therefore, I think her testimony, for what it is worth, must certainly be taken. And there is the statement of the deceased Hannah to James, the son, which we have handed on by the various people who have spoken to James.

A point was very much pressed upon us with regard to Hannah's testimony, as to which I do not think it is absolutely necessary to give any decision in the view I take, but I must mention it in order to show that it has not been overlooked. Certain observations made by Lord Watson and Lord Blackburn in the *Dysart* case¹ were quoted to us in which they distinctly say that, if a person at the time of an alleged marriage would not have been a competent witness to speak to the fact of the marriage, it was not possible afterwards to take his hearsay testimony, even although in the meantime the law had been altered and he had become a competent witness. There is, I suppose, no doubt that in 1820, if there had been a declarator of marriage, Hannah Andrews could not have been a witness, and certainly, according to what their Lordships say, that would seem to have destroyed her hearsay testimony. Their Lordships' observations were more or less *obiter*, and I am not myself satisfied on the point, but I do not think it necessary to go into it, because whatever we get from Hannah I think we also get from Mrs Middlehurst.

Well, now, what do we get from Mrs Middlehurst? We get from Mrs Middlehurst—because I quite agree with the Lord Ordinary that the reclaimers' witnesses are perfectly honest witnesses and are telling the truth—that it was always understood in the family that Hannah had been married to James Deans. But the knowledge of Mrs Middlehurst and of the family upon all else is really blank—that is to say, nobody is said to have been at the marriage. Nobody knows where the marriage took place, or how it was celebrated. There is a guess that inasmuch as it was shown that some of the family frequented a certain

¹ 6 App. Cas. 489.

Episcopal church in Glasgow, called St Andrew's Episcopal Church, it is Feb. 6, 1912. probable that the marriage took place there. But that is a mere guess. Deans's
 There is no trace of the marriage in the records of St Andrew's Church, Judicial
 which may be perfectly accounted for by the fact that it is said (I think Factor v.
 truly) that a great part of the records of St Andrew's Church has perished Deans.
 by fire. But still, there it is. It may be the misfortune of the reclaimers, Ld. President.
 but there it is. There is no record of when the marriage happened. Nay,
 more, there is nobody who says—in fact, they really say the opposite—
 that the married persons ever lived together in the sense of living together
 as married persons with an establishment. Indeed, the exigencies of the
 case were such that the reclaimers' counsel had eventually to betake himself
 to the view—and I think he was quite right as a matter of pleading—that
 the marriage was a secret marriage in this sense, that none of the hus-
 band's relatives knew anything about it, and that the first time that his
 old father—who was always known as Adjutant William Deans, and seems
 to have been a more or less well-known man in Glasgow upon what I
 may call a permanent recruiting staff—knew anything about it was after
 his son was cut off by an early death at Up Park Camp, Jamaica. Your
 Lordships will see, as I have said, that there is a terrible blank about all
 this. Really, it comes back to this, that this girl of eleven always under-
 stood that her sister had been married—and I take it that her sister
 had given out that she had been married—but when, where, or how, is a
 mystery.

Well, now, that seems to me, first of all, too little upon which to rest
 proof of the marriage. The baptismal entry in St Andrew's Church goes
 for very little. It is not certain that it applies. But even if it does, it
 would do no more than show that Hannah had told the same story to the
 clergyman as she had to her sister. But I am afraid the matter does not
 rest there, because you have the fact, which I have already adverted to, of
 a complete absence of any knowledge of the marriage upon the side of the
 father's family, and no recognition by the father's family that there ever
 had been a marriage. No doubt, there is the story of the boy meeting
 this old Adjutant in the streets of Glasgow, and being clapped on the head
 and being given half-a-crown and told to be a good boy, and there is also
 the tradition that, to a certain extent, the old man helped in his schooling.
 All that, unfortunately, is just as consonant with the idea of a connection
 which was not marriage, but which was very likely meant to end in mar-
 riage—it is just as consonant with that as with the theory of marriage.
 And then you have also the fact that not only not to his father but not to
 his comrades and superiors did James Deans ever confess himself to be a
 married man. In the regimental records his death is entered as the death
 of a person who is single. His little effects and his balance of pay were
 given over to his father, who had taken out letters of administration, with
 no mention of the person who would be his proper heir, namely, this son.
 And there is, of course, not the slightest attempt to vindicate anything in
 the nature of a pension for the widow. More than that, there is in process
 a somewhat lengthy correspondence, which is still extant, between young
 James, when he was living in Jamaica with the regiment, and his people at
 home. It is an interesting correspondence, and throws a good deal of light

Feb. 6, 1912. upon the regimental life of that period, but is quite incompatible with the view that the man who was writing was all along a married man. It is all written in a style and spirit that do not seem consistent with the idea of his having left a wife and child behind him. Accordingly, on these grounds—and this is rather the view that I take—I think the Lord Ordinary is right in holding that the marriage is not proved.

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There is one other matter to which I wish to refer. Counsel for the reclaimers quite rightly pressed upon us various authorities in the institutional writers and various cases which set up what they called the presumption of legitimacy, and they argued that that was so strong that, unless the opposite party were able to rebut it, every man must be considered legitimate. I am quite certain, after looking over the authorities and reading the cases, that that view of the presumption of legitimacy is really put forward with reference to another class of matter altogether, I mean to say, the status of a particular person. Most of the cases are cases where there was a brieve of bastardy, and if you had purchased a brieve of bastardy and wanted to take away the inheritance of a child of certain parents you had got to prove that he was a bastard, and if you failed, he would succeed and you would not. But it applies only to persons who are living more or less in the marriage state, and it cannot apply to a case where the *de quo queritur* is whether there was a marriage or not. I am all the more satisfied about this because I think, if there was such a presumption as the learned counsel urged, we should have heard a good deal more about it in some case where the stake was a great deal larger than in this case. We should have heard more about it, I think, particularly in the *Murthly* case.¹ I remember hearing the *Murthly* case¹ argued. It was one of the last that Lord Shand * argued in the Court of Session. The question was whether Major Stewart and Miss Wilson were married persons or not. There was no question that there was a child, and there was no question that that child was the child of Miss Wilson and that the father was Major Stewart. But it never occurred to all the eminent people engaged in it—and the case went to the House of Lords—to say that the marriage between Major Stewart and Miss Wilson was made out because of the presumption of the legitimacy of the child. And, in truth, when you come to press it, it really seems to me to be an illustration of what is well known as arguing in a circle. If the question had arisen between James Deans and Hannah Andrews—if Hannah Andrews had brought a declarator of marriage against James Deans, surely it would have been neither here nor there to say, “Here is a child which you cannot deny that you are the father of; there is a presumption of his legitimacy, and therefore there is a presumption that we are married.” And if she could not say that, is not it almost a *reductio ad absurdum* that, if the child raised it, it would be able to prove a marriage which its parents could not prove? In point of fact, I think, in the end it comes to be precisely the same class of argument which Lord Macaulay ridiculed when he said that the Church was the true Church

¹ (1874) 1 R. 532, *rev.* (1875) 2 R. (H. L.) 80.

* Lord Shand was counsel for the defender when the case was in the Outer House.

because she had the apostolic succession, and that she had the apostolic succession because she was the true Church. Feb. 6, 1912.

On the whole matter, therefore, I agree with the Lord Ordinary, and I think the reclaiming note should be refused.

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LORD JOHNSTON.—I concur, and wish to add a very few words to what your Lordship has said. There are branches of the evidence which your Lordship has touched upon which have weighed very much with me in this case, particularly the correspondence which Lieutenant Deans had with his family. But there is another similar subject to which I shall afterwards advert.

James Deans, the alleged father, was born on 10th October 1797. He was therefore between twenty-two and twenty-three, when James Adams Deans, whose legitimacy is in question, is alleged to have been born in Glasgow, namely, on 7th July 1820. There is nothing in the evidence to show that he had yet left his father's, the old Adjutant's, house, which was in Glasgow. Now, the case for the claimants, who are reclaimers, is that the marriage had taken place and that this child, alleged to have been born on 7th July 1820, was thus legitimate.

Now, James Deans, the alleged father, was gazetted to the 92nd Highlanders on 20th April, but he did not join the depôt of his regiment, which happened to be at the Isle of Wight, until 9th August 1820, but in the interim was, so far as appears, still living in his father's house. Accordingly, on the evidence he must have been in the same town where the mother and child were living at the time of the birth and for some little time afterwards. Moreover, it is undoubtedly in favour of the reclaimers that it is unexplained, either in the evidence or in the military papers which are produced, why it was that he was so long in joining his regiment.

Of course, it took a much longer time to reach the Isle of Wight from Glasgow than it would now; but that does not adequately explain the difference of time between the gazetting on the 20th April and the joining on 9th August 1820. And, accordingly, the suggestion is that he was in Glasgow looking after this young wife and the newly-born child. But, starting with that, we have this accurately proved by the military records—that he joins in the Isle of Wight on 9th August 1820, that he remains in the Isle of Wight until 5th November 1821, that he sails for the West Indies, and, having joined his regiment, that he serves in the West Indies until 23rd August 1825.

Well then, in light of these, consider, first, the correspondence to which your Lordship has referred. It extends from August 1820, when Lieutenant James Deans goes to the Isle of Wight, down to June 1825, which is just six weeks before his death. The letters produced are letters from him to his father and to his sister, and they are couched in such language and are written in such an open-hearted strain, as of a young man just starting in the world and having recently joined his regiment, telling of the small details of his regimental life, and of the new scenes to which he is introduced, in a tone of such innocent confidence that it is barely possible to conceive—at least it is not natural to believe—that he had left Glasgow with (what I may call) a skeleton in his cupboard. Their whole com-

Feb. 6, 1912. **Deans's Judicial Factor v. Deans.** plexion is difficult to reconcile with the idea of the secret marriage and the young wife and son deserted. For that must be the inference from the second matter on which I shall say a few words, viz., the regimental accounts, which are extraordinarily complete.

James Deans was a young man without means, who joined the Army to live on his pay. He had not a farthing beyond. And both in his letters and in the pay-sheets it is made quite clear that his whole pay is accounted for as spent in necessary regimental purposes. There is nothing that can be taken hold of which bears the slightest indication of being a remittance to this country. If it had been otherwise, it would have greatly supported the evidence adduced by the reclaimers. But taking it that the marriage is not registered—the birth, of course, could not be registered in those days,—the baptism is alleged to have been registered, but, if so, it is not registered until 1829, when the child was seven or eight years old, and there are no letters produced addressed to the mother; and read these facts and the traditional evidence for the reclaimers (for that is its true character) in the light of the correspondence and the regimental accounts to which I have referred, and the conclusion is I think inevitable that the reclaimers have failed to prove their case.

The Lord President intimated that LORD GUTHRIE concurred.

LORD KINNEAR and LORD MACKENZIE were also present at advising.

THE COURT adhered.

J. & J. GALLETLY, S.S.C.—GRAY & HANDYSIDE, S.S.C.—ALEX. STEWART, S.S.C.—
Agents.

No. 71. SCOTTISH PROVIDENT INSTITUTION, Appellants.—*Blackburn, K.C.*—
H. P. Macmillan.

Feb. 6, 1912. RICHARD FARMER (Surveyor of Taxes), Respondent.—*Morison, K.C.*—
J. A. T. Robertson.

Scottish Provident Institution v. Inland Revenue. *Revenue—Income-Tax—Interest on foreign investments—Sums “received in Great Britain in the current year”—Interest reinvested abroad in purchase of bonds—Bonds transmitted to this country—Sale of bonds in this country in a subsequent year—Sum realised from sale—Income-Tax Act, 1842 (5 and 6 Vict. cap. 35), sec. 100, Sched. D, Case IV.*

The Income-Tax Act, 1842, sec. 100, enacts that duty chargeable under Schedule D, Case IV. of that section, in respect of interest from colonial or foreign securities “shall be computed on a sum not less than the full amount of the sums (so far as the same can be computed) which have been or will be received in Great Britain in the current year without any deduction or abatement.”

The interest derived in 1907 from the American investments of a Scottish insurance company was reinvested in America in bearer bonds, and the bonds were transmitted to this country in the same year. The bonds were afterwards sold, and the proceeds of the sale were received at the head office in August and October 1908.

Held that the sums realised on the sale of the bonds being sums “received in Great Britain” in respect of interest on foreign securities, were chargeable with income-tax for the year in which the proceeds of the sales were received, although the interest had in fact been earned prior to that year.

THE SCOTTISH PROVIDENT INSTITUTION was assessed for income-tax Feb. 6, 1912. under the Acts 5 and 6 Vict. cap. 35, section 100, Schedule D, Case IV.,* and 16 and 17 Vict. cap. 34, section 2, Schedule D,† upon sums of £129,019 and £26,557, for the year ending 5th April 1909, in respect of interest arising from the Institution's colonial and foreign securities in America, these sums being to the extent of £15,681, the proceeds of bearer bonds transmitted to the United Kingdom for safe custody prior to 5th April 1908, and realised in the year of assessment.

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So far as regards the sum of £15,681 referred to, the assessment was sustained by the Commissioners on appeal, and the Institution thereupon requested and obtained a case for the opinion and judgment of the Court.

The following facts were set forth in a joint minute of admissions:—

“(1) This appeal is taken by the Scottish Provident Institution, No. 6 St Andrew Square, Edinburgh (hereinafter referred to as “the Institution”), against assessments on the sums of £129,019 and £26,557, 10s. (duty £6450, 19s. and £1327, 17s. 6d.) made upon it for the year ending 5th April 1909 in respect of interest arising from its colonial and foreign securities in America.

“(2) The Institution is a corporation which carries on the business of mutual life assurance, and granting annuities within the United Kingdom. The making of investments and the earning of interest both at home and abroad are necessary parts of the ordinary business of the Institution. The supreme control of the management and the administration of the Institution's business is vested in a board of directors in Edinburgh, where its head office is situated, all its principal books are kept, and the annual meeting of its members held.

“(3) The Institution's accounts are made up to 31st December each year, and hitherto, for convenience, the interest on foreign and colonial securities received in the United Kingdom during the Institution's year last immediately preceding the year of assessment for which completed accounts were available has been taken as furnishing the basis figure for the assessment. The assessments now in question were made in respect of sums arrived at in this way. The said sums of £129,019 and £26,557, 10s. represented interests which had accrued to the Institution in the United States of America and Canada, and been paid and invested there during the year ending 31st December 1907, in the purchase of bearer bonds which were thereafter transmitted to this country for safe custody. In respect, however, of the decision in the case of the *Scottish Widows' Fund v. Inland Revenue*, 1909 S. C., p. 1372, to the effect that the transmission of such securities was not equivalent to a remittance of the interest to the United Kingdom the assessment is no longer main-

* Quoted in the rubric.

† The Income-Tax Act, 1853 (16 and 17 Vict. cap. 34), sec. 2, provides for assessing duty, Schedule D:—“For and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere. . . .

“And for and in respect of all interest of money, annuities, and other annual profits and gains not charged by virtue of any of the other schedules contained in this Act, and to be charged for every twenty shillings of the annual amount thereof.”

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tained on its original ground, but is maintained to the extent of £15,681, on the ground set forth in the immediately succeeding paragraph, and in respect of sums received in the United Kingdom in the year ending 5th April 1909, and not during the year ending 31st December 1907.

“(4) On 8th and 9th July 1907 the Institution purchased bearer bonds in New York out of funds accumulated there amounting to £15,681. For the purpose of the present appeal the said accumulated funds may be taken as representing interest arising from the various foreign and colonial securities in America prior to said 8th and 9th July 1907. The bonds so purchased were dispatched to this country and were received at the Institution’s head office on 19th July 1907, and kept there for safe custody until the months of August and October 1908, when the said bonds were sold and the proceeds of the sale received by the Institution at its head office in Edinburgh.”

After quoting the joint minute adjusted by parties, the case stated as follows:—

“II. For the Institution, Mr R. L. Blackburn, K.C., maintained that the Income-Tax Acts are renewed annually, and that the Act for each year deals with the income of that year and that year alone. In terms of section 2, Schedule D, of the Act of 1853, all interest of money accruing during the current year is treated as income of the year, and subject to duty. The sum of £15,681, being admittedly interest which had accrued prior to 5th April 1908, cannot, within the meaning of the Income-Tax Acts, form part of the appellants’ income for the year which commenced on 5th April 1908. As a matter of fact, it had been dealt with as income of a preceding year under the Income-Tax Act then in force, and had been exempted from tax in terms of the Act of 1842, section 100, Schedule D, Case Four, on the ground that it had not been received in this country. The fact that it was received in this country during the year commencing 5th April 1908 did not make it income of that year, and there was no authority in the Income-Tax Acts for assessing to the duties authorised by the Act for the year 1908-1909 sums of money which formed part of the income of another year, when a different rate of duty may have been in operation.

“The appellants further maintained that the revenue authorities having, in accordance with their usual custom, agreed to take the interest for the year last preceding the year of assessment for which completed accounts were available—namely, in this case the year ending 31st December 1907—as the basis for assessment, were not entitled to assess to duty income not received during that period.

“III. The Surveyor of Taxes maintained:—

“(1) That as the Fourth Case of Schedule D provides that interest derived from foreign and colonial securities shall be charged on the full amount received in the United Kingdom within the year of assessment, and as the Institution admittedly had in the year ending 31st December 1907 received from such sources interest amounting to £155,576, 10s. which had been invested in bearer bonds transmitted to the United Kingdom for safe custody, and had in the year ending 5th April 1909 (the year of assessment) realised in the United Kingdom a portion of the said bonds to the amount of £15,681, the proceeds of the bonds so and when realised became a receipt of interest within the Fourth Case of Schedule D, and assessable accordingly.

"(2) That there is nothing in the terms in which the Fourth Case of Schedule D is worded to restrict the liability to interest actually earned within the same year as it was remitted to, and received in, the United Kingdom. Such a restriction would exempt interest received at the end of one year which could not possibly reach the United Kingdom until the following year, and would, in fact, provide a means of evading taxation in respect of all such foreign interest, in that a person owning foreign investments would only need to hold up the interest abroad until after the expiration of the year in which it was received to put himself outside the scope of the Act.

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"(3) That interest is assessable when remitted to this country irrespective of the year in which it is earned (*Scottish Provident Institution v. Inland Revenue*, 1901, 3 F. 874, Lord President Balfour at p. 879).

"IV. The Commissioners having considered the facts and arguments submitted to them were of opinion that the sum of £15,681, representing the proceeds of the bearer bonds realised in the United Kingdom, was interest received in the United Kingdom within the meaning of the Fourth Case of Schedule D, and as such, chargeable with income-tax. They confirmed the assessment on said sum, and discharged the balance of the assessments."

The case was heard before the First Division (without Lord Mackenzie) on 22nd November 1911.

Argued for the appellants;—What the Crown sought to do here was to bring into charge for the year 1908-9 income which had accrued in a previous year. There was no statutory power to do so. Income-tax was re-imposed by the Finance Act of each year, and the tax was imposed only for the year, and affected only the income of that particular year. There was no provision in the Income-Tax Acts¹ by which the income of previous years could be brought into charge. It was doubtful if the income from foreign investments, which had not been sent home but had been invested abroad, could ever be converted into taxable income by a subsequent sale. But in any event the effect of the Income-Tax Acts was that, when the year of assessment came to an end, the income of that year ceased to be income chargeable with income-tax. Income which had been dealt with by taxation or exemption (as here) could not be subjected to taxation in a subsequent year.² The contention of the Crown that income-tax could be charged on income whenever received in this country, no matter when it might have been earned, led to absurd results. It meant that on a man's death the whole of his estate might be subjected to income-tax on the ground that it represented the investment of income earned in previous years. It meant that income-tax might be exacted upon income which had been earned in the years before income-tax was imposed. It meant that income would be taxed, not at the rate of the year when it was earned, but at the rate of some subsequent year. The case of the *Scottish Provident Institution v. Inland Revenue*,³ relied on by the respondent, was not

¹ The following references were made to the Income-Tax Acts:—5 and 6 Vict. cap. 35, sec. 52, sec. 100, Sched. D., Rule First, Fourth Case, sec. 176, sec. 190, Sched. G, Rule X.; 16 and 17 Vict. cap. 34, sec. 2, Sched. D.; 43 and 44 Vict. cap. 19, sec. 52 (2); 7 Edw. VII. cap. 13, sec. 23 (2); 8 Edw. VII. cap. 16, sec. 7.

² *Colquhoun v. Brooks*, (1889) 14 App. Cas. 493.

³ (1901) 3 F. 874, *aff.* (1903) 5 F. (H. L.) 10.

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an authority, for the point had not been argued there and the dictum of the Lord President was merely *obiter*. Further, the Crown had adopted the standard of assessing income-tax on the Company's last completed balance-sheet, and that balance-sheet, being of date 31st December 1907, did not include the sums now sought to be charged. The Crown having adopted one standard were not at liberty to throw over that standard arbitrarily and seek to charge upon a different system.

Argued for the respondent;—There were two questions here. (1) Was this £15,000 income? It admittedly represented the proceeds of income from foreign investments, and therefore its character as income seemed clearly established. (2) Was it subject to assessment for the year 1908-9? The year during which money was earned was not the criterion of chargeability for income-tax, but the year of realisation; and receipt of profits in this country was therefore the sole test. According to that test this sum was chargeable, as it had, on realisation, been received in Great Britain in the year of assessment.¹ If the contention of the appellants were sound, an easy way of avoiding income-tax on all foreign investments would be provided, for all that would be necessary would be to retain the income abroad until the end of the year of assessment and transmit it home the following day. There was no unfairness in the contention of the Crown, for there were statutory provisions which prevented any risk of income being subjected to taxation twice over.²

At advising on 6th February 1912,—

LORD PRESIDENT.—This is a case under the Income-Tax Acts, and the facts upon which it depends have been clearly set forth in a joint minute of admissions for the parties, which forms part of the proceedings.

The Scottish Provident Institution, which is an insurance company in this country, is possessed of considerable funds abroad. Those funds are invested in, among other places, America and Canada, and the dividends from investments become part of the income of the Institution. It is set forth in the case that with about £15,000, which had so accrued, the Institution purchased bearer bonds in New York in 1907. The *corpora* of these bearer bonds were transmitted by them to this country for safe custody.

There was a case before your Lordships in which the Crown contended that receipt of the *corpora* of such bearer bonds was equivalent to receipt of the money they represented, but your Lordships held otherwise.³ The bonds here in question, after being kept from 1907 till 1908, were sold. It is admitted that the proceeds of the sale were received at the head office of the Institution in Edinburgh. The Crown proposed to charge, and

¹ *Surveyor of Taxes v. Northern Investment Co. of New Zealand*, (1887) 14 R. 734; *Scottish Mortgage and Land Investment Co. of New Mexico v. Commissioners of Inland Revenue*, (1886) 14 R. 98; *Universal Life Assurance Society v. Bishop*, (1899) 68 L. J., Q. B. 962; *Scottish Provident Institution v. Inland Revenue*, 3 F. 874, *aff. sub. nom.* *Scottish Provident Institution v. Allan*, 5 F. (H. L.) 10.

² *Taxes Management Act*, 1880 (43 and 44 Vict. cap. 19), sec. 60; *Income-Tax Act*, 1842 (5 and 6 Vict. cap. 35), sec. 171.

³ *Scottish Widows' Fund v. Inland Revenue*, 1909 S. C. 1372.

have charged, income-tax upon this sum, and that view has been upheld by Feb./6, 1912. the Commissioners, and this case is presented against their determination.

The whole of the argument before your Lordships turned upon this fact, as will be apparent from the statement which I have made, viz., that the actual earning of the interest upon which the charge is now proposed to be made was not in the year of assessment with which we are dealing; but the realisation of the earnings by means of the sale of the bonds in this country was in the year of assessment.

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The matter really turns upon two parts of the Income-Tax Acts, and two alone. First of all the charging section is under section 2, Schedule D, in the Act of 1853, and it is in these terms: " . . . for and in respect of all interest of money, annuities, and other annual profits and gains, not charged by virtue of any of the other Schedules contained in this Act, and to be charged for every twenty shillings of the annual amount thereof." There is no question that this case falls within that general description; and then the other section, which specially applies, is the Fourth Case of section 100 of the Income-Tax Act of 1842, which says that the duty to be charged in respect of interest "shall be computed on a sum not less than the full amount of the sums (so far as the same can be computed) which have been or will be received in Great Britain in the current year without any deduction or abatement."

Now, the argument for the Crown is that the interest in question was received in Great Britain in the year of assessment and therefore must be charged. The argument for the Institution is that inasmuch as it was not earned in that year it does not fall within the Income-Tax Acts at all.

I am of opinion that the determination of the Commissioners is right. There is nothing said in the Acts about profits or gains being necessarily earned within the year of assessment. No doubt that will be the natural result of the way in which the whole matter is worked; but I would like to make, first of all, this observation, that although the Act is full of the expression "annual profits and gains" in almost every section which deals with this matter, the presence of that word "annual" does not seem to me to connote necessarily the idea of nothing being chargeable which is not earned within the year of assessment, but it is there for the purpose of showing that the tax which is being levied is a tax upon income, or, in other words, upon annual profits and not upon capital. When a profit or an interest is earned in this country, the question really cannot arise, because the profit which is earned in this country is necessarily received in this country. I use the word "received," because you may quite well have a profit which has not been paid to you in hard cash. Many partnerships do not pay profits in hard cash, or a partner does not take his profits in cash, but nevertheless the profits are earned, and being earned, they are necessarily received by the partner at the time they are earned. But when the profit is earned abroad it is not necessarily received at the same time in this country. It is, of course, received in the sense of there being a right to it there, but it is not received in this country, and accordingly this Fourth Case provides that the duty shall only be computed on sums "which have been or will be received in Great Britain in the current year." As soon as they are received I think they become chargeable.

Feb. 6, 1912. I have only to say another word, and it is this. The case of the *Scottish Provident Institution v. Inland Revenue*,¹ which is reported in the House of Lords under the name of *Allan*,² undoubtedly involves this point. The rubric in the Court of Session case is rather misleading upon this matter. If you read the rubric you would think that the only point decided there was with regard to two specific sums of £25,000 and £15,000. Really, as matter of fact there was a sum of £217,000 adjudicated upon, and there is no doubt whatsoever that a considerable portion of that sum had been earned, as here, outwith the year of assessment. It is not exactly so stated in the report, but it is very evident; and a shorthand way of getting at it is to look at the figures, which show that if it was earned within the year of assessment the Scottish Provident Institution must have been in the particularly fortunate position of laying out the whole of its money at twelve per cent. The matter, however, of profit so earned was involved in that decision. I am quite aware that it was not argued, and there is a sentence in the House of Lords' report which rather looks as if Mr Blackburn had made a very late attempt to argue it in the House of Lords and was stopped because it had not been argued in the Court of Session. But there it remains, and though I do not think it is conclusive, yet, on the other hand, I think it is unlikely that if the point had been a really good one it would have been missed. On the whole matter I think the determination of the Commissioners is right.

LORD KINNEAR and LORD JOHNSTON concurred.

THE COURT affirmed the determination of the Commissioners.

DUNDAS & WILSON, C.S.—SIR PHILIP J. HAMILTON GRIERSON,
Solicitor of Inland Revenue—Agents.

No. 72. HIS GRACE JOHN DOUGLAS SUTHERLAND, DUKE OF ARGYLL, Pursuer
(Reclaimer).—*Clyde, K.C.—Macphail, K.C.—A. M. Trotter.*
Feb. 6, 1912. ANGUS JOHN CAMPBELL AND ANOTHER, Defenders (Respondents).—
Cooper, K.C.—R. S. Brown.

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Prescription—Positive Prescription—Habile title—Title by progress—Service—Competency of looking at prior writs to ascertain character of possession.

In an action between a superior and his vassal, the latter asserted a proprietary right in a castle situated, as he alleged, on certain lands held by him, and founded his right on possession of the castle for the prescriptive period following on a decree of special service of the lands (in which the castle was not mentioned), with their parts and pertinents, recorded in 1880.

Held (rev. judgment of Lord Cullen), that it was competent to look at the prior writs to ascertain the nature of the vassal's possession of the castle, and that, as these writs disclosed that the vassal's possession thereof was not as proprietor but as keeper for the superior, the service was not a habile title on which to found prescription; and claim for vassal repelled.

Observations on the effect of a decree of service as the foundation for a prescriptive title.

Earl of Argyll v. Laird of M'Naughton, (1671) M. 10,791, and *Munro v. Munro*, May 19, 1812, F. C. distinguished.

¹ 3 F. 874.

² 5 F. (H. L.) 10.

Title to Heritage—Ward-Holding—Fortress—Possession by vassal as keeper of the castle—Effect of abolition of ward-holding on vassal's title—Superior and Vassal—Property—Parts and Pertinents—Clan Act, 1747 (20 Geo. II. cap. 50). Feb. 6, 1912. Duke of Argyll v. Campbell.

From ancient times the lands of Pennycastle of, Dunstaffnage with their parts and pertinents were held by a vassal on a ward-holding, the reddendo including (besides a feu-duty) the rendering of military services to the superior and the military guardianship of the castle of Dunstaffnage, as well as the duty of maintaining the castle fit for the residence of the superior and of rendering certain services of fuel whenever he should reside there. The property in the castle admittedly remained with the superior, but the vassal's duties as keeper of the castle involved the occupation and possession of it by him.

After the passing of the Clan Act in 1747, by which ward-holding was abolished, the military services were commuted for a money payment, but the other obligations of the vassal still continued. In 1810 the castle was burned down and was never rebuilt.

In an action between the superior and the vassal brought in 1909, the vassal asserted a right of property in the castle, and maintained that, after the passing of the Clan Act, his possession of the castle was no longer that of military keeper for the superior, but was that of proprietor.

Held that the superior was still the proprietor of the castle, in respect that the Clan Act, though abolishing military services, did not alter the proprietary rights in the subjects, and that after 1747 the vassal had continued in possession of the castle solely as keeper for the superior for the purpose of rendering the civil services enumerated in his charters.

On 21st May 1909 an action was brought by the Duke of Argyll against Angus John Campbell of Dunstaffnage, and Mrs Jane Campbell, his mother, as his curator, concluding for declarator, "First, that the subjects following, *videlicet*, All and Whole the Castle of Dunstaffnage, with the whole houses, buildings, gardens, yards, and other enclosures and pertinents thereof lying within the lordship and barony of Lorne and county of Argyll, pertain and belong heritably in property to the pursuer; and Second, that the defender the said Angus John Campbell has no right or title of any kind in and to the said Castle of Dunstaffnage, houses, buildings, gardens, yards, and other enclosures thereof, or any of them." The summons also concluded for a decree ordaining the defender to remove from the subjects. 1ST DIVISION.
Lord Cullen.

The pursuer averred, *inter alia*:—(Cond. 1) "The pursuer is proprietor of the lands, lordship, and barony of Lorne, under and by virtue of numerous Crown grants in favour of his predecessors and authors . . ." (Cond. 2) "The defender Angus John Campbell (hereinafter referred to as 'the defender') is proprietor of All and Whole the lands of Pennycastle of Dunstaffnage, Penny Chenich, the one-penny land of Gannivan, the one-penny land of Penginaphuir, the one-penny land of Garupengerie, the one-penny land of Kilmore, and the one-penny land of Davagavach, with the pertinents lying in the said lordship of Lorne, conform to extract decree of special service as eldest son and nearest and lawful heir of tailzie and provision to his father, the deceased Alexander James Henry Campbell, dated 26th, and recorded in Chancery 27th May, and in the Division of the General Register of Sasines applicable to the

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county of Argyll 8th June, all in the year 1908." * (Cond. 3) "The Castle of Dunstaffnage forms part of the said lordship and barony of Lorne, and is situated in the immediate vicinity of the defenders' said lands." (Cond. 4) "From a very early date the said castle was a royal residence and fortress, and appears to have been held for and under the Crown by persons from time to time appointed to be constables thereof. As the western mainland and islands of Scotland became more fully subject to the central power, the castle appears to have lost this special character, and to have been transferred in property to the Lords of Lorne, and to have become the principal messuage of that lordship." (Cond. 5) "In the year 1470 the said lordship of Lorne was, in pursuance of a family arrangement, acquired from Walter Stewart, Lord of Lorne, by Colin, 1st Earl of Argyll, who had married one of the three daughters and co-heiresses of the deceased John Stewart, Lord of Lorne, brother and predecessor of the said Walter Stewart, Lord of Lorne. Following on a resignation by the said Walter Stewart, Lord of Lorne, the said Colin, Earl of Argyll, obtained a Crown charter of the said lordship of Lorne, dated 17th April 1470. (Cond. 6) "By charter under the Great Seal, dated 14th March 1540-41, King James V. granted to Archibald, 4th Earl of Argyll, on his own resignation, the said lands, lordship, and barony of Lorne along with the other lands and baronies therein specified, all by the said charter erected and incorporated into the free barony and lordship of Lorne, of which new and extended barony and lordship of Lorne the said Castle of Dunstaffnage is also ordained to be the principal messuage, as it had been of the older barony and lordship. The said castle has continued to be the principal messuage of the pursuer's said barony and lordship of Lorne, and has never been alienated or feued out to the defender or his predecessors and authorities or any other person." (Cond. 7) "By charter, dated 24th June 1500, Archibald, 2nd Earl of Argyll, granted in feu-farm to his beloved kinsman Alexander Campbell Kere and the heirs-male of his body, whom failing, to return to the granter and his heirs, All and Whole the lands of Pennycastell of Dunstaffniche and others, lying in the said lordship of Lorne. The reddendo of said charter included, *inter alia*, the safe keeping and maintenance of the granter's said Castle of Dunstaffnage, in the manner and to the extent therein set forth. (This reddendo is quoted in the Lord Ordinary's opinion, *infra*, p. 461.) (Cond. 8) "The said lands and others appear to have been possessed in terms of the said grant by the said Alexander Campbell Kere and his heirs until the middle of the seventeenth century. During the whole of said time and subsequently the proprietor of the said lands is frequently designed as captain of the said Castle of Dunstaffnage in like manner as other persons charged with the safe keeping of various castles belonging in property to the pursuer and his ancestors were styled captains of the said castles." In Conds. 9 and 10 reference was made to a charter of 1667, by which the 9th Earl of Argyll sold, disposed, and confirmed the subjects to one Archibald Campbell. The reddendo clause of this charter (which was in Latin) was narrated *ad longum*, but the English equivalent of it will be found quoted in Lord Johnston's opinion, *infra*, p. 494. (Cond. 11.) "In consequence of the passing of the Act, 20 Geo. II. cap. 50, abolishing ward-hol-

* The terms of this service are quoted in Lord Johnston's opinion, *infra*, p. 486. .

ings, the services specified in the said reddendo, so far as of a military character, were commuted for a money payment, and the other services and prestations continued to be exigible by the superior." (Cond. 12) "In the year 1851 the defender's predecessor and author in the said lands, the now deceased Sir Angus Campbell, obtained from his superior, the pursuer's father, the late George Douglas Glassel, 8th Duke of Argyll, a precept of clare constat, in which the reddendo clause, after specifying the sums payable in name of feuduty, proceeds as follows, viz.:—'Moreover, the said Sir Angus Campbell and his heirs shall be bound to open the said Castle of Dunstaffnage to the said Duke and his foresaids at all times whensoever they shall be required thereto; as also that they shall supply the said Duke and his heirs and successors annually with peats and elding for vaults and bakehouse and brewhouse and hall as often as the said Duke and his heirs shall happen to be therein. As also the said Sir Angus Campbell and his foresaids shall be bound to maintain all the houses and buildings of the said Castle of Dunstaffnage in all time coming upon their own proper charges and expenses, and whatever buildings are erected therein or shall be erected, they shall be bound to maintain in sufficient repair, the feuars and tenants of the said Duke in the lands of Lorne, which were formerly in use to supply service for the said Castle of Dunstaffnage, shall always be bound to the same services in future towards carrying all necessaries for the maintenance and repairing of the said castle as use is, and likewise the tenants of the said lands performing service at the said Castle of Dunstaffnage as often as the said Duke and his foresaids shall happen to be thereat, and when they shall be required thereto with the others of the said feuars and tenants of the said Duke of the other lands in Lorne according to use and wont.'"

In a statement of facts for the defenders it was averred, *inter alia*:—"1. The defender Angus John Campbell (hereinafter referred to as 'the defender') is a minor who will attain majority on 22nd November 1909. He succeeded to the estate and lands of Dunstaffnage, &c., on the death of his father, the late Alexander James Henry Campbell, on 9th March 1908. In addition to being proprietor of the lands of Pennycastle of Dunstaffnage and others set forth in article 2 of the condescendence for the pursuer, the defender is the holder of the heritable office of Marnichty, and is infeft in this office by virtue of the extract decree of special service in his favour, dated and recorded as mentioned in said article. Both in virtue of his title to the lands and in virtue of his office of Marnichty the defender and his predecessors have exclusively possessed the castle. The defender is the twentieth hereditary captain of Dunstaffnage."

The defender then set forth the history of the possession of the lands and castle by his family till 1810, when the castle was destroyed by fire. After referring to the fact that it had not been rebuilt, but had remained since then as a ruin, he further averred:—"The pursuer's predecessors took no exception to the castle remaining in its ruinous state, and have acquiesced therein, and upon that footing have renewed the titles in favour of the defender's predecessors, who have entered into possession of the lands and been designed captain of Dunstaffnage since the date of the fire. The defender and his predecessors have exclusively possessed the castle in its present state upon said titles for more than prescriptive years, and the pursuer and his predecessors have neither possessed nor claimed

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In a statement of facts for the defenders it was averred, *inter alia*:—"1. The defender Angus John Campbell (hereinafter referred to as 'the defender') is a minor who will attain majority on 22nd November 1909. He succeeded to the estate and lands of Dunstaffnage, &c., on the death of his father, the late Alexander James Henry Campbell, on 9th March 1908. In addition to being proprietor of the lands of Pennycastle of Dunstaffnage and others set forth in article 2 of the condescendence for the pursuer, the defender is the holder of the heritable office of Marnichty, and is infeft in this office by virtue of the extract decree of special service in his favour, dated and recorded as mentioned in said article. Both in virtue of his title to the lands and in virtue of his office of Marnichty the defender and his predecessors have exclusively possessed the castle. The defender is the twentieth hereditary captain of Dunstaffnage."

The defender then set forth the history of the possession of the lands and castle by his family till 1810, when the castle was destroyed by fire. After referring to the fact that it had not been rebuilt, but had remained since then as a ruin, he further averred:—"The pursuer's predecessors took no exception to the castle remaining in its ruinous state, and have acquiesced therein, and upon that footing have renewed the titles in favour of the defender's predecessors, who have entered into possession of the lands and been designed captain of Dunstaffnage since the date of the fire. The defender and his predecessors have exclusively possessed the castle in its present state upon said titles for more than prescriptive years, and the pursuer and his predecessors have neither possessed nor claimed

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possession of the castle during that period. The pursuer's predecessors, in full knowledge of the facts, never complained that the defender's predecessors had failed to implement the conditions of their holding, and never sought to get a declarator of irritancy."

The defender's father was infeft in the lands referred to in virtue of an extract decree of special service in his favour dated 23rd February 1880, and duly recorded.*

The Crown charter of 1470 in favour of the pursuer's ancestor was granted *cum castris et fortaliciis*, &c.; and under the charter of 1502 in favour of the defender's ancestor, referred to in condescendence 7, the lands conveyed thereby, with pertinents, were held ward, the reddendo imposing upon the vassal obligations of a military nature, similar to those in the subsequent charter of 1667.

The pursuer pleaded, *inter alia*;—(1) In respect of his titles to the lordship and barony of Lorne, the pursuer is entitled to decree in terms of the conclusions of the summons. (2) The defender is barred by the terms of the titles to his said estate from insisting in his present defence.

The defender pleaded, *inter alia*;—(2) The defender having, in virtue of his title, good and undoubted right to the Castle of Dunstaffnage, as part of the lands of Pennycastle of Dunstaffnage, should be assoilzied from the conclusions of the summons. (3) The defender and his predecessors, having possessed the Castle of Dunstaffnage along with the lands of Pennycastle for the prescriptive period under the titles referred to, should be assoilzied from the conclusions of the summons. (4) The defender having in any event, in virtue of his title, good and undoubted right to the office of Marnichty of Dunstaffnage, is entitled to occupy the said Castle of Dunstaffnage in respect of his holding that office, and should be assoilzied from the conclusion of the summons craving that he should be ordained to flit and remove therefrom.

A proof before answer was allowed and led. The facts thereby established, and the terms of the titles founded on, are sufficiently disclosed in the opinion of the Lord Ordinary and in the opinions of the Lord President and Lord Johnston in the Inner House.

On 22nd October 1910, the Lord Ordinary (Cullen) assoilzied the defenders from the conclusions of the summons.†

* *Vide* Lord Johnston's opinion, *infra*, p. 486.

† "OPINION.—In this action the pursuer concludes for declarator that he is proprietor of 'All and Whole the Castle of Dunstaffnage, with the whole houses, buildings, gardens, yards, and other enclosures and pertinents thereof, lying within the lordship and barony of Lorne and county of Argyll'; and that the defender Angus John Campbell of Dunstaffnage has no right or title of any kind in and to the said subjects or any of them. There is also a conclusion for removing against the defender; but in the course of the proof the pursuer intimated that he did not insist in it.

"It will be observed that there is here no specification or delimitation by boundaries or otherwise to make definite on the face of the conclusions what is the area of *solum*, or what are all the various items of existing heritable property which are intended to be included within the above general description. Throughout his condescendence the pursuer denominates the totality of the subjects claimed by him as 'the Castle of Dunstaffnage.' The evidence led under the allowance of proof before answer has not served to remove this vagueness from the pursuer's claim.

"The defender, who otherwise negatives the pursuer's claim of property,

The pursuer reclaimed, and the case was heard before the First Feb. 6, 1912. Division on 29th and 30th June, and 1st, 17th, and 21st July 1911.

Argued for the reclaimer ;—There was no doubt that the pursuer under his Crown charter of 1470, his earliest title to the lordship of Lorne, granted *cum fortaliciis*, was proprietor of the Castle of Dunstaffnage, and nothing that had happened since had altered the proprietorship. (1) The defender had acquired no prescriptive title to the castle. His title to the lands of Pennycastle of Dunstaffnage, looking to the terms of the charter of 1502 in favour of his ancestor, was not habile to prescribe possession of the castle, because the castle was excluded from the grant of the lands. The decrees of special service upon which the defender and his father had possessed added nothing to the subjects of the original grant, therefore possession following thereon did not create any right of property in the castle. It could not be shown to have been possessed by the defender as a

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pleads, *inter alia*, that the pursuer is not entitled to decree in respect the summons does not duly define the lands and others which he seeks to vindicate. This appears to me to raise an important objection to the pursuer's claim when the actual nature of the subjects is considered. The former Castle of Dunstaffnage, with its precincts of offices, gardens, yards, and other enclosures, no longer exists as a totality capable of identification. The main building of the castle was destroyed by fire in 1810. There is now no castle in any proper sense of the word, but only a considerable extent of ruined masonry. The ruin stands on a site of rock situated on a promontory at the entrance to Loch Etive. Like many other ruins throughout the country, some of them of the most fragmentary character, it is commonly known by the name of the fortress of which it now only embodies the memory. It stands surrounded by lands belonging to the defender. A part at least of the totality of subjects claimed by the pursuer, that is to say, everything of the nature of outer precincts of the former castle—gardens, yards, &c.—have been long possessed by the defender and his predecessors as their own. At the hearing it was intimated by the pursuer's counsel that, so far as these are concerned, the pursuer did not maintain that he was entitled to succeed, and that he now confined his claim to what, without any attempt at delimitation, he styled 'the castle itself.'

"I shall now advert to the state of the title. As regards the pursuer, it is clear that he and his predecessors have for centuries held a title under the Crown to the lordship and barony of Lorne, including Dunstaffnage Castle. By charter, dated 24th June 1502, Archibald, 2nd Earl of Argyll, granted in feu to Archibald Campbell Kere, the defender's ancestor, and the heirs male of his body, All and Whole the lands of 'Pennycastell of Dunstaffniche,' Penny Chaniche, and others, being the lands now belonging to the defender, and known as the estate of Dunstaffnage, within which the ruins of the castle stand. The lands are not described save by general names. The reddendo is in these terms :—'Dictus vero Alexander et sui heredes masculi prout predicitur, in firma custodia custodien' ac sine lesione nobis ac heredibus nostris tenen castru' nostru' de Du'stafynche et semper inibi tenen et haben sex homines pronos et decentes cum armatis et armis licitis pro guerris et custodia dicti castri et sufficientiarium et vigilem ad numeru' in toto octo personarum in tempore pacis et si forsan contingat guerra' existe' in Illis partibus qua patriam vastare contingerit nos et heredes nostri propriis expensis tenebimur demedietatem comunum et expensarum in illo nostro castro ad num^m necessa^m pro custodia et firma detentione ejusd castri Insup' dictus Alexander et sui heredes predicitur, inuen nobis et heredibus nostris annuatim focalia pro cameris equina pistoria et le brouhouse et semper prima nocte pro aula toties quoties nos aut heredes nostri contingim' ibid esse Etia' dictus Alex' et

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pertinent of the lands conveyed by the charter of 1502,¹ because at that date a simple charter could not carry a castle as a pertinent of lands,² and a pertinent must be shown to have been occupied as *belonging to* the principal subjects, not merely *with* them. A castle being *inter regalia* would not be carried by any grant unless it was mentioned, just as a grant of lands did not give a title to salmon-fishings unless it bore to be *cum piscationibus*. Further, the defender had not even a grant of the *custodia* of castle, such as was illustrated by the titles to other castles which the pursuer held under Crown charters, conferring rights which could not be defeated even by the Crown.³ Further, the defender could not have acquired the castle of Dunstaffnage by prescription without defeating the right of occupancy created by the reddendo in his charter, because the services thereby imposed upon him were not such as could be exacted with reference to a castle of which he was

sui heredes prout prius dicitur soluen' nobis et heredibus nris triginta bollas farrine et duas bollas ordeï annuatim pro omnibus exactionibus et demandis.'

"At the date of this charter Dunstaffnage Castle was, as it for long after continued to be, an important fortress. The general rule of construction of conveyances of lands at this early period as regards buildings situated upon them is stated by Craig to be that, while ordinary buildings passed with the *solum*, 'non tamen turres et fortalitia solo cedunt, nisi aut expresse nominentur, aut is, qui dispositionem habet, cum jurisdictione et imperio mero dispositam habeat.'—(Jus Feudale, Lib. 2, Dieg. 8, sec. 3.) The terms of the reddendo clause in the present case seem to me to evince clearly enough the application of this rule to Dunstaffnage Castle.

"The said lands of Pennycastell of Dunstaffnage and others continued to be held by the successors of Alexander Campbell Kere until the forfeiture to the Crown of the estates of the Marquis of Argyll in 1661. Upon the restoration of these estates, Archibald, 9th Earl of Argyll, made a new grant of the said lands of Pennycastell of Dunstaffnage and others, by charter, dated 7th October 1667, in favour of Archibald Campbell of Torrie, from whom the defender derives right. The description of the lands, which is by general names, is the same as in the titles of the forfeited feu. The reddendo follows so far the reddendo in the charter of 1502, but in addition binds the vassal to make 'our said castell' patent and open to the granter and his heirs and successors at all times when required, and to uphold and maintain the fabric.

"After the passing of the Act for the abolition of Ward-holdings (20 Geo. II. cap. 50) the services specified in the reddendo, so far as affected by the Act, were commuted for a money payment, the remaining obligations which continued to be expressed in the writs by progress being those relating to the making open of the castle to the superior when required, the supplying of fuel to him when there, and the maintenance of the fabric. It is remarkable that after the period of the Act the writs granted by the superior cease to speak, as the older writs consistently did, of the castle as 'our' castle. The relation of the vassal to the castle in connection with the military services contained in the original reddendo had entirely ceased. It seems, nevertheless, to be contemplated in the reddendo, as inserted in

¹ Lord Advocate v. Hunt, (1867) 5 Macph. (H. L.) 1.

² Ersk. ii. 6, 13, and 17; Craig, Jus Feudale, ii. 3, 24, ii. 8, 3; Hope's Minor Practicks, viii. 16; Duff's Feudal Conveyancing, 63; Stair, ii. 3, 65; Ross, ii. 166, 172; Home v. Home, (1612) M. 9627; Rose v. Ramsay, (1777) M. 9645.

³ Officers of State v. Earl of Haddington, (1830) 8 S. 867, Lord Moncreiff, at p. 877.

the proprietor. As his charter was free from ambiguity usage could not be referred to for the ascertainment of rights thereunder, as in a case of uncertainty as to the extent of a grant.¹ The forfeiture of the Marquis of Argyll in 1661, and the rehabilitation of his son in 1663, did not affect the title to the castle of Dunstaffnage,² which continued to be referred to thereafter as the principal messuage of the lordship of Lorne. No feudal title to the office of custodier of the castle had been created by the original charter, and subsequent investitures showed a continued recognition of the superior as the proprietor of the castle; therefore it was clear that the possession had by the defenders' predecessors was to be ascribed to the reddendo in the charter, and to that alone.³ While the changes brought about by the Conveyancing Act of 1874 made it no longer necessary for a superior to be called upon to infeft a vassal upon a service such as that of 1880,⁴ an implied entry could not enlarge the rights that would have been preserved

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the writs granted after the Act, that the vassal should reside or have the right to reside in the castle, throwing it open to the superior when required. And I do not think that there is anything in the tenor of these writs, taken by themselves, which is sufficient to exclude the castle from the grant. It may perhaps have been intended, in view of the effect of the Act, that the castle, which had come to have the character of a place of residence merely, and which had all along been the actual residence of the Dunstaffnage family, should be merged in their property under the obligation to make it open to the superior, &c., and this may perhaps explain the disuse of the word 'our.' There was, however, no novodamus. That the castle was looked upon as the family mansion-house of the Dunstaffnage family, and included in their property, is shown by the fact that when Dunstaffnage was entailed in 1790 the entail expressly excluded from the computation of free rental in estimating family provisions the Castle of Dunstaffnage or other principal family mansion for the time, and the offices and gardens thereto belonging, &c., and provided that these should be always reserved for the use and accommodation of the heir of entail for the time. The entail was followed by a charter of resignation incorporating its terms and dated 9th August 1815.

"In 1810 the castle was reduced to ruins by fire. It was not rebuilt. As a place of strength it had ceased to have any *raison d'être*, and it was apparently not considered worth the expense to rebuild it for use as a residence. It has not been contended that the vassal's obligation of upkeep extended to rebuilding it after the fire. The proprietor of Dunstaffnage thereafter took up residence in a house on the estate at some distance from the castle. So far as the superior is concerned, the ruins of the castle were simply left derelict. There is no evidence of any act done by him in relation to the castle up to 1900, when the present pursuer, then under the erroneous impression that the castle had been a royal castle of which he held the office of hereditary keeper, set about obtaining subscriptions for putting it in better repair, and suggested to the proprietor of Dunstaffnage various fanciful devices for increasing its attractiveness to sightseers, with a corresponding increase in the gate-money.

"Turning now to the actings of the proprietors of Dunstaffnage in rela-

¹ Agnew v. Lord Advocate, (1873) 11 Macph. 309; Boyd v. Bruce, 1872) 11 Macph. 243.

² Fountainhall, i. 182.

³ Earl of Dalhousie v. M'Inroy, (1865) 3 Macph. 1168; Lord Advocate v. Sinclair, (1867) 5 Macph. (H. L.) 97.

⁴ Conveyancing (Scotland) Act, 1874 (37 and 38 Vict. cap. 94), sec. 4 (2) (3).

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unaltered had it still been necessary to go to the superior for an entry. It was competent to consider the question whether the rights claimed to have been acquired by the defender were in excess of the rights conferred by the original charter¹; and, for the purpose of examining the character of the defender's possession during the prescriptive period, it was competent to look at the earlier titles.² In considering this question effect must be given to the terms of the original feu-right,³ because the defender could not assert a supervening prescriptive title in prejudice of the author from whom his possession originally flowed,⁴ if the acts of possession founded on were consistent with occupation for that author, and so were truly in exercise of the author's possession. Such acts of possession could not be regarded as explaining the original grant to the effect of altering its nature,⁵ or enlarging it,⁶ and they did not

tion to the subjects after the castle was reduced to ruins by the fire of 1810, it appears that they have possessed and absorbed in their surrounding lands all that is embraced in the pursuer's claim, as stated in his summons, in the nature of ground or offices formerly attached to the castle, so far as these are susceptible of beneficial possession. The evidence is, I think, sufficient to show that they have had full and continuous enjoyment of these for more than the prescriptive period. And, as I have already stated, the pursuer now concedes that he is unable to vindicate right to the totality of the subjects claimed in the summons, although he has not followed this up by any attempt to formulate a habile description of the residuum to which he now confines his claim for declarator of property.

"As regards the ruin of the main building of the castle itself and the rocky portion of the promontory on which it stands, the proprietors of Dunstaffnage have not, naturally, had the same kind of possession and enjoyment of these sterile subjects as they have had of the surrounding ground. They have, however, since about 1867, appointed a caretaker to look after the ruins and regulate the admission of the public to view them, and for many years a charge for admission has been made. They have occasionally lodged fishermen in a bothy in the ruins during the fishing season. They have fitted up a small building in the ruins called the tea-house, which has been used by them and for the entertainment of their friends when visiting the ruins. These acts of possession are said to be more or less casual, and to fall short of full possession. I think, however, that in order to appreciate the extent of the possession, regard must be had to the totality of the subjects which the pursuer claims. In absorbing the ground about the ruins capable of beneficial occupation, and in treating the ruins and their sterile site as they have done, it seems to me that the proprietors of Dunstaffnage have possessed the subjects, taken as a whole, in the same way as would ordinarily be done by any undoubted proprietor of land on which a former castle or fortalice on a sterile site has become obsolete and fallen into ruin and decay. I am of opinion that, assuming

¹ *Officers of State v. Earl of Haddington*, 8 S. 867, Lord Glenlee, at p. 880.

² *Lord Advocate v. Hunt*, (1865) 3 Macph. 426, Lord Deas, at p. 454.

³ *Hutton v. Macfarlane*, (1863) 2 Macph. 79; *Stair*, ii. 1, 27; *Ersk.* ii. 1, 30.

⁴ *Napier on Prescription*, 288.

⁵ *Officers of State v. Earl of Haddington*, 8 S. 867, at p. 875 (2).

⁶ *Officers of State v. Earl of Haddington*, (1831) 5 W. & S. 570, Lord Chancellor Lyndhurst, at p. 596; *Duke of Argyll v. Campbell*, (1891) 18 R. 1094.

constitute such possession as was required to bring into effect the provisions of the Act 1617.¹ (2) Upon his titles the defender had never occupied the castle as proprietor, because though the Clan Act² might be held to have removed the reasons for which the castle was not included in the original grant of the lands of Pennycastle of Dunstaffnage, its exclusion from the grant continued to be effectual, and was not affected by the vassal's possession. That Act did not, and could not, have the effect of changing the ownership of the castle. When the reddendo was changed in terms of the Act and in part commuted for a money payment, the obligation to keep the castle open for the superior remained, in terms of the charter of adjudication in favour of Campbell of Ederline granted by the pursuer's predecessor in 1763; and upon the titles as they stood thereafter, the superior might have enforced his rights as proprietor of the castle at any time.³ But there had been no acts of possession on the part of the vassal which were adverse to the pursuer's claim, or inconsistent with his view of the title, because in order to implement the services required in terms of the reddendo, even as modified after 1747, personal occupation of the castle by the vassal was necessary. Accordingly, there had never been any occasion for interference on the part of the superior. While it was not admitted that the defender was entitled to live in the castle in order to fulfil the prestations due by him as vassal, the pursuer did not desire to exclude him from entering the subjects in question so far as it might be necessary for him to do so for the purpose of such fulfilment, and if leave were granted by the Court, the pursuer was prepared to amend the second conclusion of the summons accordingly.*

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the existence of a habile title, there has, for the prescriptive period, been sufficient possession of the subjects claimed by the pursuer to enable the defender to maintain a claim of property thereto.

"As a basis for his prescriptive possession, the defender appeals to the recorded services of his father and himself, the former of which was recorded in the Register of Sasines on 20th April 1880. These vest the lands without qualification, and appear to me to be an *ex facie* valid irredeemable title to land capable of serving as a basis for prescribing a right to the subjects in question which are situated on these lands.

"The pursuer, however, maintains that *esto* there has been possession it has not been *cum animo domini*, but that it is to be explained as possession by licence of the superior as under the early titles. It appears to me, however, that after the fire of 1810 had reduced the castle from a habitable structure to a mass of ruins, which, with the acquiescence of the superior, were left to moulder in decay, a situation was created and continued which was not contemplated at all in the reddendo clause of the charters, and I am unable to accede to the pursuer's view that the proprietors of Dunstaffnage in possessing and absorbing the ground about the ruins, and in dealing with the ruins themselves as they have done, fall to be regarded as having been merely occupying these subjects with a view to making open when required a non-existent castle to the Duke of Argyll, and supplying him with fuel therein, &c.

"Following these views, I am of opinion that the defender is entitled to absolvitor from the conclusions of the action."

¹ Act 1617, cap. 12.

² 20 Geo. II. cap. 50.

³ Edmonstone, &c., v. Jeffray, &c., (1886) 13 R. 1038.

* A minute of amendment was lodged for the pursuer in which it was sought to amend the second declaratory conclusion of the summons by adding thereto the words:—"Except in so far as he may require to enter

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Argued for the defender;—The defender Angus Campbell was proprietor of the Castle of Dunstaffnage (1) because he had acquired a prescriptive title thereto; or, alternatively, (2) because it fell within his title to the lands of Pennycastle of Dunstaffnage. (1) The decree of special service of 1880, followed by that of 1908, upon which there had been possession for the prescriptive period, was a *habile* title upon which to acquire the castle by prescription, and it excluded examination of earlier titles.¹ The defender had discharged the onus of showing that the possession had of the castle was of such a character as could only be attributed to ownership, and was inconsistent with possession merely on behalf of the superior.² When, in 1790, the lands of Dunstaffnage were entailed by the defender's ancestor, the castle had been treated as the mansion-house of the estate, and excluded, in the usual way, from the power of the heirs of entail to grant *liferent* provisions, and the terms of the deed of entail had been acknowledged by the superior in subsequent investitures, *e.g.*, the charter of 1815. Even if there was a doubt whether the castle was included with the lands still, as the title relied upon was in terms which might comprehend the castle,³ possession of the castle following thereon was sufficient to exclude inquiry.⁴ Though the castle was not included in the original grant of the lands, and though it was originally retained *per expressum* by the superior, the defender's was a sufficient title, in a question with the superior, on which to prescribe a right of property in it as a part and pertinent of the lands.⁵ After the abolition of ward-holding the tenure of the defender's predecessors was no longer as keeper, and, if not of right, must have been of tolerance or of neglect, and either of the latter afforded ground for setting up a prescriptive title to the castle.⁶ (2) Though up to 1747 the defenders' predecessors had possessed as keepers of the castle and not as occupying owners, the Clan Act,⁷ passed in that year abolishing ward-holding, made occupation as keeper of the castle an impossibility, and, accordingly, after that date possession could only be attributed to ownership. The land upon which the castle stood was within the original grant, and when its character as a fortalice was abolished, the land was freed from the exception which excluded the castle from the grant. The obligations

into or occupy the same for fulfilment of the prestations due by him for the lands of Pennycastle and others under and in terms of his titles thereto."

¹ Fraser v. Lord Lovat, (1898) 25 R. 603, Lord Kinneir, at p. 617; Scott v. Bruce Stewart, (1779) M. 13,519; Duff's Feudal Conveyancing, 176; Conveyancing (Scotland) Act, 1874 (37 and 38 Vict. cap. 94), sec. 34; Act 1617, cap. 12; Act 1594, cap. 218.

² Lord Advocate v. Hunt, 3 Macph. 426, Lord Deas, at p. 455.

³ Ersk. ii. 6, 17.

⁴ Auld v. Hay, (1880) 7 R. 663, Lord Deas, at pp. 672 and 673; Earl of Argyle v. Laird of M'Naughton, (1671) M. 10,791.

⁵ Magistrates of Perth v. Earl of Wemyss, (1829) 8 S. 82; Earl of Fife's Trustees v. Cuming, (1830) 8 S. 326; Countess of Moray v. Wemyss, (1675) M. 9636; Crawford v. Maxwell, (1724) M. 10,819.

⁶ Forbes v. Livingstone, (1827) 6 S. 127, Ross's Leading Cases, Land Rights, iii. 342; Duke of Buccleuch v. Cunynghame, (1826) 5 S. 57, Ross's Leading Cases, Land Rights, iii. 338; Rankine, Land Ownership, 4th ed., 29.

⁷ 20 Geo. II. cap. 50.

imposed in terms of the reddendo as altered after the passing of the Feb. 6, 1912. Clan Act did not affect the change brought about thereby in the character of the castle, and that change made the castle a subject that fell within the category of parts and pertinents. By usage also it had been brought within that category. Thus the Clan Act had altered the character of the vassal's possession of the castle, and therefore the original charter could no longer be referred to in order to defeat a prescriptive title acquired by a possession which was now quite compatible with ownership,¹ or, apart from any question of prescription, to define what was the true nature of the defender's title.

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At advising on 6th February 1912,—

LORD PRESIDENT.—The Castle of Dunstaffnage is one of the oldest fortalices or strong places in Scotland. The date of its building is lost in antiquity. It played its part at a time when kingly power could scarcely be said *de facto* to extend over the lands of what is known as Scotland. In after days it was one of the strongholds of the great feudal chief of the Campbells, where, to use the quaint words of an old memorial, “was the only sanctuary against the insults of the M’Leans, the Macdonalds, and all the other clans.” Since 1810, when it was burnt, it has been a picturesque semi-ruin of interest to the historian and the antiquary. And now it has become before your Lordships the subject of a litigation which it is impossible not to regret. For the parties to it without, so far as I can see, any very real dispute have slid into a process in which I think nothing can be determined except the repelling of the extreme claims which the pursuer and the defender have alike put forward at some stage of the process.

The case comes before your Lordships by reclaiming note against the interlocutor of the Lord Ordinary, by which he assoilzies the defender from the conclusions of the summons. The conclusions of the summons assert at least (I shall revert to them more particularly hereafter) a right of property in the pursuer in the castle, and the defender puts forward, *inter alia*, the following plea, viz. :—“(3) The defender and his predecessors, having possessed the Castle of Dunstaffnage along with the lands of Pennycastle for the prescriptive period under the titles referred to, should be assoilzied from the conclusions of the summons.” It is not therefore doubtful that the application of the Lord Ordinary’s interlocutor would mean that the sole right of property in the castle belonged to the defender and not to the pursuer.

The Lord Ordinary bases his decision on the view of prescriptive title consisting of possession of the ruin by the servants of the defender and his father, following upon a registered service of his father in 1880, for more than twenty years—a title which he looked upon as excluding further inquiry, and it was upon this view that the defender’s counsel mainly, if not entirely, relied. I shall explain subsequently the fallacy which, in my opinion, underlies and vitiates the argument. But I think it will be convenient first to approach the matter in the historical order of time, as indeed

¹ Munro v. Munro, F. C., May 19, 1812, Ross’s Leading Cases, Land Rights, iii. 373.

Feb. 6, 1912. the Lord Ordinary has done, and examine the state of the title at each of what I may call the critical dates in the history.

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Ld. President. It is, I think, immaterial to decide whether Dunstaffnage was or was not originally a royal castle. Even if it was, it could be carried by charter if so expressed ; and Stair ranks Dunstaffnage by name as one in such a position. Whether it was or was not originally a king's castle, it is perfectly clear that by the year 1470 it was the property of Colin, first Earl of Argyll, who got a Crown charter in that year to the lordship of Lorne *cum castris, fortaliciis, &c.* And the importance of Dunstaffnage is still further recognised when by the Crown charter of 1540 the Castle of Dunstaffnage is made the principal messuage for sasine of the whole barony and dominion of Lorne. With these titles the present pursuer is admittedly connected by an unimpeachable progress.

We now come to the origin of the defender's titles. From the earliest times there seems to have been a Campbell as captain of Dunstaffnage. There is produced an old title of 1490 with a gift to a person so designed of some merk lands situated in Perthshire. The first title, however, of the lands of Pennycastell of Dunstaffnage and others dates from 1502, when there is a charter by the second Earl of Argyll in favour of Alexander Campbell Kere, the predecessor of the defender. This is a grant of various parcels of land, and is a proper ward-holding. There is no money reddendo, but the services are set forth which are to be rendered by the vassal. They are not expressed as services *solita et consueta*, but are set forth with great minuteness, and consist in the watching and warding of the granter's castle of Dunstaffnage, with a provision of six armed men and two others in time of peace ; with certain provisions for finding fuel for the different rooms to be occupied by the superior when he came to the castle. There was also a yearly payment of meal and bear. By this charter there is no question that the castle could not and did not become the property of Campbell. But the reddendo which imposed on him a duty gave him also the clear right to possess and occupy the castle as and for the superior his lord. The lands became involved in the attainder of the Argylls, but upon the restoration of the forfeited estates to the Argyll family, were again made over to the family of Campbell of Dunstaffnage by the disposition of 1667. This deed contains a practical repetition of the old reddendo, mainly amplifying the services as to providing fuel, by first inserting an obligation to make the castle patent and open to the superior when required. This reddendo was repeated in all the titles for the next century. To sum up the situation, under the earlier titles, *i.e.*, up to 1747, it seems to me abundantly clear that the position was as follows :—1. The Argylls were proprietors of the fortalice or castle. 2. The Dunstaffnage Campbells were vassals, and as such, proprietors of the *dominium utile* of the penny lands of Dunstaffnage and others, and were also heritable captains and custodiers of the castle. 3. The holding was a ward-holding. 4. The reddendo consisted in the ordinary ward services, and also in particular services which had to be done in the castle and could only be done if the vassals occupied and possessed the castle. 5. Such services to be performed upon the superior's property were quite recognised by the ancient feudal tenures, both of ward and also of one form of socage—(Ersk. ii. 4, 5). 6. The upshot of the

matter for the present purpose is that the vassal had not only a right but a duty to occupy and possess the castle, which, nevertheless, remained the property of the superior, never having been gifted to the vassal; the possession of the vassal *qua* captain and guardian being in law the superior's possession.

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So matters remained seemingly unchanged till we come to the passing of the Act of 1 Geo. I. cap. 54, after the rebellion of '15, and the Clan Act after the rebellion of '45. By those Acts ward-holdings were abolished—that is to say, the casualties of ward, recognition, and marriage were no longer exigible, and certain classes of services, viz., personal attendance, hosting, hunting, watching, and warding were prohibited. But services other than those prohibited were not struck at. The question, therefore, next comes to be, what was the effect of these Acts on the Dunstaffnage reddendo? It is superfluous to say that the Act of 1 Geo. I. and the Clan Act effected no change of property from superior to vassal. Now, on this point, I think we have very satisfactory evidence both in the later stage of the title itself and in recorded decisions. The first charter which we find of date posterior to 1747 is a charter of adjudication granted by Argyll in favour of Campbell of Ederline, who had adjudged the lands of Campbell of Dunstaffnage for debt. This charter, with a dispositive clause which is identical with that in the ancient charters, inserts a reddendo where there is, for the first time, a payment of £22, 17s. Scots, upon a recital of this being the commuted value of the ancient services and casualties so far as struck at by the Clan Act as evaluated by the Act of Sederunt of 1749; then it goes on to state the old victual duty; and then it proceeds with a recital of the obligation to open the castle, to provide fuel, and further to keep the castle wind and water tight, with a counter obligation on the superior to compel his other tenants to help the tenants of the lands of Pennycastle, &c., to assist in the work of reparation so often as reparation should be required. This reddendo is inserted in the conveyance which reconveyed the lands to the Campbell family—the debt for which adjudication had been laid having been paid—and appears in all subsequent titles. It is therefore evident that the conveyancers of the period considered that while the casualties of ward, marriage, and recognition, and the services of keeping armed men, were struck at by the Acts, the obligation to keep the castle, to make it open to the superior, and to furnish fuel, &c., were still good services not struck at by them. And this, I think, was the correct view as evidenced by decision.

There is a case, which was not quoted in the argument, which has, I think, an important bearing on the question. That is the case of the *Duke of Argyll v. Creditors of Tarbert*.¹ It is in the year 1762, that is, after both the Acts above mentioned. The feu-charters of the estate of Tarbert, granted by the family of Argyll, contain, *inter alia*, the following reddendo. “Una cum nave sex remorum, tempore belli et pacis, quam navem sufficienter tenebuntur ornare armamento, omnibus neccessariis, cum sex remigibus et nauclero, lie *steersman*, pro servitio S. D. N. Regis, et nostris nostrorumque hæredum et liberorum, ad transportandum nos nostrosque

¹ (1762) M. 14,495.

Feb. 6, 1912. *prædict. a Tarbert ad Strondour, Silvercraigs et Lochgear,* and then various other places where they were to be ferried across, "*Et similiter, dict. Archibaldus M'Alister ejusque prædict. tenebuntur fideliter, firmiter, et secure, custodire, defendere, et tueri, dict. castrum et fortalicium, pro usu et utilitate nostra, nostrorumque prædict. ab invasionibus hostilium et inimicorum nostrorum, et recipere et custodire in dicto castro captivos, lie prisoners, sumptibus nostris, nostrorumque prædict. quandocunque mandatum acceperint a nobis, nostrisque prædict. aut nostris deputatis, a tempore in tempus. Et quod fideles et obedientes erunt nobis, nostrisque prædict. in omnibus aliis rebus incumbentibus ad officium custodiæ dict. castri, sicuti reliqui capitanei et custodes aliorum nostrorum castrorum et domuum, infra vice-comitatum de Argyl, tenebuntur et solent præstare. Ac etiam, conservare et sustentare dict. castrum de Tarbert sartum et tactum, lie *wind et water-tight*, omni tempore futuro, sumptibus et expensis dict. Archibaldi M'Alister, ejusque prædict. et hospitio recipere nos nostrosque suprascript. gratis, quandocunque ad dict. castrum venimus, sicuti alii custodes castrorum nostrorum facere solent."*

M'Alister of Tarbert having allowed the castle to go into disrepair, the Duke of Argyll brought a process against him, concluding that he should perform the several prestations contained in the above clause, and that they should be declared real burdens upon the lands. M'Alister having become bankrupt, compearance was made for his creditors, "who objected, that these prestations of keeping up a house and a boat for receiving and entertaining the superior, and transporting him from one place to another, fell under the Act 1mo, G. I., cap 54, § 10, which discharges all personal services, and attendance of vassals upon their superiors, and ordains the same to be converted into an annual value in money, to be ascertained by the Court of Session, in case the parties themselves cannot agree upon it." "In the course of the process, his Grace admitted that so much of the reddendo as obliged the vassal to keep and defend the castle for the use of the superior against the invasions of his enemies, or for the reception of his prisoners, could not now be lawfully exacted, the same being against the public law of the kingdom," but maintained that all the others were good. And then they seem to have come to a sort of bargain that, inasmuch as the old castle had gone into disrepair, the Duke said he would not exact what he was asking as to making the old castle wind and water-tight, if the vassal would promise on his part to allow this prestation to apply to a modern mansion-house which he had built upon the estate. That was really, so to speak, a transaction between themselves. The Lords found "that the pursuer's vassal in the estate of Tarbert is bound, upon his own proper charges and expenses, to keep and uphold a boat of six oars, and to provide the same with six rowers and a steersman, and all things necessary for the use of the superior and his family, in terms of the former feu-charters thereof; and also, to keep the mansion-house, now built upon said estate, wind and water-tight; and find, that the prestations are not personal services, and do not fall under the Statute of G. I. founded on." And then they were not quite certain about the provision which made the vassal have to feed the Duke *gratis* when he went there, and they remitted to the Lord Ordinary for further inquiry upon this subject.

It is not quite certain whether that castle of Tarbert was actually upon Feb. 6, 1912. the feu or was not. I have looked up the Session papers, but, unfortunately, they do not give the old feu-charters, nor do the old reports in the Faculty ^{Duke of} Collection. Parts of the argument point the one way, while, on the other ^{Argyll v. Campbell.} hand, there is a part of the argument which points more to keeping up an ^{Ld. President.} edifice on the feu. But I do not think it matters whether the castle of Tarbert had up to this time passed to the M'Alister or remained with Argyll. That would of course depend upon the charter, and whether there was a grant *cum fortaliciis* or not. The importance of the case is that it shows that these services of keeping the castle wind and water-tight were not services, in the view of the Court, which were struck at by the Act of 1 Geo. I., or by the Clan Act. Applying that case to this there was, after 1747, still a duty, and necessarily a right, in the vassal to remain in the castle, and his possession there would necessarily be the possession of the superior.

The result is that in my view the right and duty of the keeper and custodier to occupy and possess the superior's castle remained just as before, with only this difference, that he might occupy with peaceful servants instead of armed men; ready to perform the humble duty of *patefacere* instead of the harder task of keeping out M'Leans, Macdonalds, and other unruly persons. And this duty and right was expressed in the altered *reddendo* which appeared in all the subsequent investitures.

No more need be said till we come to the event of the fire in 1810, which rendered the castle so uninhabitable that the captain no longer lived there. Now I do not think that it is necessary to discuss whether the vassal's obligation to keep the castle in repair reached to the repairing of the damage, &c., caused by fire. Very likely it would not. But he was, I think, clearly entitled, and indeed bound, to go on with such occupation as the subject now permitted of, while waiting till either he or the superior repaired the ravages of the fire. At least it is, I confess, an entirely novel idea, that the fact of a fire could change the legal aspect of possession. No such idea at least entered the minds of the parties, for the *reddendo* with its expressed duties continued, after the fire, exactly as before.

We now come to the last important date, viz., 1880, when the father of the defender succeeded and made up his title by registering a decree of special service in the Register of Sasines. The possession of the ruined castle continued as before. The Lord Ordinary has held that the registered service being an *ex facie* irredeemable title is a good foundation for prescription: that possession such as the subject permitted of being retained for twenty years, it must be held that the castle has now been possessed as "part and pertinent" of the Pennycastle lands, and that that is a title to exclude, and therefore ends the matter. In my opinion this reasoning errs in assuming what cannot be simply assumed, viz.:—that the possession of the castle *was* a possession of it as part and pertinent of the Pennycastle lands, and in shutting one's eyes to the most cogent evidence of what that possession must really be ascribed to, viz.:—the terms of the title itself. And when I say the title itself, I mean not simply the recorded service itself, but what that recorded service really is in law. It is a temptation too often yielded to—of which the argument of the defender's counsel pre-

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sented a good example—to forget that the shorthand methods of modern conveyancing must never be taken as expressing only what the words used express, but must be taken along with the statutory interpretation which is impressed upon the words so used.

Ld. President.

I shall now examine what the recorded service really meant and effected. If in doing so I am compelled to say what will really resemble a lecture in conveyancing, my justification must be that the inquiry was steadily avoided in the argument of the defender ; and as it is possible that this case may go further where there cannot be familiarity with the progress of our conveyancing statutes, it is as well to treat the matter from the beginning. It is not necessary to begin with very ancient times. We may pass at once to the time when feus had long ago been recognised as hereditary, or, in other words, to the practice as to title before the reforming legislation which began in 1845, and was continued in 1847, 1858, 1868, and 1874. Now at this time when the ancestor infeft in the *dominium utile* died it was absolutely necessary to have recourse to the superior before the heir could be infeft in the lands which his ancestor had held. It is not necessary to consider the various positions arising where the ancestor was not himself infeft or where the ancestor left a disposition *mortis causa* dealing with the estate. For my purpose I take the simple case of the ancestor infeft with a destination which pointed to the heir. The heir would naturally make up title, for if he did not the lands were in non-entry, and the superior, by declarator of non-entry, could enter into possession. No doubt in many cases where the relief duty was trifling, and the superior careless, an estate might be possessed for years on apparency. That, however, has only to be mentioned to show that the proposition as to the heir being bound to make up title was not universal. We are here dealing with the case where he did make up title. Now the only person who could give him infeftment was the superior, and he was in use to do so by a deed known as a precept of clare constat. The warrant for such deed was usually, as the name denotes, the common knowledge of the superior himself that the person demanding the entry was really the heir of the investiture. But the warrant might be a retour of his service as heir exhibited to the superior, and though originally the deed following thereon was called a precept, and not a precept of clare, yet by the time that Duff wrote his Feudal Conveyancing, the deed had come to be called a precept of clare indiscriminately, whether the warrant was the private knowledge of the superior or a retour exhibited to him. If a superior, on production of a retour, would not grant the precept, there were ways—which I need not detail—of getting past him to the next immediate superior, and so on to the Crown, who never refused an entry.

Now, what was the precept of clare? It was a deed by the superior which recited the fact that the heir applying was the heir under the destination contained in the deed which regulated the lands, which deed was specified ; it narrated the tenendas and the reddendo of the original charter, or, in other words, the terms on which the lands were held of the superior, and then it appointed a bailie to proceed to the lands and give the heir heritable state and seisin there. Provided with this deed the heir by himself or his attorney went to the lands accompanied by the bailie

and a notary, and seisin was there delivered to him; the notary executed Feb. 6, 1912. an instrument or record of the transaction, which set forth the precept as the warrant and the fact of actual delivery of the seisin, and the instrument duly attested was thereafter registered in the Register of Sasines, and the title was now complete, the heir being infeft on a warrant flowing from the superior, and therefore holding public. It will be at once seen that a setting forth of the reddendo is an integral part of this performance.

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So matters remained until the Service of Heirs Act in 1847. This Act primarily simplified the process of service itself, but in section 21 it proceeded also to deal with the making up of title. It provided that service in the new form recorded in Chancery should contain a precept of sasine. This was an entire novelty, the function of a service, of which the retour was the proof, being hitherto merely to establish the character of heir. But though a novelty it was quite logical, because by section 21 it was provided that the retour with precept of sasine when recorded in the Books of Chancery should operate exactly as a disposition of the deceased. In other words, the precept in the retour was made equivalent to a precept in a disposition *mortis causa* by the deceased to the heir. If, therefore, the heir chose he could take infeftment on this precept, and record in the Register of Sasines the instrument following thereon. This holding, however, be it observed, was not public. The whole rights of the superior were preserved intact by a proviso in said section 21. The lands accordingly would, in the case supposed, be in non-entry, and the holding would not be made public and unimpeachable till the superior granted a charter of confirmation which confirmed the base infeftment. This method was not obligatory, as there was nothing to prevent the vassal forbearing to use the precept in the retour and going to the superior as before for a precept of clare, infeftment on which made his holding public at once. But again it is to be noticed that if the new method was taken, the charter of confirmation, which was absolutely necessary to perfect the title, necessarily set forth the reddendo of the original grant.

In 1858 came the great change by which it became no longer necessary to expedite instruments of sasine, but a registration of the conveyance itself operated as both the execution and registration of this instrument. The effect of this on the procedure above detailed was to make it unnecessary to execute an instrument upon the precept in the retour, and instead to allow of the registration in the Register of Sasines of the retour itself; but so far as the superior was concerned, it left things exactly as they were, i.e., a title so made up was ineffectual against him till he had confirmed it.

The 1868 Act repealed the Service of Heirs Act and the Act of 1858, but re-enacted their provisions in practically identical terms.

Lastly came the Act of 1874. This abolished the granting of charters by progress—save and except precepts and writs of clare constat—and provided that registration of the conveyance which had already been made equivalent to infeftment should also be equivalent to entry “to the same effect as if such superior had granted a writ of confirmation” (which under the Act of 1858 was equivalent to a charter of confirmation, and necessitated the exhibition by the vassal of a charter or other writ showing the tenendas and reddendo); but under the Act of 1874, section 4 (2), “such

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implied entry shall not be held to confer or confirm any rights more extensive than those contained in the original charter or feu-right of the lands or in the last charter or other writ by which the vassal was entered therein."

Let us now apply these enactments to the facts here. When Alexander Campbell, the father of the defender, served heir in special to his cousin in the lands of Dunstaffnage and others he established his character as heir under the regulating deed, or in other words his character as heir of provision under the entail of 1790; by recording the retour in the Register of Sasines he first of all, in virtue of the Act of 1868, operated an infeftment in favour of himself to the same effect as if he was under the old law disponee in a disposition from his ancestor containing a precept of sasine, had taken infeftment in virtue of the precept, and had recorded the instrument following thereon in the Register of Sasines; and he also, in virtue of the Act of 1874, was entered with his superior by having that infeftment confirmed in the same way as if under the old law he had received a charter of confirmation from the superior with all usual and necessary clauses. Now, one of the usual and necessary clauses was the reddendo. And that reddendo set forth the right and duty of the vassal to occupy and possess the Castle of Dunstaffnage, not as part of his own property, but as doing service to the superior on his property, to repair it and *patefacere* the same when called on. How then in the face of this title—and that is the only title he has got—can the vassal be heard to say, "I do not ascribe my possession to the duty which is set forth in the reddendo of the title under which I hold, which possession is in law the possession of my superior; but I ascribe my possession to my clause of parts and pertinents which is a possession antagonistic to my superior, and has the effect, after the years of prescription be run, of enlarging the grant which I originally got"? It is just as if A took a lease from B, and then proceeded to say, "I ascribe my possession to another better and inherent title in myself." Of course the mere fact of taking a lease will not prevent A showing that he has another and superior title. But that title will have to prevail *ex proprio vigore*, and it cannot be justified by the possession which was given and accepted under the lease. So in a case with a superior, a vassal may quarrel with his superior as to the right of property in a certain subject. He may show that he has an express right to it contained in a title flowing from someone else, and he may show that that title will prevail against the superior's title *proprio vigore*, or he may show that he has had prescriptive possession on that title; but if the latter, he must be able to show that the possession was attributable to that title, and not to the title he took from the superior, if the true construction of the title he took from the superior left the subject with the superior and did not give it to him.

The method which the judgment under review adopted of assuming that, because possession of the castle is concurrent with a title which gives parts and pertinents, therefore the possession must be ascribed to the parts and pertinents is not only wrong as I think on clear principle, but it is directly in the teeth of the judgment of the House of Lords in the well-known and authoritative case of the *Lord Advocate v. Hunt*.¹ To quote

¹ 5 Macph. (H. L.) 1.

the words of the Lord Chancellor,¹ "The title under which the possession commenced may have been an infirm and invalid one, but if the party can show that he has possessed the subject of the infeftment for forty years he is safe from all future interruptions. So the subject claimed need not be expressly mentioned in the charter, but may be comprehended with the terms 'parts and pertinents.' But in such a case it will not be sufficient to prove that the alleged pertinent has been occupied with the principal subject; it must be occupied as belonging to such subject; for when the statute says that the parties must be 'able to show and produce a charter of such lands and other foresaids granted to them,' it seems clear that something more is necessary to be proved than a joint possession of the principal subject of the charter with that which is alleged to be a part and pertinent to it." The House of Lords, agreeing with Lord Deas and the Lord Ordinary, Lord Mackenzie, held that Mr Hunt had not discharged the onus of showing that his possession of the Palace of Dunfermline (which was undoubted) was really ascribable to the clause of parts and pertinents in his barony title of the lands of Pittencreeff. On the facts it seems to me that this case is really *a fortiori* of that.

That case is also particularly instructive as showing that all the Lords, except perhaps Lord Ardmillan, thought themselves not only justified, but bound to inspect the whole progress of the defender's, Mr Hunt's, titles far outwith the prescriptive period. Now, in that case the titles disclosed no possible reason for possession except possession as part and pertinent. In other words the only alternative was mere usurpation without a title at all. Whereas here, the moment you look at the defender's title, expanded from the shorthand form, you find an obvious reason for possession consistent with the view of the superior and inconsistent with the idea of possession as a part and pertinent. Moreover, the two last findings expressed in Lord Deas's opinion might be taken literally, substituting "fortalice" for "palace" and "lands of Pennycastle of Dunstaffnage" for "barony," and applied to this case. "I am of opinion," he says, "(2) that it does not appear, as matter of fact, that the possession had of the palace for the prescriptive period was possession as part and pertinent of the barony; (3) that, as matter of law—although *bona fides* is not required in the long prescription—a party cannot prescribe in the face of his own title; and here the defender's titles show, upon the face of them, that the palace was neither part nor pertinent of the barony." By this he necessarily means the whole titles; and here the whole titles are such that in view of the law as it then stood, it was a feudal impossibility for the fortalice, as at the date of the original grant, to be included under the general words of part and pertinent of the lands.

There is another way of putting what in truth is only another aspect of the same thing, which perhaps it may be as well to add. If there is one thing better fixed than another in our law of prescription, it is that possession must be adverse, that is to say, that the party against whom it is pleaded must have been in a situation to oust that possession if *his* title was good. The numberless decisions on the plea known as *non valens agere* are all illustrations of one form of this general proposition. As Lord Braxfield

¹ 5 Macph. (H. L.) 1, at p. 6.

Feb. 6, 1912. with a procuratory of resignation, and made no mention of the charter. On his death his brother Duncan by general service came in right of the procuratory upon which he expedite a charter of resignation on which he was infest. He afterwards upon his own resignation obtained a Crown charter upon which he was infest, and then conveyed the superiority to Munro of Novar. None of the titles contained any reference to the charter of 1708. The pursuer—who was the grandson and heir of Sir Harry, the son of the original disponent,—brought an action against Duncan and Munro of Novar, his disponent, in which he sought reduction of all the later titles, as inconsistent with the original disposition, and declarator that he was entitled to a conveyance on payment of 1000 merks. The defence was title to exclude as on the positive prescription, and want of title in the pursuer as upon the negative prescription. Both defences were held good by the Court.

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Now, here there was no question as to possession at all. The point was that there had been infestments proceeding on precepts of clare from 1765 down to date 1812, *i.e.*, for the forty years, and it was held that that being so, the defender might stand on them without producing and referring to the original charter of 1708; just as he might if the charter of 1708 had been lost. But that is miles away from the proposition that you could not look at the precepts of clare to see the terms of the holding. Here there was of course no question with the superior at all. So the words of Lord Meadowbank—"He produced what the law held to be an exclusive title, and he is the judge whether he will produce any further title or not; And, *quoad* all the world, the charter is to be held as not extant if he does not chuse to found upon it,"—must be taken as all words in judgments must be, *i.e.*, *secundum subjectam materiem*. Lord Meadowbank never meant to say anything so absurd as that, in a question with the superior, you could look at nothing but instruments of sasine if you could allege a prior possession for forty years. The absurdity of such a proposition is perhaps best pointed out by showing that it would necessarily lead to the vassal being able to refuse payment of the feu-duty. For an instrument of sasine never did and never could bear any reference to the feu-duty, which is naturally mentioned in the reddendo, which no instrument of sasine in ordinary form ever mentioned, it being, as I have said, the evidence of delivery under a title but not a title itself. And it is settled beyond all contradiction that no continuation of non-payment of feu-duty for the years of prescription will ever free the vassal from the payment when demanded, though, of course, the negative prescription will cut off at the proper time an action for arrears—see also *Campbell*.¹

Lastly, it is to be observed that cases of the class of *The Isle of Sleepless*² and *Auld v. Hay*³ do not touch the first question. In the latter of these possession *qua* owner was admitted; in the former it was allowed to be proved. But both were cases between third parties, and no question could be raised in *Auld v. Hay*³ as to what was the character of possession. Lord Deas, who agreed in *Auld v. Hay*,³ was the very Judge who had insisted

¹ 5 Brown's Supp. 812.

² Magistrates of Perth v. Earl of Wemyss, (1829) 8 S. 82.

³ 7 R. 663.

on the necessity of showing that the possession could be referred to the title in *Hunt's* case.¹ No one doubts that if your title is *habile*, i.e., is a title at all, and does not contain the idea of the exclusion of the subject on the face of it, you may prescribe something that is included *per expressum* in the titles of another, whether that other is your superior or not. But to do so you must show exclusive possession clearly referable to the title you say includes it, and you can never prevent the opponent from showing from your own title that your possession was given you as an agent for another.

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The result is that in my opinion the decree of absolvitor is wrong, and the pursuer is entitled to a declarator of property. But it follows from what I have said that he is not entitled to any decree of exclusion, for the defender is charged by the titles flowing from and continually renewed by the pursuer's authors with the very duty of occupancy which a decree of exclusion would shut him out from. The result, as I said, is therefore to settle nothing, for there is no real dispute between the parties so soon as the extreme claims are denied to both.

I therefore propose to your Lordships that we should decern in terms of the first conclusion, and assoilzie the defender from the second conclusion.

The proposed amendment on the second conclusion for the pursuer was only made after the case had been nearly all heard, and comes too late; and, further, does not go to clear up any existing dispute between the parties. I am, therefore, for not admitting it. As both parties have over-pleaded their case, I think there should be no expenses found due to either party.

LORD JOHNSTON.—The leading conclusion of the summons is that “the Castle of Dunstaffnage, with the whole houses, buildings, gardens, yards and other enclosures and pertinents thereof lying within the lordship and barony of Lorne and county of Argyll, pertain and belong heritably in property to the pursuer,” the Duke of Argyll. That is a positive proposition. But there is a second conclusion which involves a negative counterpart of the above, viz., “That the defender the said Angus John Campbell has no right or title of any kind in and to the said Castle of Dunstaffnage, houses, buildings, gardens, yards and other enclosures thereof, or any of them.” It was proposed after the debate to add to this conclusion the words, “except in so far as he may require to enter into or occupy the same for the fulfilment of the prestations due by him for the lands of Pennycastle and others under and in terms of his titles thereto.” I agree that that amendment comes too late. But I do not think that, had it been allowed, it really would have substantially altered the case as submitted to us, while it would have called for an answer, and led to further debate.

I pass over the operative conclusion which follows the declaratory, as it is not pressed.

I have specially noted at the outset these double or counterpart conclusions, because I think, first, that in the result his Grace succeeds in supporting the positive proposition and in establishing his right to the bare declarator of property, but fails in sustaining the negative proposition and

¹ 3 Macph. 426.

Feb. 6, 1912. establishing his adversary's entire absence of right, and therefore his own exclusive right; but, second, that though in the process there is probably material for determining what is the measure of the defender Angus John Campbell's subordinate right, there are not in the summons, and would not have been even if amended as proposed, any *termini habiles* for declaring it. This arises from the fact that the parties both in pursuit and defence have attempted a higher flight than their wings will carry them.

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There is a secondary question, which also I think we can hardly reach in the present record, viz., the limits of application of the positive declarator which the pursuer seeks to obtain, that is to say, what is included in the castle and its pertinenta.

I do not think that any good purpose would be served by detailed consideration of the record, particularly as it does not disclose the defender's real line of defence as it was developed in argument. Suffice it to say that the pursuer founds his right to the Castle of Dunstaffnage and its pertinenta on his title to the lands, lordship, and barony of Lorne, which goes back to 1470. He describes the defender as his vassal in the lands of Pennycastle of Dunstaffnage and others, which admittedly surround, but, it is maintained, do not include, the castle and its pertinenta, in support of which he points to the reddendo for the said lands in the original grant to the defender, which includes, *inter alia*, the safe keeping and maintenance of the granter's said castle of Dunstaffnage to the effect set forth in the charter of the lands. While the conclusions of the summons ignore any such right, the condescendence substantially admits a heritable keepership, and this was, I think, conceded in argument.

The course which the pursuer found himself bound to take,—though I think that he has unfortunately allowed himself to be led to take up somewhat too extreme a position,—was deemed to be imposed upon him by the equally extreme and untenable contention of the defender. The latter's attitude is shortly put in answer 13: "Explained that the right of the defender in the castle is a right of property and a right of possession."

The defender having set forth his title, states the two pleas: "2. The defender having, in virtue of his title, good and undoubted right to the Castle of Dunstaffnage as part of the lands of Pennycastle of Dunstaffnage, should be assoilzied from the conclusions of the summons. 3. The defender and his predecessors, having possessed the Castle of Dunstaffnage along with the lands of Pennycastle for the prescriptive period under the titles referred to, should be assoilzied from the conclusions of the summons." The pursuer's answer is contained in his first two pleas: "1. In respect of his titles to the lordship and barony of Lorne, the pursuer is entitled to decree in terms of the conclusions of the summons. 2. The defender is barred by the terms of the titles to his estate from insisting in his present defence." These pleas indicate, I think, correctly and completely the lines on which consideration of the case may be most conveniently approached.

First, then, how stands the pursuer's title? During the century or two centuries which preceded 1470, Argyll, which then included Argyllshire and Inverness-shire and the Isles, was only in course of being reduced to an integral part of the kingdom of Scotland, and being changed from a

Celtic to a feudal tenure. And even in the end of the fifteenth century Feb. 6, 1912. one has some hesitation in applying to things Ergadian the strict rules of the feudal law as they are handed down in the standard authorities. ^{Duke of Argyll v. Campbell.} What the precise position constitutionally of the lordship of Lorne prior to 1470 was, it is impossible to ascertain with any approach to historical ^{Ld. Johnston.} accuracy. From practical independence it had passed through semi-dependence into more close relations with the Crown, as feudal superior rather than as sovereign, when in 1470, on the partition of the possessions of the Stewart lords of Lorne by a family arrangement, when the male line of the Stewarts failed, Colin, first Earl of Argyll, obtained the lordship of Lorne as his share by virtue of his marriage to one of the heirs female. More than this cannot be said, and I only refer to it as bearing on the position of the Castle of Dunstaffnage. It has always been reputed a royal castle. But I more than doubt whether it ever was so in the proper sense. It was the chief strength of the lords of Lorne, and so far royal as they were independent. But it was not erected by licence of the Scottish Crown, and never apparently passed into the hands of the Crown.

Accordingly, when in 1470 the lordship of Lorne was transferred from Walter, Lord of Lorne, to Colin, Earl of Argyll, the Crown charter granted in the latter's favour, on a resignation *in favorem*, bore to confirm "totum et integrum dominium de lorne cum tenentibus et tenandiis ecclesiarum donationibus pendentibus castris fortaliciis et pertinentiis eorundem"; and *castra* or *castella et fortalicia* appear in the *quæquidem* and all the formal clauses of the charter, which for purposes of infeftment unites the subject of the grant into a barony. Dunstaffnage is not named, but was undoubtedly the chief fortalice, and included among the *castra* and *fortalicia* generally conveyed. There was a good deal of discussion on the old feudal law of property in castles, and citation was made of Craig, Stair, Erskine, and Walter Ross, &c. But I do not think that it is necessary to give any detailed consideration to this subject. The authorities say that fortalices were, *inter regalia minora*, by feudal custom appropriated to the sovereign, and not "presumed to be conveyed by the charter unless it be expressed"¹; or, as Mr Erskine further explains, they were naturally pertinents of lands, but by feudal custom were understood to be excepted from the grant unless expressed. Be it so, the charter of 1470 to Colin, Earl of Argyll, is a sufficient expression of the grant of fortalices to carry any particular castle, subject always to the operation of the rules of prescription. It is important to note, however, what Stair says,² "By fortalices are understood, all strengths built for public defence whether that appear by common fame or reputation, such as all the King's castles, whereof many are now in private hands, as proprietors, or heritable keepers thereof, or constables of the same"; and then as examples of the former class he gives "such as the castles of Dunstaffnage, Carrick, Skipness, and others belonging to the Earl of Argyle," and of the latter class, "the constabulary of Forfar belonging to the Earl of Strathmore; the constabulary of Dundee, &c." Writing thus in or about 1681, Stair, while I think in error in assuming it ever to have been a royal castle, recognises Dunstaffnage as now in the

¹ Ersk. ii. 6, 13.² II. 3, 65.

Feb. 6, 1912. private hands of the Earl of Argyll as proprietor. And this is consistent with the charter of confirmation of the barony and lordship of Lorne, enlarged by further acquisitions, by James V. in favour of Archibald, fourth Earl of Argyll, in 1540. Two things are to be noted. While *cum castris, turribus, fortaliciis, &c.*, follow as formerly the grant of the lands and lordship of Lorne, &c., there are expressly added to the old lordship and barony "Terras et baroniam de Kilmun, Terras de Bordland cum custodia castri de Donune," and also "totas et integras terras et baroniam de Kilmychell cum custodia castri de Swyne," drawing thus a distinction between the Castle of Dunstaffnage and other castles within the lordship, and the castles of Dunoon and Swyne in the lands and baronies added to it. And further, after erecting and uniting the lands confirmed in the charter into a new and extended barony and lordship of Lorne, the charter ordains the Castle of Dunstaffnage to be the principal messuage of the lordship and barony, at which sasine of the whole might be taken. And this at a date subsequent to that at which the defender's title to the castle is alleged to commence.

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It is unnecessary to refer to the titles which raise the estate from a lordship to an earldom and from an earldom to a dukedom. It is enough to say that they preserve the above distinction between the tenure of the various castles within the bounds, and that, while they recognise Inveraray as the principal messuage, they still retain a separate reddendo for the barony and lordship of Lorne of 1540, payable at the Castle of Dunstaffnage. If, then, the Castle of Dunstaffnage was from 1470 vested in property in the Argyll family, whatever its previous history be, equally it was from that date alienable as any other heritable property. It is on that ground that I think it beside the mark to consider further the law regarding royal castles.

The defender maintains that the Castle of Dunstaffnage is now his property by virtue of his title or by virtue of possession under his title. There are a series of what I may for shortness call changes in the situation which it is convenient here to note:—(1) The grant to the defender's predecessor in 1502; (2) the re-grant in 1667 after the forfeiture and rehabilitation of Argyll; (3) the passing of the Clan Act in 1747; (4) the entail of Dunstaffnage in 1790 and charter of resignation following thereon in 1815; and (5) the present title, which, if the years of prescription only are looked to, stands on the decree of special service in favour of defender's father in 1880, and the similar decree in his own favour in 1908.

I do not think that it would be doing justice to the strength of the defender's case, as developed in argument, if I was to take his defence based upon title alone,—as would otherwise be natural,—because he is entitled to stand on a prescriptive title, and need not produce more than composes his prescriptive title. A prescriptive title is an exclusive title, and precludes the examination of anything which precedes it, and therefore to examine first what precedes it would make it difficult to concentrate attention on the prescriptive title itself. But then the prescriptive title must be habile to sustain prescriptive possession, by which I understand intrinsically valid and *per se* sufficient to support the possession which is attributed to it. Hence the defender is entitled to require that the title on which to

found prescription be examined without reference to prior titles, but at the Feb. 6, 1912. same time he must show that this title is sufficient to sustain prescriptive possession, and that the possession on which he founds has been possession on such title. It follows that to give proper consideration to the defence it is convenient, if not necessary, to work backwards on the five points which I have noted above, and I shall therefore take them in their reverse order.

1. First, then, the defender alleges prescriptive possession for twenty years on recorded decrees of special service in favour of his father in 1880 and himself in 1908.

The alternative title for prescription under the statute of 1617 (cap. 12) appropriate to the case of an heir on which the defender founds, is thus expressed: ". . . or where there is no charter extant, that they show and produce instruments of sasine, one or more, continued and standing together for the said space of forty years, either proceeding upon retours or upon precepts of clare constat." The period is now twenty years, under the Conveyancing Act, 1874, sec. 34. Two things have been decided. The party pleading prescription on an instrument of sasine cannot be required to produce a charter, even if it exists (*Munro*),¹ and cannot be required to produce the retour or precept of clare, or to "instruct" such "otherwise than by the relation of the sasine (*Earl of Argyle*)."² But no case has as yet, so far as I am aware, occurred where the title has been made up by service in modern statutory form by which the instrument of sasine disappears and the recorded decree of special service takes the place of retour and sasine, so that there is nothing to represent the instrument of sasine, unless it be the extract of the recorded decree.

The difficulty which occurs in applying the rules of prescription to a title made up in this modern shorthand way will be apparent from an examination of the decrees of service founded on by the defender. On such examination a question at once arises under the provision of the 34th section of the Conveyancing Act, 1874, which prefaces the reduction of the years of prescription, and is meant to bring the statute of 1617, cap. 12, into accordance with modern methods of making up title. It says, "Any *ex facie* valid irredeemable title to an estate in land recorded in the appropriate Register of Sasines shall be sufficient foundation for prescription," and proceeds to provide that possession following on such recorded title for twenty years shall for the purpose of the Act, 1617, cap. 12, be equivalent to possession for forty years "by virtue of heritable infestments for which charters and instruments of sasine or other sufficient titles are shown and produced, according to the provisions of the said Act." What is the "*ex facie* valid irredeemable title" which is to stand for the infestment of former times? The importance of the question lies in this, that where title is made up by service under the Conveyancing Acts, 1847-74, the proposition above stated, viz., that you cannot look beyond the instrument of sasine, is at once challenged on the ground that its equivalent, the recorded decree, is not a title self-contained, but a title by reference. My

¹ May 19, 1812, F.C.

² M. 10,791, at p. 10,793.

Feb. 6, 1912. meaning will be plain if I refer to the actual decree of service in the present case.

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The decree of service of the defender in 1908 finds "that the late Alexander James Henry Campbell of Dunstaffnage, and nineteenth hereditary captain of the royal castle of Dunstaffnage in the county of Argyll" (this is the first instance in which the hereditary captaincy is introduced into the title, or the quality "royal" asserted for the castle, and I think it may be discarded, as merely foreshadowing the rise of the present dispute), "died on or about the ninth day of March 1908, last vest and seized in . . . As also in All and Whole the lands of Penny Castle of Dunstaffnage, Penny Chenich, the one penny land of Gannivan, the one penny land of Penginaphuir, the one penny land of Garpengerie, the one penny land of Kilmore, and the one penny land of Davagavach, with the pertinents lying in the lordship of Lorne and sheriffdom of Argyll; together with the office commonly called Marnichty . . . Conform to extract decree of special service of the said Alexander James Henry Campbell, as nearest lawful heir of tailzie and provision in special of the late Sir Donald Campbell, third and last baronet of Dunstaffnage [dated 22rd February and recorded 20th April 1880]; but always as regards the whole of the said lands with and under the whole conditions" of the entail of 1790. And then the said decree finds "that the petitioner is the eldest son and nearest and lawful heir of tailzie and provision in special of the said Alexander James Henry Campbell in the lands and others foresaid under and by virtue of the said deed of entail"; and therefore serves him as such in the said lands under the conditions of the said entail.

Passing back to the service of the defender's father in 1880, we find that it sets forth that his predecessor Sir Donald, the last baronet, died last vest and seized as heir of the late Sir Angus Campbell, Bart., in the lands of Pennycastle of Dunstaffnage, &c., described in the same words as in the service last mentioned, "conform to writ of clare constat by His Grace George Douglas Glassell Campbell, Duke of Argyll" in his favour dated 20th and recorded 25th April 1865, but always under the conditions of the entail of 1790.

If these two writs are to be treated as self-contained, and not importing by reference, the first mentioned the prior service, and the second the prior precept of clare, it is obvious that the infeftments upon them by recording would be heritable infeftments in certain specified lands with their pertinents upon which possession might follow, and I assume has followed in fact, reserving the question whether the possession of the castle can be attributed to such infeftments. But before that question is reached it has, I think, to be determined whether they are in themselves, in the sense of the Act of 1874, "valid irredeemable titles to an estate in land" beyond which, in applying the law of prescription, it is incompetent to look. Personally I do not think that anything can be so described which does not link on with the superior, or show or give the means of ascertaining the tenure. Shorthand as the statutory conveyancing may be, this link would be afforded by the intrinsic reference back to the prior deeds of transmission if it is competent to look at them. Light, I think, upon this point is afforded by examining the history of modern statutory conveyancing.

In 1847 was passed the Act amending the law and practice of service of Feb. 6, 1912. heirs in Scotland. It ended the practice of service by brieve from ^{Duke of} Chancery, or otherwise than as according to the provisions of the Act, ^{Argyll v.} and substituted a petition of service to the Sheriff, including the Sheriff of ^{Campbell.} Chancery. The form of petition of special service prescribed in Schedule Ld. Johnston. B contains the words "last vest and seized in . . . conform to charter [or disposition or precept of clare constat or whatever else was the deed on which the ancestor's infeftment proceeded here specify it], dated and to instrument of sasine following thereon recorded" But at the same time section 4 of the Act enacts that it shall not be necessary to set forth in the petition, *inter alia*, of whom the lands are held, or by what service or tenure they are held; section 5 that the conditions of any entail need not be inserted at length, but only by reference in the petition of service and decree following thereon; and section 6 that real burdens, conditions, or limitations, appointed to be fully inserted in the investiture of such lands, need not be fully inserted, but also only by reference. Sections 9 and 10 make the petition of service equivalent to the former brieve and claim, and the Sheriff's judgment thereon to the verdict of the jury under the brieve of inquest. By section 12 the Sheriff's judgment was to be recorded in Chancery and an extract transmitted and delivered to the party serving, and by section 13 the decree of service so recorded and extracted was to have the full legal effect of a service duly retoured to Chancery, and to be the equivalent of a retour of a service under the brieve of inquest, and the extract the equivalent of the certified extract of the retour.

Such being the new and simplified procedure introduced by the Act of 1847, section 21 contains a provision regarding the completing of the feudal title of the heir so served, which is all-important to the present question. Reading it shortly, every decree of special service shall contain a precept of sasine, and when recorded and extracted shall have the effect of a disposition in ordinary form by the party deceased and last infeft in favour of the heir so served, and to his other heirs entitled to succeed under the destination of the lands contained in the deceased's investiture thereof, but under the whole conditions and qualifications of such investiture as set forth or referred to in such extract decree of special service containing obligation to infeft by two several infeftments and manners of holding, the one *de me* blench of the deceased and his heirs, and the other *a me* under the immediate lawful superiors in the same manner that the deceased, his predecessors and authors, have or might have holden the same, "and that by confirmation"; and in order that such sasine might be so taken by, and the feudal title be completed in, the person of the heir so serving, it was made lawful for him to use such decree of special service in the same manner and to the same effect as if such decree were actually a disposition of the nature above mentioned, but all "without prejudice to the right of the superior to require such heir to enter forthwith as accords of law, and to deal otherwise with such heir as a vassal unentered." Lastly, section 26 left the practice of entering by precept of clare unaltered.

It is unnecessary to go back in detail upon the practice prior to the Act of 1847. It is sufficient to say that the more elaborate procedure ended in

Feb. 6, 1912. a retour, but that while the retour operated a transference from the deceased to the heir, it did not operate an investiture of the heir. For that the intervention of the superior was requisite, and could be compelled, *e.g.*, under 20 Geo. II. cap. 50, section 12. The customary mode of entry had come to be by precept of clare constat. The production of a retour was often dispensed with by the superior, but production of prior titles to show the holding was always required. On the precept infeftment was taken; hence the position of the superior was amply protected. It was equally so, as is shown above, under the procedure introduced by the Act of 1847, for not only must the conditions and qualifications of the investiture be set forth or referred to in the extract decree of service, but the infeftment effected by recording such decree remained base and therefore did not affect the superior till confirmed; and reference may be made to section 6 of the relative Transference of Lands Act, 1847, cap. 48, under which confirmation might be compelled, but "Provided also, that such superior shall be entitled to insert in the charter to be granted by him the clauses of tenendas and reddendo contained in the former charters of such lands and heritages, and all other clauses and conditions contained therein, in so far as the same are usual and necessary, and are not set forth in such instrument of sasine, or duly referred to in terms of this Act, or of an Act passed in the present session of Parliament intituled" the Service of Heirs Act, 1847 (10 and 11 Vict. cap. 47). The purpose and effect of section 21 of this Act is examined and explained in the case of *Moreton's Trustees*.¹

The Titles to Land Act, 1868, consolidated and superseded the prior modern conveyancing statutes. In services, the procedure of 1847 was substantially retained, and section 46 replaced section 21 of the Act of 1847. But section 46 was expressed in somewhat different terms. Eliminating all reference to the case of lands held burgage, it provided, reading it shortly, that every recorded and extracted decree of special service should be equivalent to a disposition in ordinary form of the lands contained in such service by the deceased last vest and seized in the lands in favour of the heir served and the other heirs of investiture, "but under the whole conditions and qualifications of such investiture as set forth or referred to in such extracted decree, containing the various clauses set forth in No. 1 of Schedule B hereto annexed." Now, these clauses are "With entry at the term of . . . ; to be holden the said lands and others . . . a me (or a me vel de me, as the case may be), and I resign the said lands and others . . . for new infeftment or investiture." Section 46 then proceeded to provide for completion of the feudal title or investiture in the person of the heir so served in the same terms and to the same effect as did section 21 of the Act of 1847, including the "without prejudice to the right of the superior to require the heir so served . . . to enter forthwith as accords of law, and to deal otherwise with the heir so served and his heirs . . . as vassals unentered." The position of the superior therefore remained conserved under the Act of 1868, in the same manner as under that of 1847.

I come now to the effect on the situation of the Conveyancing Act, 1874,

¹ 16 D. 1108.

abolishing direct entry with the superior by a writ of progress, and substituting the implied entry of section 4 of the Act. The implication is that (subsection 2) by the registration of his writ of transmission the vassal shall be held to be "duly entered" with his superior "to the same effect as if such superior had granted a writ of confirmation according to the existing law and practice . . . but such implied entry shall not be held to confer or confirm any rights more extensive than those contained in the original charter or feu right of the lands, or in the last charter or other writ by which the vassal was entered therein." And further (subsection 3), "All the obligations and conditions in the feu rights prestable to or exigible by the superior, in so far as the same may not have ceased to be operative in consequence of the provisions of this Act or otherwise, shall continue to be available to such superior in time coming." Hence I think it is clear that, notwithstanding the effect of the Act of 1874 upon section 46 of the Act of 1868, and the modification of the decree of special service consequent thereon, and especially the elimination of the right of the superior to require the heir served "to enter forthwith as accords of law," the position of the superior is preserved as it stood under the Act of 1868, and in particular that neither the infeftment on a special service nor the implied entry now involved in recording the retour of such service can, prescriptive possession or no prescriptive possession, obviate recourse to the last writ of investiture. I therefore conclude that the services of 1880 and 1908 cannot be regarded as either of them *per se* an "*ex facie* valid irredeemable title" on which prescription can run, without importing by reference the conditions and qualifications of the investiture. This they do in a sufficient though sketchy manner: that of 1908 by stating the last vassal, Alexander James Henry Campbell, to have been infeft conform to the extract decree of special service in his favour of 1880, and that of 1880 by stating Sir Donald, the last preceding vassal, to have been infeft conform to writ of clare constat by the pursuer's predecessor in his favour dated in 1865. When the writ of clare constat of 1865 is examined, it is found that it proceeds on a decree of special service or retour in favour of Sir Donald as heir of his brother Sir Angus, and declares the lands embraced are "to be holden of me, my heirs and successors, in manner and for payment of the duties specified in the precept of clare constat in favour of the said Sir Angus Campbell before mentioned." That precept, again, was granted in 1851, and does not, as subsequent ones do, import the tenure merely by reference. On the contrary, it sets it forth thus: that Sir Donald Campbell (the first baronet, father of Sir Angus) died last vest and seized in All and Whole the lands of Penny-castle, &c., but always with and under the conditions and limitations of the entail of 1790; that Sir Angus was his eldest son and nearest heir of tailzie and provision, "and that the foresaid lands with the fishings and pertinents are held of me and my heirs and successors in feu-farm, fee and heritage for the annual payment by the said Sir Angus Campbell and the heirs of entail succeeding to him" (then follows an enumeration of the feuduties substituted for the ward services abolished by the Clan Act of 1747): "Moreover, the said Sir Angus Campbell and his heirs shall be bound to open the said Castle of Dunstaffnage to the said Duke and his foresaids at all times whensoever they shall be required thereto, as also

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Feb. 6, 1912. that they shall supply the said Duke and his heirs and successors annually with peats and elding for vaults, and bakehouse and brewhouse, and hall, as often as the said Duke and his heirs shall happen to be therein, as also the said Sir Angus Campbell and his foresaids shall be bound to maintain all the houses and buildings of the said Castle of Dunstaffnage in all time coming upon their own proper charges and expenses, and whatever buildings are erected therein or shall be erected they shall be bound to maintain in sufficient repair the feuars and tenants of the said Duke in the lands of Lorne, which were formerly in use to supply service for the said Castle of Dunstaffnage, shall always be bound to the same services in future towards carrying all necessities for the maintenance and repairing of the said castle as use is, and likewise the tenants of the said lands performing service at the said Castle of Dunstaffnage as often as the said Duke and his foresaids shall happen to be thereat and when they shall be required thereto with the others of the said feuars and tenants of the said Duke of the other lands in Lorne according to use and wont."

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The services of 1880 and 1908 cannot therefore be regarded as "*ex facie* valid irredeemable titles" in the sense of the Act of 1874, section 34, except as incorporating by reference this last clause. If that clause be read into them, it follows, I think, that the title is not sufficient to sustain the possession, *qua* proprietor, of the castle, which is attempted to be attributed to it, for the clause in the reddendo, which bears on the vassal's obligation regarding the castle, is not consistent with a full right of property. It must be read along with and as qualifying the description of the lands.

Further, to support prescription there must be a *habile* title. By *habile* I understand to be meant a title which, though it does not in terms bear to convey, is conceived in terms capable of being construed as conveying the subject in question. It may be general, indefinite, or even ambiguous, so that it remains doubtful whether the particular subject is conveyed, or what is the extent of the subject conveyed. But if the title is couched in terms susceptible of a construction which will embrace the subject in question, that is enough. Prescription intervenes and does the rest. More shortly put, the party pleading prescription need not produce a title which *ex facie* comprehends, but only one which may comprehend (*per* Lord Justice-Clerk Moncreiff, in *Auld v. Hay*, 7 R. 663). The door is then open for prescriptive possession. Where the title is thus *habile*, inquiry into more ancient writs is excluded.

Now a precept of clare or a special service describing the lands as All and Whole the lands of Pennycastle of Dunstaffnage, &c., is general and indefinite, and I am even prepared to say ambiguous, for the lands of Pennycastle of Dunstaffnage rather indicate something distinct from than identified with "the castle and one penny land of Dunstaffnage," which, having regard to the importance of the castle, is the description which would naturally convey what the defender contends. The expert witnesses engaged appear to consider the lands of Pennycastle as equivalent to the one penny lands of the castle, and fail to see any distinction between lands described as the lands of Pennycastle, and again of Pennychenich, and those described as the one penny lands of Gannivan, the one penny lands of Penginaphuir, &c., which follow in the enumeration of lands. If there were no such contrast

I would concede that the affix "penny" had reference to an old Celtic Scandinavian division of land for purposes of taxation, and that the lands of Pennycastle of Dunstaffnage might mean the one penny lands of Dunstaffnage Castle. But I venture to think that the affix "Penny" in Pennycastle is something quite different, and is descriptive of some local peculiarity of situation or formation. This is not by any means the only Pennycastle in Argyllshire. Pennycross and Pennygael in Mull are also well known. There is also a less important Pennymore on Lochfyneside. The suffix "more" is in itself contradictory of the idea of a one penny land.

But the terms of the description are capable of construction as including the castle and its site. Hence, had the writs founded on contained nothing else, I should have been prepared to say that a habile title had been produced and that the only thing that remained was to examine the possession alleged. But the precept of clare to which the services revert by reference contains something more than the mere description above quoted. It contains a clause in the reddendo, which, though it does not definitely speak of the castle, makes provisions which are quite inconsistent with its being conveyed with the lands of Pennycastle in absolute property to the vassal. Hence it is that I have examined the conveyancing so particularly, the result of the examination being, in my opinion, that the writs adduced to found prescription cannot receive such a limited reading, but must be construed as importing by reference that which renders the title inhabile to support prescription, for it renders it incapable of including the castle and its site in property, though leaving it uncertain what the precise rights in the castle are, and relegating that question to what other proof there may be.

In this conjunction I may refer to the case of *Hutton*¹ where Lord Cowan (Lord Neaves agreeing) expressed *obiter* a similar opinion. Though it was not necessary for the disposal of the case, he stated that he was disposed to think that there was no habile title for prescription, because the title by referring to the original feu-charter and to the ancient rights and infestments might be held to be *in gremio* qualified and restricted.

But the alleged prescriptive title is one "with pertinents"; and it is said, be it that the castle is not included in the description "the lands of Pennycastle of Dunstaffnage," it is one of its pertinents, and has been possessed as such. Whether a royal castle or not, Dunstaffnage Castle was in 1470 the property of Argyll, and I cannot gainsay that, whatever might have been held by our predecessors prior to the '45, for the last century, and probably more, it must have been deemed capable of passing as a pertinent. But then arises the question, Has the possession been as of a pertinent? I do not feel perfectly confident in the correctness of the following distinction between a title which is capable of being construed as including a subject, and one which cannot be so construed but of which the subject may be a pertinent. In the former case, I think, if the description in the title is capable of being construed as including the subject, the title precludes inquiry into more ancient writs. If the possession is consistent

¹ 2 Macph. 79.

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with the title so construed, that is sufficient. But in the latter case the question must, in my opinion, always arise, Is the alleged possession attributable to the title adduced or to something else? For possession of the so-called pertinent may be on a totally different title. In that case there is no ground for restricting proof to the prescriptive period or for refusing to look at more ancient writs, which may throw light on the possession of the alleged pertinent. For they would not go to affect the title, which must be accepted as habile to sustain prescription. They would go to the very different question whether the possession which might quite well have been under the title, has not been really under something else. This I humbly understand to be the explanation of the case of *Lord Advocate v. Hunt*,¹ and its reconciliation with the other decisions on prescription, such as *Auld v. Hay*.² Like the seashore in *Agnew v. Lord Advocate*,³ there is *ex hypothesi* no presumption that the castle is a pertinent of the lands, but it may be proved such by possession. Yet the question remains, Did the possession follow on the grant of the lands or on something else? That it did follow on something else will be seen to be clear when the matters bearing on the other points to be considered come to be examined.

2. The next step backwards is the entail of Dunstaffnage in 1790 and charter of resignation thereon in 1815. I confess it is a little difficult to follow the argument founded by the defender on the entail. It entails his lands according to the usual description, and it expressly excludes "Dunstaffnage Castle, or other principal family mansion-house for the time, the offices and gardens thereto belonging, and the five enclosures next adjacent thereto consisting of about sixty-five acres Scotch measure, and the large and small islands also adjacent thereto," from the lands to be localled for a liferent infestment or annuity in favour of a wife or husband of an heir of entail, and also from the power given to lease the lands. This is read as an assertion of a right of property in the castle and its precincts, and I am willing to accept it as such, though I cannot but recognise that it is susceptible of another construction, viz., that as regards the castle and its adjuncts, whatever might be the case with another mansion-house, it is an acknowledgment that it could not be included in the locality lands or let by reason of the title of possession not being a title of property. But giving it the defender's reading, it is not the entail which affects the superior, but the charter by progress which follows on the entail. Though I cannot say that the Duke's rights were very well understood or attended to by his commissioner, Mr Ferrier, P.C.S., still, in the first place, a superior cannot be hurt or a vassal's right enlarged by a charter by progress—*Hutton*⁴; and, in the second place, the charter of resignation just contains that saving clause inconsistent with the Castle of Dunstaffnage being included in property in the subjects conveyed, and explaining its exclusion from a locality of lands in a liferent provision. I cannot, therefore, see that the defender takes much from the terms of the entail. If his contention comes to anything, the terms resolve at best into an adminicle of evidence of possession inconsistent with the title.

¹ 3 Macph. 426, and 5 Macph. (H. L.) 1.² 11 Macph. 309.³ 7 R. 663.⁴ 2 Macph. 79.

3. There is next the Clan Act of 1747, the same which has already been Feb. 6, 1912. cited for another purpose as the Act 20 Geo. II. cap. 50. I need not do more than note that there is produced a precept of clare by the third Duke of Argyll in 1745, just before the passing of the Clan Act, for infefting Neil Campbell of Dunstaffnage in the lands of Pennycastle of Dunstaffnage Ld. Johnston. and others, the reddendo expressed including the keeping of "our" Castle of Dunstaffnage, &c., on which sasine was taken in 1751, and that the first title by progress after the passing of the Clan Act is a charter of adjudication by the fourth Duke of Argyll in 1763 in favour of Colin Campbell of Edderline, truly in trust for Angus Campbell of Dunstaffnage, the lands passing back to Dunstaffnage in 1767, when the trust purpose was fulfilled. This charter of 1763, then, while following in the main the older titles, has a new and altered reddendo in money, "*nomine feudifirmæ . . . et hoc vice et loco divoriarum et servitiorum quæ dict Duci tanquam superiore pro aut ex dictis terris aliisque antea solubilia erant nomine casualitatum Wardæ Relevii et Maritagii quando occurrerent,*" which casualties and services, it is explained, were abolished and converted by virtue of the Clan Act, 1747, and in terms of the Act of Sederunt following thereon. And after expressing the alteration in the reddendo necessitated by the Act, the reddendo proceeds:—"Insuper dictus Colinus Campbell ejusque hæredes obligati erint dictum castrum de Dunstaffnadge dict Duci ejusque prædict patefacere omnibus temporibus quandocunque ad hoc requisiti fuerint"; and then follows in full an obligation to supply fuel to the Duke and his heirs whenever he should happen to be at the castle, to maintain the buildings of the castle, the tenants or feuars in Lorne to be astricted or bound to perform the customary services in the matter of carriage to that end, and likewise the tenants of the lands of Penny Castle, &c., performing along with the other feuars and tenants in Lorne the customary services to the Duke whenever he should be at the Castle of Dunstaffnage, all in terms of the prior titles, eliminating only the military services.

It is contended that at least from this date the castle became the property of the Campbells of Dunstaffnage. But I am not quite sure of the reasoning on which this conclusion is reached. It is clear that the Clan Act, and anything done by virtue of it, did nothing more than alter the tenure and substitute feu for ward. It did not affect the vassal's right of property, if before it was something short of that right. And it cannot be regarded therefore apart from the more ancient rights on which it followed from the precept of 1745 backwards.

4. In the year 1667 the forfeiture of the Marquis and rehabilitation of his heir the ninth Earl coincided with the financial involvement of the Campbells of Dunstaffnage. According to the law as then understood, "the Captain and his predecessors being infeft in the lands of Dunstaffnadge holding of the Earle of Argyle. The s^d rights not being confirmed by the King did in law fall under the Marquis of Argyle his forfaultrie. And this Earle as donator to the forfaultrie will have right to the said lands." I quote from a memorandum for the captain of Dunstaffnage dated 11th January 1667. Consequently, as there was no intention on the part of Argyll to take advantage of the situation created by this state of the law, an arrangement was come to which was carried out by a disposition by the ninth Earl

Feb. 6, 1912. of Argyll in favour of Archibald Campbell of Torrie, dated 18th May 1667, as an interposed person, for the protection of John Campbell of Dunstaffnage and Alexander Campbell, his son, with an obligation of same date to infest said John and Alexander Campbell on a new charter, freely and without composition, whenever Archibald Campbell of Torrie should make due resignation in his hands. The disposition above mentioned states as the cause of granting that the lands of Penny Chastle of Dunstaffneis were originally feued out to the predecessors of Johnne Campbell, now of Dunstaffneis, and Alexander Campbell, his eldest lawful son, "for the service of keeping of the Castell of Dounstaffneish and other duties and services underw^{ren}," and that the granter was desirous that "our said Castle of Dounstaffneis should be kepted and upholdin be Archibald Campbell off Torrie and his successors after mentioned trulie and faithfullie for the use of us and our successors." The disposition contained an obligation according to the conveyancing of the day on the granter to infest the grantee and that by "ane sufficient infestment and charter of alienatione with precept of sasine, sasine and possession following thereupon in dew and competent forme" for a reddendo comprising along with the "services, feu ferme duties and others underw^{ren}," this, viz., "the said Archibald Campbell and his foresaids keeping in sure custodie and without hurt to us, our aires and successors, holding our said Castell of Dunstaffneis and ever keeping and holding therein six able and decent men with armour and arms sufficient for warr and keeping of the said Castell. And ane sufficient portar and watch at least extending in the haill to Eight persones in tyme of peace. And if warr shall happin to fall out in these parts wherethrow the Countrie shall happin to be wasted, we and our aires shall be holden on our owne proper charges to be at the halff of the expense to be necessarye bestowed for the keeping and sure detaining of the said Castell over and above the saides eight persones to be kepted therein be the said Archibald Campbell and his foresaids on ther owne charges as said is. Moreover, the said Archibald Campbell and his aires above-wren shall be obleist to make our said Castell patent and open to us and our foresaids at all tymes whensoever they are requyred therto. As also to furnish to us, our aires and successors foresaids yeerlie peats or aldin for chambers, kitchine, bakehouse, and brewhouse, and for the hall als oft and sua oft as we or our aires shall hapin to be ther. And sicklyk the said Archibald Campbell and his aires foresaids shall be astricted, bund and obliged to sufficientlie uphold and maintaine the haill house and buildings of our said Castell of Dunstaffneis in the samen conditione everie way as the said Archibald Campbell does presentlie or shall heirafter hapin to enter or receave the samen, the fewars and tennents of our Lands in Lorne, who wer formerlie in use of doeing service to our said Castell of Dounstaffneis being alwayes astricted thereto in tyme coming for careage of all materialls necessarie for the upholding and repairing of the samen according to use and woint. As also the tenants of the foresaids Lands of Pennychastell," &c., "doeing also service at the said Castell of Dounstaffneis, als oft as wee or our foresaids shall hapin to be ther. And as they shall be requyred thereto with the rest of thee fewars and tennents of our other lands in Lorne astricted as said is conforme to use and wont. And in lyk maner the said

Archibald Campbell and his heirs foresaids payand to us our aires male and successors above w^{ren} threttie bolls meall and twa bolls bear yeirlie." Feb. 6, 1912.

This disposition was followed on 7th October 1667 by a formal charter in favour of Archibald Campbell of Torrie, which, so far as the lands of Pennycastle were concerned, contained in Latin form precisely the reddendo stipulated in the preceding disposition. And sasine followed. In 1681, the object of the trust having been fulfilled, resignation was made by Torrie, and a charter of novodamus was granted by Argyll in favour of the Alexander Campbell above mentioned, repeating the terms of the charter of 1667.

It is true that the view of the law on which the conveyancing of 1667 proceeded is doubtful, if it was not upset by subsequent decision. But the conveyancing stands as a fresh start to the title of the defender's authors, and it completely explains the condition of that title, not only prior to the Clan Act of 1747, but subsequent thereto and down to the present day, and shows conclusively on what the possession of the defender and his authors has proceeded. It has been possession by virtue of an obligation involving possession for its implement, and not possession by virtue of property. In referring to these prior titles to explain the ground and circumstances of possession, I am, I think, entirely supported by the judgment of the House of Lords in *Lord Advocate v. Hunt*.¹

5. It is only necessary for completeness to refer shortly to the original grant of Dunstaffnage to the defender's predecessor in 1502. It is abundantly clear from its terms that though the Campbells, since of Dunstaffnage, may have held the office of captain of the Castle of Dunstaffnage from an earlier date, whether personally or heritably, the grant of 1502 was an original grant of the lands of Pennycastle of Dunstaffnage. It contains in slightly shorter form the whole conditions of tenure of the subsequent titles. At that date, had the castle been intended to be conveyed, it would certainly have either been included *nominatim*, or there would have been a clause *cum castris*. Instead there is an assertion that the castle is the superior's and to remain the superior's, for the reddendo for the lands is the keeping of "our castle." The castle could not therefore be included in the lands conveyed.

I do not think that it is necessary to canvass the nature of the possession had. Till the pacification of the Highlands after 1745, and even to a later date, the possession was completely consistent with the title. Since then, and particularly since the fire in 1810, the possession has been such as naturally grew out of the circumstances, and though, if we knew nothing more, it might be assumed to be possession on a title of property, when the history of the title is known it is shown that it was not possession which could be attributed to such a title, and is therefore unavailing to establish prescriptive possession as pertinent.

But I think it follows from the review that the keepership of the castle is an hereditary and heritable office, carrying with it a right of possession of the castle, subject to the conditions of the keepership so far as now applicable, and that therefore the pursuer is only entitled to his positive

¹ 5 Macph. (H. L.) 1.

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More than that I do not think can be decided as the record stands.

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I should not omit to add that the office of marnichty, now in desuetude, has nothing to do with that of captain of the castle. It was a Celtic equivalent of a baron bailieship, and gave authority, not as constable of the castle merely, but as commissioner over a district of which, as many of the documents produced show, the castle was the central point.

In conclusion, I do not think we are in a position to decide to what area the pursuer's declarator of property can be extended. Stair says of castles,¹ where these are disposed either in property or custody, the infeftments carry not only the bounds of the castle, but the dependencies, gardens, orchards, parks, meadows, &c., possessed by the king or keeper for the use of the castle. I can only say that there is considerable ground for surmising, but not more, that a guide to determining the proper pertinents of the castle is to be found in the clause of exclusion in the entail of 1790, viz., "the offices and gardens thereto belonging, and the five enclosures next adjacent thereto consisting of about sixty-five acres Scotch measure, and the large and small islands also adjacent thereto."

Accordingly, though if I could agree with his premises I should also agree with his conclusion, I am obliged to differ from the Lord Ordinary, and think that his interlocutor should be recalled, and decree in terms of the first declaratory conclusion only pronounced.

LORD MACKENZIE.—The question here is one between superior and vassal. The pursuer, as proprietor of the lordship of Lorne, owns the places of strength within its bounds. Certain of his titles contain an express grant of fortalices. Dunstaffnage was a fortalice, and the question is whether it was ever parted with by the predecessors of the Duke. The case of the defender is founded on possession for the prescriptive period. This case, in my opinion, fails. The Lord Ordinary has held that the defender has an *ex facie* valid irredeemable title in the recorded service produced, and that this is sufficient foundation for prescriptive possession. This is not a case in which the title of the defender is challenged. If it were, then the same effect would be given to the recorded service here as was done in *Fraser v. Lord Lovat*,² where it was pointed out that it was irrelevant to say that if the history were investigated it would be found that the title was ultimately traceable to an invalid grant, or to a granter who had no right. Prescriptive possession is not here pleaded to cure a bad title proceeding *a non domino*. The question is with the granter of the title, who refers to the terms of the title he granted as the basis of his case. It is maintained by the defender that he cannot do so. This is to mistake the part which the recorded service plays. There is no right of property under it. Its terms may disguise—owing to the shorthand method of conveyancing—but cannot alter, the terms of the right which flows directly from the superior. By express declaration *in gremio* of the service itself the extent of the grant can only be ascertained by reference back through the charters by progress to the terms of the original grant.

¹ II. 3, 65.. . . .

² 25 R. 603.

It is common ground that the terms of the original grant, the charter of Feb. 6, 1912. 1502, were not sufficient to carry the Castle of Dunstaffnage. The links which intervene between this and the service of 1880 are charters by progress, none of which enlarged the original grant. There was no novodamus. It was argued by the defender's counsel, on the authority of *Forbes v. Livingstone*,¹ that on a charter by progress more may be prescribed than was in the original grant, but in that case there was a novodamus. The position of matters therefore on this branch of the case is that the defender must put forward a title other than the charter of 1502 as the foundation of his prescriptive possession, and this he has failed to do.

Down to the date of the Clan Act, in 1747, the possession of the castle was plainly referable to the reddendo in the charter. It was maintained that the rights of parties were affected by the provisions of that Act, which abolished ward-holding, the argument being that this made the old possession impossible in law. After the Act the services in the reddendo, so far as affected by that Act, including the provision of armed men, ceased. In lieu thereof there was a commuted money payment. The prestations which remained included the obligation (contained first in the charter of 1667) to make the castle patent and open to the granter and his heirs, the supplying of fuel to him when there, and the maintaining of the fabric. The defender says that after 1747 his possession of the castle was not under the reddendo but as part and pertinent of his Pennycastle lands. He maintains that after the Clan Act none of the obligations in the reddendo, as altered, gave him or his predecessors a right to live in the castle, and that therefore what he did could not be referred to the performance of services due, but was in exercise of a right conferred. This argument seems to imply that although the day before the Clan Act was passed the defender's predecessor was possessing on the reddendo, the effect of the Act was that the day after he was possessing the castle as a pertinent. In order, however, to make anything of the change in the law in 1747 it would be necessary for the defender to show that there were thereafter acts of possession on his part which the superior knew of and could have stopped. The defender has failed to prove this. Either the acts were such that the superior cannot fairly be presumed to have had knowledge of them, as for example, the proposed inclusion of the castle in the subjects exposed for judicial sale by the creditors of Donald Campbell, fourteenth captain, in 1797, though the common agent was also agent of the Duke; or were acts the superior saw no reason to object to, as for example, the terms of the deed of entail in 1790; or they were just such acts as would be done consistently with the tenure under which the defender and his predecessors held the castle. In no view was the possession adverse to the superior's own title to the subjects in dispute. Unless it was adverse it cannot avail the defender in this case.

The result of my opinion is that the conclusion of the summons should be disposed of in the manner proposed.

LORD KINNEAR.—I have had the advantage of reading the opinion which

¹ 6 S. 167, 173.

Feb. 6, 1912. has been delivered by your Lordship in the chair, and I agree with it so entirely in all respects that I do not think it would be a reasonable or useful occupation of your Lordships' time if I were to give any opinion in detail, or at any length, for the purpose of stating my own reasons. I shall therefore confine myself to stating what appear to me to be the main points requiring consideration and my own opinion on them as shortly as I can.

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I agree with your Lordship as to the order in which it is useful to examine the titles. I think it is perfectly logical to start with the earlier titles, notwithstanding that the defender puts forward a title beginning in 1880 as the foundation of what he alleges to be a prescriptive right. It is perfectly true that possession upon a habile title, if it has been continuous and exclusive possession, absolves the person pleading it from the duty of producing any earlier title. He is quite entitled to say, "I will not inquire whether the title upon which I found is in itself valid or not if it is sufficient to support prescription." But, then, the title put forward in the present case is in the first place a title by progress, and secondly, does not give any right in express terms to the subject in dispute, and therefore it is subject to construction; and for the purpose of construing the title itself irrespective of any question of possession, it would be, I think, unreasonable to say you are not to look at the earlier titles (which are in fact produced and brought before the Court by both parties) in order to understand the history of the right, supposed to have been acquired by prescription with which this particular title is dealing.

To begin with, it is common ground that the Castle of Dunstaffnage belonged to the Earls of Argyll. I do not think it is of consequence to inquire whether it was a royal castle in the strict sense of that term, whatever it may mean, since it is not disputed that the Duke of Argyll's title to the castle stands on a valid grant from the Crown, nor could the defender who alleges that he has derived right from the Duke's predecessors, have been allowed to dispute his superior's title. Again, there is no question that when he granted out the lands which now belong to the defender, he did not give the property of the Castle of Dunstaffnage along with them. I take it to be settled law, and I do not think it is disputed, that under our old law castles and fortalices did not pass except by express grant, and the conveyance of lands contained in the earliest grant in 1502 certainly does not convey any right in the Castle of Dunstaffnage. That alone would perhaps be sufficient. But not only is the property not conveyed, but the terms on which the lands are conveyed make it perfectly clear that the property was retained by the granter, because the condition upon which the grantee is to hold his lands is for certain feudal services, and among others for keeping open, maintaining, and repairing the granter's Castle of Dunstaffnage, with the obligation of admitting the latter when he chose to come and live there, and providing him with fuel for his comfort when he came; and therefore the legal effect of the original grant is beyond a question.

The next question that is raised is whether the abolition of ward-holding had any effect upon this title of property, and the Lord Ordinary seems to hold that it had some effect, although he is a little vague as to its extent and method of operation. I think with your Lordship that the Clan Argyll

had no effect whatever upon the property of the castle. It abolished the Feb. 6, 1912. military services, but it did not abolish all the other services for the benefit of the superior, and in particular it did not abolish the duty of the vassal in the lands to keep the castle open and in repair, and to admit the superior and provide him with fuel. I think that follows from the decision to which your Lordship referred. But even if there were any doubt about the continuance of the services, I should still be unable to infer a transference of any right of property from the superior to the vassal. It may very well be that if a superior had granted lands to be held ward, the vassal, when ward services were abolished, would continue to hold the lands without rendering any services at all. But if the superior has granted a property on condition of his grantee performing services upon another property which he does not grant, I do not see how the abolition of these services could ever operate as a transference of the property which he has kept to himself. The Lord Ordinary says that "the relation of the vassal to the castle in connection with the military services contained in the original reddendo had entirely ceased. It seems, nevertheless, to be contemplated in the reddendo as inserted in the writs granted after the Act that the vassal should reside or have a right to reside in the castle, throwing it open to the superior when required." I think that is perfectly true; I think that was the implication of the original grant, because the service was required to render involved a right and a duty of occupation; but as Lordship goes on to say that "it may perhaps have been intended, in view of the effect of the Act, that the castle, which had come to have the character of a place of residence merely, and which had all along been the usual residence of the Dunstaffnage family, should be merged in their property." If that means that the vassal might naturally come to consider that the castle which stood upon his lands, and which he was required to keep open and maintain, was his property, it may very well be; but if the learned Lord Ordinary means to suggest that property can pass from superior to vassal by any such operation as he describes, I disagree with him.

It is elementary and fundamental that property in land cannot be voluntarily transferred from one to another except by grant. No amount of possession will infer a right unless it is supported by a written title; and an intention to give or acquire the castle in property could be of the slightest avail if it were not embodied in a written grant. A limited right may be merged in a wider and more absolute right, as when a tenant or assignee acquires the fee; but the notion of a transference of a separate subject from one owner to another by merger is altogether unknown to the law of Scotland. If the property of the castle, therefore, remained with the superior after the original grant of the lands, it could not pass from him to his vassal except by force of a novodamus or new grant, and the Lord Ordinary says correctly that there was no novodamus. There was indeed no title which could operate as a novodamus, because all the titles which connect the various successors in the lands with the original grant were, of course, titles by progress, and these could have no effect in law to enlarge the grant as it was originally made, or to alter the conditions of the grant. I think that was clearly decided in the case to which Lord John-

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which is referred to in *Hutton v. Macfarlane*.¹ The question there was whether the vassal had acquired a right to minerals which were reserved in the original charter, but which he said were given to him by a charter by progress, and the grounds of judgment are stated there in the clearest way. The Lord Justice-Clerk says:—"It is said in this case, that the vassal's estate has been enlarged from what it was under his original feudal obligation as he has become the owner of the minerals, which were not included in the original feu-right: and it is said that this change has been brought about, not by any new conveyance of the estate and the minerals but by reason of the terms of the charters by progress,—of the confirmation, or the charter of confirmation and precepts of clare constat,—which have had the effect of enlarging the estate of the vassal, and of making him the owner of the coals, metals, and minerals, just as if they had been included in the original feu right. Now, I think it is not necessary to enter into a dispute by the mere terms of charters by progress whether a vassal acquires a right to minerals. I can quite understand that the thing done by a charter by progress by throwing in a clause of confirmation and precepts of clare constat are not necessary to enlarge the estate of a vassal as a recognition of a certain person as vassal is a necessary consequence of a charter by progress. That is the sole effect which a charter by progress has. It does not enlarge the estate of the vassal. The same law is laid down in *Macfarlane v. Hope*.² and in *Macfarlane v. Hope*.³ The effect of precepts of clare constat is to enlarge the estate of the vassal. The Lord Justice-Clerk does in the case of *Hutton v. Macfarlane*.

The question then arises as to whether the feoffee has produced a title which will support his claim. Now, the only title alleged is that of the feoffee and upon the face of the service as recorded there is a mention of the feoffee of Dunstaffnage. It is said that the decree of the court of Session in the case of *Macfarlane v. Hope* is a title to the feoffee of Dunstaffnage. I do not know whether the feoffee maintains that the title is a title to the feoffee of Dunstaffnage without the addition of the feoffee of Dunstaffnage. I do not know that he argued that a service of the feoffee of Dunstaffnage would carry the estate upon the principle of *edificatum solo*. I do not know that he argued that the doctrine does not apply to the feoffee of Dunstaffnage. The suggestion then is that this is a good title to the feoffee of Dunstaffnage as a pertinent to the estate of Dunstaffnage.

I agree with your Lordships that there is no title here that will support the claim. The effect of the Service of Heirs Act, as was decided in *Macfarlane v. Hope*,¹ is merely to provide machinery for enabling a person to complete a feudal title so as to enable him to derive the estate without going to the superior for an entry. A service is not a conveyance; and the reference in the Act to a hypothetical disposition does not, according to the decision, operate as a conveyance, but merely as a statutory warrant for a base infeftment to be effected by registration.

¹ 2 Macph. 79.² 2 Macph. 670.³ 16 D. 1108.

follows that the registration of the service did not in itself create the relation of superior and vassal, and could not in any way alter the scope or conditions of the original grant. And, when the Act of 1874 came in to operate the entry of the heir who had been infeft base under the Service of Heirs Act, it expressly provided that the implied entry should not be held to confer or confirm any rights more extensive than those contained in the original charter or other writ by which the last vassal was entered. The hypothetical writ of confirmation, therefore, which is the supposed basis of the alleged prescriptive right, must be deemed to contain in its terms all the clauses, and particularly the reddendo, which show that the castle in dispute still belonged to the superior, and that it was part of the vassal's obligations as vassal in the lands conveyed, which do not include the castle, to maintain it as the property of the superior. And even if there were any doubt as to the effect of the title, I apprehend there is none whatever as to the effect of the possession. Nothing can be clearer in the law of prescription than this, that the possession must be exclusive and unequivocal, that it must be ascribed to the title which is alleged to be its basis, and that it must be adverse to the conflicting right brought under controversy. I find nothing in the possession here to satisfy any one of these conditions.

I cannot think it doubtful, after the case of the *Lord Advocate v. Hunt*,¹ that although no effect ought to be given to prior titles for the purpose of invalidating an alleged prescriptive title, they may nevertheless be taken into account for the purpose of explaining the possession. It is not enough to prove actual possession of the subject in dispute. It must be shown that the possession is to be ascribed to the alleged title; and when the subject is not expressly described in the title, but is said to be included in a grant of pertinents, it is necessary to show that it has been in fact possessed, not merely along with, but as a pertinent of, the subject described. For that purpose it was found in the *Lord Advocate v. Hunt*¹ to be competent to examine the whole history of the subject as shown in a series of titles much earlier in date than that put forward as the basis of prescription. I agree with your Lordship in the chair in thinking that this is a simpler case for the application of that doctrine than the *Lord Advocate v. Hunt*,¹ because the possession proved in that case was a much more unequivocal assertion of a right of property than anything that is alleged in the present, inasmuch as Mr Hunt had taken the old palace which was in dispute into his grounds and had exercised all the proprietary rights which were suitable to the subject, and also because there was no other title to support any right whatever in the subject, except a grant of barony with parts and pertinents. But the earlier titles showed that it was a royal palace and not a part of the barony. It followed that although he had possessed the two subjects together, he had not possessed the palace as a pertinent of his barony. It was therefore held that he had no title to support his possession, and, consequently, that he had acquired no prescriptive right. In the present case the defender has a title to explain his possession irrespectively of any right of property, and has had no enjoyment and exercised no right which is not consistent with his admitted character of custodier of

¹ 5 Macph. (H. L.) 1.

Feb. 8, 1912. the castle. There was no adverse possession for the reason your Lordship
 Duke of . has given ; and there was nothing done for which the Duke of Argyll,
 Argyll v. alleging a right of property in the castle, could have ejected his vassal in
 Campbell. the lands ; inasmuch as in the occupation of the castle the vassal was only
 Lord Kinnear. fulfilling the conditions of the grant of his lands.

I cannot help saying, as your Lordship did at the outset of your opinion, that it is very much to be regretted, that so much expense and research should have been thrown away upon the settlement of a question which, of whatever academical interest, is of no practical importance to the parties in this case, since the result of the decision must be to leave the possession and enjoyment of the subject in dispute exactly where they were before. The only result of the case is that your Lordships find that the legal right of property is in the pursuer, but that the pursuer is not entitled to turn out the defender in terms of the second conclusion of his summons. Therefore I agree that the case should be disposed of as your Lordship proposes, by giving the declarator in terms of the first conclusion and assoilzieing the defender with regard to the second conclusion.

THE COURT pronounced the following interlocutor :—" Recall said interlocutor: Refuse said minute of amendment: Find and declare that the subjects following, viz., All and Whole the Castle of Dunstaffnage with the whole pertinents thereof lying within the lordship and barony of Lorne and county of Argyll, pertain and belong heritably in property to the pursuer: *Quoad ultra* assoilzie the defenders: Find no expense due to or by either party; and decern."

LINDSAY, HOWE, & Co., W.S.—MITCHELL & BAXTER, W.S.—Agents.

No. 73.

JOSEPH HARDIE, Pursuer (Respondent).—*D.-F. Dickson—J. R. Christie.*

Feb. 8, 1912. ALEXANDER HERBERT BROWN, C.A. (Alexander Macfarlan's Judicial Factor), Defender (Reclaimer).—*Horne, K.C.—Black.*

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Macfarlan's
Judicial
Factor.

Alimentary provision—Liability to diligence—Trust—Alimentary liferent to beneficiary under trust—Debt due by beneficiary to trust-estate—Relation of liferent in satisfaction of debt—Excess over reasonable alimentary provision.

A person entitled under a will to the liferent of a share of residue, was also a debtor to the trust in respect of money which had been advanced to him by the testator. The liferent was declared to be strictly alimentary and not attachable for debt. After paying all creditors of the trust-estate, a balance, without including the debt due by the liferenter, remained for division among the residuary legatees.

In an action by the beneficiary for payment of his liferent provision held that the judicial factor on the trust-estate was not entitled to retain the whole of the beneficiary's share of income in satisfaction of the debt, but (*rev. judgment of Lord Skerrington*) that he was entitled to retain so much thereof as exceeded a reasonable aliment.

2D DIVISION. ON 11th October 1910 Joseph Hardie, farmer, Brown Summit
 Lord U.S.A., brought an action of declarator, count, reckoning, and pay-
 Skerrington. ment against Alexander Herbert Brown, C.A., Glasgow, judicial

factor on the trust-estate of the deceased Alexander Macfarlan. Feb. 8, 1912.
 The action concluded, *inter alia*, for payment to the pursuer of one-fourth of the income of the residue of Alexander Macfarlan's estate.

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Alexander Macfarlan died on 1st July 1909 leaving a trust-disposition and settlement dated 23rd April 1909. As none of the trustees accepted office, the defender was appointed judicial factor on the trust-estate.

The testator by his trust-disposition and settlement, after directing payment of his debts and making various other testamentary dispositions, provided by the eleventh purpose thereof as follows:—" (Eleventh) After fulfilling or providing for the foregoing purposes I direct my trustees to hold the residue of my means and estate and produce and proceeds thereof for my nephews and nieces, Joseph Hardie [the pursuer] and Alexander Macfarlan Hardie, both sons of my late sister Catherine, and Mrs Jessie Fleming or Mercer and Mrs Elizabeth Fleming or Smith, both daughters of my late sister Margaret, in liferent, for their liferent alimentary use allenary, equally share and share alike, and their lawful issue *per stirpes* in fee." The testator further declared that "the whole of the alimentary provisions hereinbefore provided shall be strictly alimentary allenary and shall not be assignable nor attachable for the respective beneficiaries' debts, deeds, or obligations."

The pursuer averred that he was entitled to an alimentary liferent of one-fourth of the income of the residue of the estate.

Defences were lodged by the judicial factor.

The nature of the defence and the admitted facts of the case were thus summarised by the Lord Ordinary:—"At the date of the will the pursuer was indebted to the testator in a sum of nearly £5000, being advances received by the pursuer from time to time in order to enable him to carry on his business as a farmer in the United States of America. There is an action in this Court at the instance of the judicial factor against Mr Hardie, in which he sues the latter for £4795, 12s. 8d., being the amount of said advances. The present action was debated upon the assumption that the judicial factor's claim was a good one, and that he held a decree for the amount.* The question in the present case is whether the defender, the judicial factor, is entitled to operate repayment of his debt by impounding the pursuer's liferent interest under his uncle's trust. It is obvious from the averments of both parties that the judicial factor may find it difficult to recover payment of the debt by taking proceedings in the United States. The pursuer, who is sixty-two years of age, alleges that he retired from business three years ago; that his farm was purchased in the name of his wife, and belongs to her; and that the stock belongs to his eldest son. In these circumstances, the defender claims that he is entitled, on the principle of retention or of compensation, to impound either the whole of the pursuer's liferent provision, or at least so much thereof as exceeds a reasonable aliment. He alleges that an allowance of £300 of aliment from the trust-estate would enable the pursuer to maintain himself and his wife comfortably according to their position in life. The estate left by the

* Between the date of the Lord Ordinary's judgment and the decision in the reclaiming note, decree was obtained by the judicial factor against Mr Hardie for the sum sued for.

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testator was very considerable.* The pursuer estimates his one-fourth share of the income of the residue at £1500 per annum, and the defender at £1000."

The pursuer pleaded, *inter alia*;—(2) The pursuer being entitled to the alimentary liferent of one-fourth of the residue of the testator's estate, the defender is bound to hold just count and reckoning with the pursuer and to make payment to him as concluded for in the second conclusion of the summons.

The defender pleaded, *inter alia*;—(1) The defender being justly entitled to retain the pursuer's share of the revenue of the trust-estate against, and apply it towards satisfaction of, the debt due by the pursuer to the testator and interest thereon, decree of absolvitor should be pronounced with expenses. (4) In any event the sum of £300 a year, in view of the station and circumstances of the pursuer, being a reasonable provision for his aliment, the defender is entitled to apply the pursuer's said share of the revenue of the trust-estate—in so far as it exceeds said sum—in satisfaction of pursuer's indebtedness to the trust-estate.

On 19th January 1911 the Lord Ordinary (Skerrington) pronounced this interlocutor:—"Finds that on a sound construction of the trust-disposition and settlement of the deceased Alexander Macfarlan, he directed that the share of the trust-estate bequeathed to the pursuer should be held by the trustees for the purpose of alimenting him, and that it should not be made available for any other purpose: Repels the whole pleas in law stated for the defender; and *quoad ultra* continues the cause: Reserves all questions of expenses; and, on the motion of counsel for the defender, grants leave to reclaim."†

* The estate, exclusive of the sum due by the pursuer, was admitted to be amply sufficient to meet all the claims of creditors.

† "OPINION.—[After narrating the facts]—Except that it confers upon the trustees power to compromise or refer disputed claims, the trust-disposition and settlement contains no express directions as to the recovery of the testator's estate in general or of the pursuer's debt in particular. The inference is that the testator either overlooked the pursuer's debt or intentionally refrained from giving any directions in regard to it. If it were legitimate to speculate on such a matter, I should think it probable that the testator knew perfectly well what he was doing, and that he had excellent reasons in his own mind for making no reference to the debt in his will, either by a clause expressly remitting it or by a clause directing that it should be paid out of the pursuer's life interest. Counsel on both sides referred to the clauses above quoted as throwing light upon the testator's intention in regard to the matter in dispute. The defender's counsel founded upon the words 'residue' and 'equally.' He argued that there could be no proper residue upon which the residuary clause could operate until the pursuer had first paid his debt, and further, that there would be no equality but, on the contrary, inequality among the beneficiaries unless the debt was repaid out of the pursuer's life interest. This argument is fallacious. Whether the pursuer does or does not ultimately pay his debt to the trust-estate, the free estate now in the hands of the defender must be held by him for behoof of four several groups of beneficiaries according to their respective rights of liferent and fee. The only question is whether, according to the wishes of the testator as expressed in his will, the income from one equal fourth share of the residue now in the hands of the defender falls to be paid to the pursuer or must be applied in payment of the pursuer's debt.

"The pursuer's counsel pointed to the clauses declaring the pursuer's

The defender reclaimed, and the case was heard before the Second Division (without Lord Dundas) on 20th and 21st December 1911. Feb. 8, 1912.

Argued for the reclaimer;—The benefit conferred on the respondent by the will was a share of “residue,” and residue meant the actual sum realised by the trust management at its conclusion, and not the amount of the trust-estate as at the death of the truster or any intermediate period.¹ Thus the respondent could not have any claim till the amount of the residue had been made up, and that could not happen until he had paid his debt to the trust-estate. A person who owed an estate money, that is to say, who was bound to increase the general mass of the estate by a contribution of his own, could not claim an aliquot share given to him out of that mass without first making the contribution which completed it.² The question was really as to the right of the judicial factor to ingather the estate, and no question as to the alimentary nature of the beneficiary’s pro-

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provisions to be alimentary as impliedly excluding any right of retention or compensation on the part of the defender. But for these clauses it would have been not merely the right but also the plain duty of the defender to operate repayment out of the pursuer’s share of the trust-estate, but that duty would not have arisen out of any legal fiction as to the testator’s intentions. The duty would have been equally imperative in the case of a debt of which the testator was wholly ignorant. The law itself casts upon trustees the duty of acting in an ordinary businesslike manner, and it forbids them to expose any asset of the estate to unnecessary risk. The question is whether the terms of this particular trust sufficiently indicate that the testator did not desire his trustees to proceed according to the ordinary rules of trust management in regard to the recovery of the pursuer’s debt. I am of opinion that the testator’s directions are free from ambiguity. He directed that the share of the trust-estate bequeathed to the pursuer should be held by the trustees for the purpose of alimending him and that it should not be made available for any other purpose. Although the word ‘attachable’ probably refers to legal proceedings at the instance of third parties I do not think it is possible to read the clauses as if they expressly excepted from their operation debts due by beneficiaries to the testator. Such a construction would amount to the insertion into the will of a direction which the testator might have been the first to repudiate if his attention had been called to the matter.

“Assuming that the defender is debarred from impounding the whole of the pursuer’s life interest his counsel argued that the provision was in excess of what was reasonable in the circumstances. It followed that so far as excessive the provision was not truly alimentary and that it might be made available for payment of the pursuer’s debt. Although I do not see the relevancy of this proposition I admit that either a creditor or an assignee from the pursuer might partially defeat the testator’s expressed intention and might insist upon receiving payment of so much of the pursuer’s life interest as exceeded what the Court might decide to be a reasonable aliment. In defence to such an action it would be the duty of the defender to protect the pursuer against his own improvidence, and to endeavour, so far as possible, to carry out the wishes of the testator. It is conceivable that the defender might satisfy the Court that the provision as it stands is not, in the whole circumstances, excessive. The peculiarity and novelty of the present case is that no one impeaches the validity of the trust except the

¹ Mackenzie’s Trustees v. Macdowall, (1852) 14 D. 739.

² White v. Cordwell, (1875) L. R., 20 Eq. 644; Akerman v. Akerman, [1891] 3 Ch. 212; Taylor v. Wade, [1894] 1 Ch. 671; Partridge v. Rhodesian Goldfields, Limited, [1910] 1 Ch. 239.

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vision could arise until the estate out of which it was to be paid had been ingathered. In any case, the reclamer was entitled to retain the respondent's share in so far as it was in excess of a reasonable provision, as to the amount of which there should be inquiry, failing agreement. It was not disputed that a creditor was entitled to attach *quoad excessum* an alimentary provision in favour of his debtor, and there was no difference in this respect between the position of the reclamer and that of an ordinary creditor.

Argued for the respondent;—This was just the usual case of an alimentary provision which could not be attached by creditors. The English cases relied on by the reclamer had no application, because by English, as distinguished from Scots, law, funds could not be put beyond the reach of creditors by being declared alimentary.¹ If payment of his debt was intended to be a condition of the respondent taking his share of the estate, such a condition would require to be clear and unambiguous.² So far from this being the case, the fact that the provision was declared to be alimentary was an indication to the contrary.³ In the circumstances of the case the amount of the provision could not be questioned. All the creditors on the estate had been paid, and the only persons who had an interest in the matter, and whom alone the reclamer represented, were the residuary legatees. They could not raise the question whether the respondent's allowance was in excess of what an alimentary allowance should be without reprobating that part of the will which fixed the amount of the allowance, while approbating that part which conferred a benefit on themselves. In any event the reclamer could not retain the whole of the respondent's share of income, but was bound to pay him a reasonable alimentary provision estimated on the basis of the cost of living in America.

At advising on 8th February 1912,—

LORD SALVESEN.—[In his Lordship's absence his opinion was read by the Lord Justice-Clerk]—It is unnecessary to recapitulate the facts of this case as these are fully stated in the Lord Ordinary's opinion. It may be noted however, that since the interlocutor under review was pronounced the defender has obtained a decree against the pursuer for a sum of £4795 odd with expenses, being the amount of the pursuer's indebtedness to the trust estate. It has thus been judicially affirmed that the testator did not discharge his debt, but that it was one which it was the duty of the defender in a due course of his administration to recover for behoof of the residuary legatees.

The questions of law for our decision are two:—(1st) Is the defender

defender, whose duty it is to protect it. There is a difference of opinion between the defender and the testator as to what sum would form a reasonable aliment for the pursuer. I propose to follow the opinion of the testator and to direct that the trust shall be executed according to its terms. I accordingly repel the whole pleas stated for the defender, and *quoad ultra* continue the case."

¹ Surman v. Fitzgerald, [1904] 1 Ch. 573, *per* Cozens Hardy, L.J., at p. 589, Stirling, L.J., at p. 593.

² Bell's Com. (7th ed.), vol. i., p. 143.

³ Reid v. Bell, (1884) 12 R. 178; Bell's Com. (7th ed.), vol. i., pp. 124-126.

entitled to retain from the bequest in favour of the pursuer his indebtedness Feb. 8, 1912.
 to the trust-estate as now constituted, paying him no part of the income until the debt has been fully satisfied? and (2nd) Assuming that he is bound in the first place to provide for the reasonable maintenance of the pursuer, in accordance with the testator's expressed desire, is the defender entitled to retain the balance until the pursuer's debt is extinguished?

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The defender's contention on the first question was that the pursuer had no right to demand any benefit under the will until he had first repaid his debt to the testator; and reference was made to certain English authorities, of which *Akerman*¹ may be taken as typical. These authorities do not, in my opinion, support the defender's contention. It is common ground that the law of England, differing from the law of Scotland, does not recognise, as in a question with creditors, a condition of a bequest of income that it shall not be attachable for debt. These authorities are therefore in line with the law of Scotland which, but for the condition imposed by the testator on this bequest for the protection of the pursuer, would have made it not merely the right but the duty of the defender to retain the pursuer's share of income as it accrued until his indebtedness to the trust-estate was completely satisfied. That condition, however, makes it plain that the testator was anxious to provide for the maintenance of the pursuer, and his desire would be defeated if the whole income were absorbed for several years in discharging the pursuer's debt. I have therefore come to the same conclusion as the Lord Ordinary with regard to this question.

The second question is one of more difficulty. It is settled law that an alimentary provision is not protected against creditors except to the extent of a reasonable provision, and that *quoad excessum* it is open to diligence. The most authoritative decision on this subject is that of *Livingstone*,² where Lord President Inglis discussed all the earlier authorities. The Lord Ordinary appears to admit this, but he puts his judgment upon the ground that the defender cannot impeach the validity of the alimentary provision in favour of the pursuer to any extent, because it is his duty to protect it. I am unable to concur in this view. The defender's duty to recover debts due to the trust is just as imperative as his duty to divide the income of the residue according to the testator's directions. If it were otherwise, and the pursuer had no other funds (and here he alleges that he has none), there would be in effect an implied discharge of the debt which the defender has now constituted against the pursuer, and the other residuary legatees would be paid a less income than the testator intended them to receive. The two duties appear to me to be sufficiently reconciled by holding that to the extent of a reasonable provision for the pursuer's maintenance the defender must pay him the income of his share of residue, and that *quoad* the balance the defender is entitled to retain it until the pursuer's debt is extinguished. This is just doing directly what I think could be done in a more circuitous way. I see no reason why the defender should not have sold his claim against the pursuer to a third party; and that third party would have been under no duty to restrict his diligence to funds other than those which the pursuer derived by way of annual income from Mr Macfarlan's trust-estate.

¹ [1891] 3 Ch. 212.

² 14 R. 43.

Feb. 6, 1912. has been delivered by your Lordship in the chair, and I agree with it so entirely in all respects that I do not think it would be a reasonable or useful occupation of your Lordships' time if I were to give any opinion in detail, or at any length, for the purpose of stating my own reasons. I shall therefore confine myself to stating what appear to me to be the main points requiring consideration and my own opinion on them as shortly as I can.

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Lord Kinneir.

I agree with your Lordship as to the order in which it is useful to examine the titles. I think it is perfectly logical to start with the earlier titles, notwithstanding that the defender puts forward a title beginning in 1880 as the foundation of what he alleges to be a prescriptive right. It is perfectly true that possession upon a habile title, if it has been continuous and exclusive possession, absolves the person pleading it from the duty of producing any earlier title. He is quite entitled to say, "I will not inquire whether the title upon which I found is in itself valid or not if it is sufficient to support prescription." But, then, the title put forward in the present case is in the first place a title by progress, and secondly, does not give any right in express terms to the subject in dispute, and therefore it is subject to construction; and for the purpose of construing the title itself, irrespective of any question of possession, it would be, I think, unreasonable to say you are not to look at the earlier titles (which are in fact produced and brought before the Court by both parties) in order to understand the history of the right, supposed to have been acquired by prescription, with which this particular title is dealing.

To begin with, it is common ground that the Castle of Dunstaffnage belonged to the Earls of Argyll. I do not think it is of consequence to inquire whether it was a royal castle in the strict sense of that term, whatever it may mean, since it is not disputed that the Duke of Argyll's title to the castle stands on a valid grant from the Crown, nor could the defender, who alleges that he has derived right from the Duke's predecessors, have been allowed to dispute his superior's title. Again, there is no question that when he granted out the lands which now belong to the defender, he did not give the property of the Castle of Dunstaffnage along with them. I take it to be settled law, and I do not think it is disputed, that under our old law castles and fortalices did not pass except by express grant, and the conveyance of lands contained in the earliest grant in 1502 certainly does not convey any right in the Castle of Dunstaffnage. That alone would perhaps be sufficient. But not only is the property not conveyed, but the terms on which the lands are conveyed make it perfectly clear that the property was retained by the granter, because the condition upon which the grantee is to hold his lands is for certain feudal services, and among others for keeping open, maintaining, and repairing the granter's Castle of Dunstaffnage, with the obligation of admitting the latter when he chose to come and live there, and providing him with fuel for his comfort when he came; and therefore the legal effect of the original grant is beyond all question.

The next question that is raised is whether the abolition of ward-holding had any effect upon this title of property, and the Lord Ordinary seems to hold that it had some effect, although he is a little vague as to its extent and method of operation. I think with your Lordship that the Clan Act

had no effect whatever upon the property of the castle. It abolished the Feb. 6, 1912.
 military services, but it did not abolish all the other services for the benefit
 of the superior, and in particular it did not abolish the duty of the vassal Duke of
 in the lands to keep the castle open and in repair, and to admit the superior Argyll v.
 and provide him with fuel. I think that follows from the decision to Campbell.
 which your Lordship referred. But even if there were any doubt about Lord Kinneir.
 the continuance of the services, I should still be unable to infer a trans-
 ference of any right of property from the superior to the vassal. It may
 very well be that if a superior had granted lands to be held ward, the
 vassal, when ward services were abolished, would continue to hold the
 lands without rendering any services at all. But if the superior has granted
 a property on condition of his grantee performing services upon another
 property which he does not grant, I do not see how the abolition of these
 services could ever operate as a transference of the property which he has
 kept to himself. The Lord Ordinary says that "the relation of the vassal
 to the castle in connection with the military services contained in the
 original reddendo had entirely ceased. It seems, nevertheless, to be con-
 templated in the reddendo as inserted in the writs granted after the Act
 that the vassal should reside or have a right to reside in the castle, throw-
 ing it open to the superior when required." I think that is perfectly true ;
 I think that was the implication of the original grant, because the service
 he was required to render involved a right and a duty of occupation ; but
 his Lordship goes on to say that "it may perhaps have been intended, in
 view of the effect of the Act, that the castle, which had come to have the
 character of a place of residence merely, and which had all along been the
 actual residence of the Dunstaffnage family, should be merged in their pro-
 perty." If that means that the vassal might naturally come to consider
 that the castle which stood upon his lands, and which he was required to
 keep open and maintain, was his property, it may very well be ; but if
 the learned Lord Ordinary means to suggest that property can pass from
 superior to vassal by any such operation as he describes, I disagree with
 him.

It is elementary and fundamental that property in land cannot be volun-
 tarily transferred from one to another except by grant. No amount of
 possession will infer a right unless it is supported by a written title ; and
 no intention to give or acquire the castle in property could be of the
 slightest avail if it were not embodied in a written grant. A limited right
 may be merged in a wider and more absolute right, as when a tenant or
 liferenter acquires the fee ; but the notion of a transference of a separate
 subject from one owner to another by merger is altogether unknown to the
 law of Scotland. If the property of the castle, therefore, remained with the
 superior after the original grant of the lands, it could not pass from him
 to his vassal except by force of a novodamus or new grant, and the Lord
 Ordinary says correctly that there was no novodamus. There was indeed
 no title which could operate as a novodamus, because all the titles which
 connect the various successors in the lands with the original grant were,
 of course, titles by progress, and these could have no effect in law to
 enlarge the grant as it was originally made, or to alter the conditions of the
 grant. I think that was clearly decided in the case to which Lord John-

Feb. 6, 1912. *ston referred of Hutton v. Macfarlane.*¹ The question there was whether the vassal had acquired a right to minerals which were reserved in the original charter, but which he said were given to him by a charter by progress; and the grounds of judgment are stated there in the clearest way. The Lord Justice-Clerk says:—"It is said, in this case, that the vassal's estate has been enlarged from what it was under his original feu-right, inasmuch as he has become the owner of the minerals, which were not included in the original feu-right; and it is said that this change has been brought about, not by any new conveyance of the estate and the minerals, but by reason of the terms of the charters by progress,—of the omission in the charter of confirmation and precepts of clare constat,—which have had the effect of enlarging the estate of the vassal, and of making him the owner of the coals, metals, and minerals, just as if they had been embraced in the original feu right. Now, I think it is not competent to effect such a purpose by the mere terms of charters by progress without a novodamus. I can quite understand that the thing might be accomplished by a charter by progress by throwing in a clause of novodamus. But confirmations and precepts of clare constat are not conveyances of rights, but are recognitions of a certain person as vassal in a certain feu constituted by other writings." That is the sole effect which the various charters by progress can have; they recognise the heirs of the existing investiture and do nothing more. The same law is laid down in a case reported in the same volume of Macpherson, *Hope v. Hope*²; and in that case Lord Deas states the law as to the effect of precepts of clare constat in exactly the same way as the Lord Justice-Clerk does in the case of *Hutton*.¹

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Lord Kinnear.

The question then comes to be whether the defender has produced any title which will support prescription. Now, the only title alleged is a recorded service, and upon the face of the service as recorded there is no mention of the Castle of Dunstaffnage. But it is said that the decree of service of 1880 vests the heir in the lands of Pennycastle of Dunstaffnage with the pertinents. I do not know whether the defender maintains that he could have made any progress in his case without the addition of the words "with the pertinents." I do not know that he argued that a service to the lands would carry the castle upon the principle of *ædificatum solum solo cedit*; but at all events it is certain that that doctrine does not apply to castles and fortalices. The contention then is that this is a good title to found a prescriptive right to the Castle of Dunstaffnage as a pertinent of the lands of Pennycastle.

I agree with your Lordships that there is no title here that will support such a prescription. The effect of the Service of Heirs Act, as was decided in *Moreton's Trustees v. Moreton*,³ is merely to provide machinery for enabling an unentered heir to complete a feudal title so as to enable him to deal with the estate without going to the superior for an entry. A service is not a conveyance; and the reference in the Act to a hypothetical disposition does not, according to the decision, operate as a conveyance, but merely as a statutory warrant for a base infeftment to be effected by registration. It

¹ 2 Macph. 79.

² 2 Macph. 670.

³ 16 D. 1108.

follows that the registration of the service did not in itself create the relation of superior and vassal, and could not in any way alter the scope or conditions of the original grant. And, when the Act of 1874 came in to operate the entry of the heir who had been infeft base under the Service of Heirs Act, it expressly provided that the implied entry should not be held to confer or confirm any rights more extensive than those contained in the original charter or other writ by which the last vassal was entered. The hypothetical writ of confirmation, therefore, which is the supposed basis of the alleged prescriptive right, must be deemed to contain in its terms all the clauses, and particularly the reddendo, which show that the castle in dispute still belonged to the superior, and that it was part of the vassal's obligations as vassal in the lands conveyed, which do not include the castle, to maintain it as the property of the superior. And even if there were any doubt as to the effect of the title, I apprehend there is none whatever as to the effect of the possession. Nothing can be clearer in the law of prescription than this, that the possession must be exclusive and unequivocal, that it must be ascribed to the title which is alleged to be its basis, and that it must be adverse to the conflicting right brought under controversy. I find nothing in the possession here to satisfy any one of these conditions.

I cannot think it doubtful, after the case of the *Lord Advocate v. Hunt*,¹ that although no effect ought to be given to prior titles for the purpose of invalidating an alleged prescriptive title, they may nevertheless be taken into account for the purpose of explaining the possession. It is not enough to prove actual possession of the subject in dispute. It must be shown that the possession is to be ascribed to the alleged title; and when the subject is not expressly described in the title, but is said to be included in a grant of pertinents, it is necessary to show that it has been in fact possessed, not merely along with, but as a pertinent of, the subject described. For that purpose it was found in the *Lord Advocate v. Hunt*¹ to be competent to examine the whole history of the subject as shown in a series of titles much earlier in date than that put forward as the basis of prescription. I agree with your Lordship in the chair in thinking that this is a simpler case for the application of that doctrine than the *Lord Advocate v. Hunt*,¹ because the possession proved in that case was a much more unequivocal assertion of a right of property than anything that is alleged in the present, inasmuch as Mr Hunt had taken the old palace which was in dispute into his grounds and had exercised all the proprietary rights which were suitable to the subject, and also because there was no other title to support any right whatever in the subject, except a grant of barony with parts and pertinents. But the earlier titles showed that it was a royal palace and not a part of the barony. It followed that although he had possessed the two subjects together, he had not possessed the palace as a pertinent of his barony. It was therefore held that he had no title to support his possession, and, consequently, that he had acquired no prescriptive right. In the present case the defender has a title to explain his possession irrespectively of any right of property, and has had no enjoyment and exercised no right which is not consistent with his admitted character of custodier of

¹ 5 Macph. (H. L.) 1.

Feb. 6, 1912. the castle. There was no adverse possession for the reason your Lordship
 Duke of . has given; and there was nothing done for which the Duke of Argyll,
 Argyll v. alleging a right of property in the castle, could have ejected his vassal in
 Campbell. the lands; inasmuch as in the occupation of the castle the vassal was only
 Lord Kinnear. fulfilling the conditions of the grant of his lands.

I cannot help saying, as your Lordship did at the outset of your opinion, that it is very much to be regretted, that so much expense and research should have been thrown away upon the settlement of a question which, of whatever academical interest, is of no practical importance to the parties in this case, since the result of the decision must be to leave the possession and enjoyment of the subject in dispute exactly where they were before. The only result of the case is that your Lordships find that the legal right of property is in the pursuer, but that the pursuer is not entitled to turn out the defender in terms of the second conclusion of his summons. Therefore I agree that the case should be disposed of as your Lordship proposes, by giving the declarator in terms of the first conclusion and assoilzieing the defender with regard to the second conclusion.

THE COURT pronounced the following interlocutor:—"Recall said interlocutor: Refuse said minute of amendment: Find and declare that the subjects following, viz., All and Whole the Castle of Dunstaffnage with the whole pertinents thereof, lying within the lordship and barony of Lorne and county of Argyll, pertain and belong heritably in property to the pursuer: *Quoad ultra* assoilzie the defenders: Find no expenses due to or by either party; and decern."

LINDSAY, HOWE, & Co., W.S.—MITCHELL & BAXTER, W.S.—Agents.

No. 73.

JOSEPH HARDIE, Pursuer (Respondent).—*D.-F. Dickson—J. R. Christie.*

Feb. 8, 1912.

Hardie v.
Macfarlan's
Judicial
Factor.

ALEXANDER HERBERT BROWN, C.A. (Alexander Macfarlan's Judicial Factor), Defender (Reclaimer).—*Horne, K.C.—Black.*

Alimentary provision—Liability to diligence—Trust—Alimentary liferent to beneficiary under trust—Debt due by beneficiary to trust-estate—Retention of liferent in satisfaction of debt—Excess over reasonable alimentary provision.

A person entitled under a will to the liferent of a share of residue, was also a debtor to the trust in respect of money which had been advanced to him by the testator. The liferent was declared to be strictly alimentary and not attachable for debt. After paying all creditors on the trust-estate, a balance, without including the debt due by the liferenter, remained for division among the residuary legatees.

In an action by the beneficiary for payment of his liferent provision, *held* that the judicial factor on the trust-estate was not entitled to retain the whole of the beneficiary's share of income in satisfaction of the debt, but (*rev. judgment of Lord Skerrington*) that he was entitled to retain so much thereof as exceeded a reasonable aliment.

2D DIVISION.
Lord
Skerrington.

ON 11th October 1910 Joseph Hardie, farmer, Brown Summit, U.S.A., brought an action of declarator, count, reckoning, and payment against Alexander Herbert Brown, C.A., Glasgow, judicial

factor on the trust-estate of the deceased Alexander Macfarlan. Feb. 8, 1912.
 The action concluded, *inter alia*, for payment to the pursuer of one-fourth of the income of the residue of Alexander Macfarlan's estate.

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Alexander Macfarlan died on 1st July 1909 leaving a trust-disposition and settlement dated 23rd April 1909. As none of the trustees accepted office, the defender was appointed judicial factor on the trust-estate.

The testator by his trust-disposition and settlement, after directing payment of his debts and making various other testamentary dispositions, provided by the eleventh purpose thereof as follows:—“(Eleventh) After fulfilling or providing for the foregoing purposes I direct my trustees to hold the residue of my means and estate and produce and proceeds thereof for my nephews and nieces, Joseph Hardie [the pursuer] and Alexander Macfarlan Hardie, both sons of my late sister Catherine, and Mrs Jessie Fleming or Mercer and Mrs Elizabeth Fleming or Smith, both daughters of my late sister Margaret, in liferent, for their liferent alimentary use allenary, equally share and share alike, and their lawful issue *per stirpes* in fee.” The testator further declared that “the whole of the alimentary provisions hereinbefore provided shall be strictly alimentary allenary and shall not be assignable nor attachable for the respective beneficiaries’ debts, deeds, or obligations.”

The pursuer averred that he was entitled to an alimentary liferent of one-fourth of the income of the residue of the estate.

Defences were lodged by the judicial factor.

The nature of the defence and the admitted facts of the case were thus summarised by the Lord Ordinary:—“At the date of the will the pursuer was indebted to the testator in a sum of nearly £5000, being advances received by the pursuer from time to time in order to enable him to carry on his business as a farmer in the United States of America. There is an action in this Court at the instance of the judicial factor against Mr Hardie, in which he sues the latter for £4795, 12s. 8d., being the amount of said advances. The present action was debated upon the assumption that the judicial factor's claim was a good one, and that he held a decree for the amount.* The question in the present case is whether the defender, the judicial factor, is entitled to operate repayment of his debt by impounding the pursuer's liferent interest under his uncle's trust. It is obvious from the averments of both parties that the judicial factor may find it difficult to recover payment of the debt by taking proceedings in the United States. The pursuer, who is sixty-two years of age, alleges that he retired from business three years ago; that his farm was purchased in the name of his wife, and belongs to her; and that the stock belongs to his eldest son. In these circumstances, the defender claims that he is entitled, on the principle of retention or of compensation, to impound either the whole of the pursuer's liferent provision, or at least so much thereof as exceeds a reasonable aliment. He alleges that an allowance of £300 of aliment from the trust-estate would enable the pursuer to maintain himself and his wife comfortably according to their position in life. The estate left by the

* Between the date of the Lord Ordinary's judgment and the decision in the reclaiming note, decree was obtained by the judicial factor against Mr Hardie for the sum sued for.

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testator was very considerable.* The pursuer estimates his one-fourth share of the income of the residue at £1500 per annum, and the defender at £1000."

The pursuer pleaded, *inter alia*;—(2) The pursuer being entitled to the alimentary liferent of one-fourth of the residue of the testator's estate, the defender is bound to hold just count and reckoning with the pursuer and to make payment to him as concluded for in the second conclusion of the summons.

The defender pleaded, *inter alia*;—(1) The defender being justly entitled to retain the pursuer's share of the revenue of the trust-estate against, and apply it towards satisfaction of, the debt due by the pursuer to the testator and interest thereon, decree of absolvitor should be pronounced with expenses. (4) In any event the sum of £300 a year, in view of the station and circumstances of the pursuer, being a reasonable provision for his aliment, the defender is entitled to apply the pursuer's said share of the revenue of the trust-estate—in so far as it exceeds said sum—in satisfaction of pursuer's indebtedness to the trust-estate.

On 19th January 1911 the Lord Ordinary (Skerrington) pronounced this interlocutor:—"Finds that on a sound construction of the trust-disposition and settlement of the deceased Alexander Macfarlan, he directed that the share of the trust-estate bequeathed to the pursuer should be held by the trustees for the purpose of alimenting him, and that it should not be made available for any other purpose: Repels the whole pleas in law stated for the defender; and *quoad ultra* continues the cause: Reserves all questions of expenses; and, on the motion of counsel for the defender, grants leave to reclaim."†

* The estate, exclusive of the sum due by the pursuer, was admitted to be amply sufficient to meet all the claims of creditors.

† "OPINION.—[After narrating the facts]—Except that it confers upon the trustees power to compromise or refer disputed claims, the trust-disposition and settlement contains no express directions as to the recovery of the testator's estate in general or of the pursuer's debt in particular. The inference is that the testator either overlooked the pursuer's debt or intentionally refrained from giving any directions in regard to it. If it were legitimate to speculate on such a matter, I should think it probable that the testator knew perfectly well what he was doing, and that he had excellent reasons in his own mind for making no reference to the debt in his will, either by a clause expressly remitting it or by a clause directing that it should be paid out of the pursuer's life interest. Counsel on both sides referred to the clauses above quoted as throwing light upon the testator's intention in regard to the matter in dispute. The defender's counsel founded upon the words 'residue' and 'equally.' He argued that there could be no proper residue upon which the residuary clause could operate until the pursuer had first paid his debt, and further, that there would be no equality but, on the contrary, inequality among the beneficiaries unless the debt was repaid out of the pursuer's life interest. This argument is fallacious. Whether the pursuer does or does not ultimately pay his debt to the trust-estate, the free estate now in the hands of the defender must be held by him for behoof of four several groups of beneficiaries according to their respective rights of liferent and fee. The only question is whether, according to the wishes of the testator as expressed in his will, the income from one equal fourth share of the residue now in the hands of the defender falls to be paid to the pursuer or must be applied in payment of the pursuer's debt.

"The pursuer's counsel pointed to the clauses declaring the pursuer's

The defender reclaimed, and the case was heard before the Second Division (without Lord Dundas) on 20th and 21st December 1911. Feb. 8, 1912.

Argued for the reclaimer;—The benefit conferred on the respondent by the will was a share of “residue,” and residue meant the actual sum realised by the trust management at its conclusion, and not the amount of the trust-estate as at the death of the truster or any intermediate period.¹ Thus the respondent could not have any claim till the amount of the residue had been made up, and that could not happen until he had paid his debt to the trust-estate. A person who owed an estate money, that is to say, who was bound to increase the general mass of the estate by a contribution of his own, could not claim an aliquot share given to him out of that mass without first making the contribution which completed it.² The question was really as to the right of the judicial factor to ingather the estate, and no question as to the alimentary nature of the beneficiary’s pro-

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visions to be alimentary as impliedly excluding any right of retention or compensation on the part of the defender. But for these clauses it would have been not merely the right but also the plain duty of the defender to operate repayment out of the pursuer’s share of the trust-estate, but that duty would not have arisen out of any legal fiction as to the testator’s intentions. The duty would have been equally imperative in the case of a debt of which the testator was wholly ignorant. The law itself casts upon trustees the duty of acting in an ordinary businesslike manner, and it forbids them to expose any asset of the estate to unnecessary risk. The question is whether the terms of this particular trust sufficiently indicate that the testator did not desire his trustees to proceed according to the ordinary rules of trust management in regard to the recovery of the pursuer’s debt. I am of opinion that the testator’s directions are free from ambiguity. He directed that the share of the trust-estate bequeathed to the pursuer should be held by the trustees for the purpose of alimentering him and that it should not be made available for any other purpose. Although the word ‘attachable’ probably refers to legal proceedings at the instance of third parties I do not think it is possible to read the clauses as if they expressly excepted from their operation debts due by beneficiaries to the testator. Such a construction would amount to the insertion into the will of a direction which the testator might have been the first to repudiate if his attention had been called to the matter.

“Assuming that the defender is debarred from impounding the whole of the pursuer’s life interest his counsel argued that the provision was in excess of what was reasonable in the circumstances. It followed that so far as excessive the provision was not truly alimentary and that it might be made available for payment of the pursuer’s debt. Although I do not see the relevancy of this proposition I admit that either a creditor or an assignee from the pursuer might partially defeat the testator’s expressed intention and might insist upon receiving payment of so much of the pursuer’s life interest as exceeded what the Court might decide to be a reasonable aliment. In defence to such an action it would be the duty of the defender to protect the pursuer against his own improvidence, and to endeavour, so far as possible, to carry out the wishes of the testator. It is conceivable that the defender might satisfy the Court that the provision as it stands is not, in the whole circumstances, excessive. The peculiarity and novelty of the present case is that no one impeaches the validity of the trust except the

¹ Mackenzie’s Trustees v. Macdowall, (1852) 14 D. 739.

² White v. Cordwell, (1875) L. R., 20 Eq. 644; Akerman v. Akerman, [1891] 3 Ch. 212; Taylor v. Wade, [1894] 1 Ch. 671; Partridge v. Rhodesian Goldfields, Limited, [1910] 1 Ch. 239.

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vision could arise until the estate out of which it was to be paid had been ingathered. In any case, the reclamer was entitled to retain the respondent's share in so far as it was in excess of a reasonable provision, as to the amount of which there should be inquiry, failing agreement. It was not disputed that a creditor was entitled to attach *quoad excessum* an alimentary provision in favour of his debtor, and there was no difference in this respect between the position of the reclamer and that of an ordinary creditor.

Argued for the respondent;—This was just the usual case of an alimentary provision which could not be attached by creditors. The English cases relied on by the reclamer had no application, because by English, as distinguished from Scots, law, funds could not be put beyond the reach of creditors by being declared alimentary.¹ If payment of his debt was intended to be a condition of the respondent taking his share of the estate, such a condition would require to be clear and unambiguous.² So far from this being the case, the fact that the provision was declared to be alimentary was an indication to the contrary.³ In the circumstances of the case the amount of the provision could not be questioned. All the creditors on the estate had been paid, and the only persons who had an interest in the matter, and whom alone the reclamer represented, were the residuary legatees. They could not raise the question whether the respondent's allowance was in excess of what an alimentary allowance should be, without reprobating that part of the will which fixed the amount of the allowance, while approbating that part which conferred a benefit on themselves. In any event the reclamer could not retain the whole of the respondent's share of income, but was bound to pay him a reasonable alimentary provision estimated on the basis of the cost of living in America.

At advising on 8th February 1912,—

LORD SALVESEN.—[In his Lordship's absence his opinion was read by the Lord Justice-Clerk]—It is unnecessary to recapitulate the facts of this case, as these are fully stated in the Lord Ordinary's opinion. It may be noted, however, that since the interlocutor under review was pronounced the defender has obtained a decree against the pursuer for a sum of £4795 odds with expenses, being the amount of the pursuer's indebtedness to the trust-estate. It has thus been judicially affirmed that the testator did not discharge his debt, but that it was one which it was the duty of the defender in a due course of his administration to recover for behoof of the residuary legatees.

The questions of law for our decision are two:—(1st) Is the defender

defender, whose duty it is to protect it. There is a difference of opinion between the defender and the testator as to what sum would form a reasonable aliment for the pursuer. I propose to follow the opinion of the testator and to direct that the trust shall be executed according to its terms. I accordingly repel the whole pleas stated for the defender, and *quoad ultra* continue the case."

¹ Surman v. Fitzgerald, [1904] 1 Ch. 573, *per* Cozens Hardy, L.J., at p. 589, Stirling, L.J., at p. 593.

² Bell's Com. (7th ed.), vol. i., p. 143.

³ Reid v. Bell, (1884) 12 R. 178; Bell's Com. (7th ed.), vol. i., pp. 124-126.

entitled to retain from the bequest in favour of the pursuer his indebtedness to the trust-estate as now constituted, paying him no part of the income until the debt has been fully satisfied? and (2nd) Assuming that he is bound in the first place to provide for the reasonable maintenance of the pursuer, in accordance with the testator's expressed desire, is the defender entitled to retain the balance until the pursuer's debt is extinguished?

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 Lord Salvesen.

The defender's contention on the first question was that the pursuer had no right to demand any benefit under the will until he had first repaid his debt to the testator; and reference was made to certain English authorities, of which *Akerman*¹ may be taken as typical. These authorities do not, in my opinion, support the defender's contention. It is common ground that the law of England, differing from the law of Scotland, does not recognise, as in a question with creditors, a condition of a bequest of income that it shall not be attachable for debt. These authorities are therefore in line with the law of Scotland which, but for the condition imposed by the testator on this bequest for the protection of the pursuer, would have made it not merely the right but the duty of the defender to retain the pursuer's share of income as it accrued until his indebtedness to the trust-estate was completely satisfied. That condition, however, makes it plain that the testator was anxious to provide for the maintenance of the pursuer, and his desire would be defeated if the whole income were absorbed for several years in discharging the pursuer's debt. I have therefore come to the same conclusion as the Lord Ordinary with regard to this question.

The second question is one of more difficulty. It is settled law that an alimentary provision is not protected against creditors except to the extent of a reasonable provision, and that *quoad excessum* it is open to diligence. The most authoritative decision on this subject is that of *Livingstone*,² where Lord President Inglis discussed all the earlier authorities. The Lord Ordinary appears to admit this, but he puts his judgment upon the ground that the defender cannot impeach the validity of the alimentary provision in favour of the pursuer to any extent, because it is his duty to protect it. I am unable to concur in this view. The defender's duty to recover debts due to the trust is just as imperative as his duty to divide the income of the residue according to the testator's directions. If it were otherwise, and the pursuer had no other funds (and here he alleges that he has none), there would be in effect an implied discharge of the debt which the defender has now constituted against the pursuer, and the other residuary legatees would be paid a less income than the testator intended them to receive. The two duties appear to me to be sufficiently reconciled by holding that to the extent of a reasonable provision for the pursuer's maintenance the defender must pay him the income of his share of residue, and that *quoad* the balance the defender is entitled to retain it until the pursuer's debt is extinguished. This is just doing directly what I think could be done in a more circuitous way. I see no reason why the defender should not have sold his claim against the pursuer to a third party; and that third party would have been under no duty to restrict his diligence to funds other than those which the pursuer derived by way of annual income from Mr Macfarlan's trust-estate.

¹ [1891] 3 Ch. 212.

² 14 R. 43.

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Judicial
Factor.

Lord Salvesen.

The claim against the pursuer is just an ordinary claim of debt, payment of which can be recovered by the person in right of it by any legal diligence against any income which, although declared to be alimentary and not attachable for debt, happens to be in excess of a reasonable provision for maintenance. The ground upon which the Lord Ordinary proceeds is, I think, impliedly negatived in the case of *Rothwell*.¹ That case no doubt related to a capital sum which was declared to be alimentary and not assignable, and which, when once paid over to the legatee, was not protected from creditors, and could have been disposed of by her as she pleased. But the claim to retain was made by the trustees who were the holders of the fund; and if the principle which the Lord Ordinary has given effect to had been well founded in law, it was a good answer to them that it was their duty to give effect to the truster's declared intention. This was expressly pleaded, for one of the arguments as recorded is as follows:—"At all events, in a question with the trustees the legacy must be held to be incapable of assignment; and even if third parties could plead that the clause was ineffectual, the machinery of a trust not being provided for, the trustees could not maintain that plea." The First Division rejected this contention, and sustained the claim of the trustees to repay themselves their advance before paying the legacy. The reasoning upon which they proceeded appears to me to be applicable to so much of the income payable to the pursuer as is not effectually protected against creditors.

It is a question of circumstances (including the social position of the party in whose favour the alimentary provision has been conceived) what annual sum will constitute a reasonable provision for maintenance. Parties are not agreed upon the facts; and I think it is necessary accordingly that we should remit the case back to the Lord Ordinary to allow a proof of the averments so far as bearing on this matter. I indicate no opinion at this stage as to the relevancy of the averment that the expenses of living in America are higher than the corresponding expenses here, but in the meantime the whole facts bearing on this matter had better be ascertained.

LORD GUTHRIE.—I concur. The reclamer maintained that he was in a better position than an ordinary creditor, and could not merely use the income of the share of the deceased's estate, bequeathed to the respondent, for repayment of the debt due by him, so far as that income might exceed what was necessary for his aliment, but that he was entitled to retain the whole income till the debt was liquidated. The respondent, on the other hand, maintained, in the first place, the view given effect to by the Lord Ordinary, namely, that the testator's direction was that "the share of the trust-estate should be held by the trustees for the purpose of alimentering him" (the respondent), "and that it should not be made available for any other." Alternatively, the respondent asked payment of the fund, so far as necessary for his aliment.

I concur in rejecting the Lord Ordinary's construction of the clause in question. I do not find any instruction, either express or implied, by the deceased to his trustees that the respondent's share of his estate should not

¹ 1 F. 81.

be made available for any other purpose than that of alimenting him. The Feb. 8, 1912.

Lord Ordinary holds that the reclamer has not the ordinary rights of a creditor in the case of an alimentary provision. It is true that the judicial factor happens not to represent creditors, who have all been paid. But that is an accident, which cannot affect a question of construction. I cannot attach importance to the view thus stated by the Lord Ordinary :—

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Factor.

Lord Guthrie.

"The peculiarity and novelty of the present case is that no one impeaches the validity of the trust except the defender, whose duty it is to protect it." It does not appear to me that the reclamer's position involves any impeachment of the validity of the trust. His extreme view only suggests a suspension for a time of the respondent's interest under the trust, and the alternative view, which we are upholding, gives full effect to the trust as an alimentary provision. In addition, while the reclamer has a duty to protect the trust, he has also a duty under the trust to ingather the trust-estate.

The LORD JUSTICE-CLERK concurred.

THE COURT pronounced this interlocutor :—"Sustain the reclaiming note and recall the . . . interlocutor [reclaimed against]: Find that the defender is entitled to retain in his own hands until the pursuer's debt to the deceased testator is satisfied the income of the one-fourth share of the residue of the means and estate of the deceased Alexander Macfarlan, referred to in the first conclusion of the summons, to the extent that said income exceeds a reasonable aliment to the pursuer: Remit the cause to the Lord Ordinary to determine, after such inquiry as he may think fit, what in the circumstances is a reasonable aliment for the pursuer: Find the defender entitled to one-half of the expenses of the reclaiming note against the pursuer, and remit . . . *Quoad ultra* reserve all questions of expenses."

ROBERT H. PATERSON, S.S.C.—DOVE, LOCKHART, & SMART, S.S.C.—Agents.

HENRY HAMILTON FLEMING (Halliday's Curator Bonis), Petitioner No. 74.
(Reclamer).—*Gilchrist*.

Judicial Factor—Curator bonis—Expenses—Resignation of curator—
Expenses of discharge and new appointment.

Feb. 8, 1912.

Halliday's
Curator Bonis.

A curator bonis was appointed to a lunatic, whose whole estate amounted to less than £2000. Fifteen months after his appointment the curator, who desired to resign in order that he might take up a post that had been offered him abroad, petitioned the Court to discharge him and to appoint a new curator.

Held that the expenses of the discharge and new appointment did not, in the circumstances, form a good charge against the ward's estate.

Observed that the question was always a question of degree, in which the size of the estate and the length of the curator's service would be elements for consideration.

On 25th October 1911 a petition was presented by Henry Hamilton Fleming, C.A., Glasgow, setting forth that on 5th July 1910 the petitioner was appointed curator bonis to James Halliday, an inmate of the Royal Asylum, Gartnavel, Glasgow, and that he was desirous of

1st DIVISION.
Lord Hunter.

Feb. 8, 1912. **Halliday's Curator Bonis.** resigning that office, as he had got a professional appointment of a permanent nature in Minneapolis, U.S.A., and was leaving this country to enter upon his duties there. He accordingly craved the Court to recall his appointment and to discharge him, and to appoint a new curator.

The ward's estate, as disclosed in the petitioner's accounts brought down to 30th September 1911, consisted of a tenement of houses, the rental of which was £68, 6s., and moveable property valued at £1076, 15s. 5d. The tenement of houses, together with another house which had now been sold, had been the subject of a note by the petitioner for authority to complete title and to sell.

On 19th January 1912 the Lord Ordinary (Hunter), upon consideration of a report by the Accountant of Court,* discharged the petitioner in terms of the prayer of the petition, and found "that in the circumstances the expenses of this application do not form a proper charge against the curatorial estate."

The petitioner reclaimed, and the case was heard before the First Division on 7th February 1912.

Argued for the reclamer;—During the period for which the petitioner had acted procedure had been carried through in connection with the sale of heritable subjects belonging to the ward, and thus there had been administration for the permanent benefit of the curatory estate. The petitioner had a reasonable cause for desiring to resign, and, as he had throughout acted in good faith, the circumstances did not warrant a refusal of expenses in accordance with the Accountant's report.¹ If the ward were capax so that the consent of the beneficiary could be obtained, the Court would allow the petitioner the expenses of his discharge.² In the case of an incapax the matter was entirely with the Court, and, as a loss would be imposed upon the curator if the Lord Ordinary's finding were upheld, the discretion of the Court should be exercised to allow these expenses. That would be in accordance with the usual practice of the Court, upon which a party accepting office as a curator was entitled to rely.

At advising on 8th February 1912,—

LORD PRESIDENT.—The point raised by this reclaiming note involves a very small sum of money, but is one of some interest. The petitioner is the curator bonis of a lunatic, who was appointed by the Court and entered upon the office, and has realised and managed the ward's estate. The petitioner was appointed in July 1910. About fifteen months after his appointment he was offered a professional appointment of a permanent nature in the United States which he was desirous of accepting, and accordingly he made an application for recall of his appointment and for discharge, and for the appointment of a new curator bonis. In November 1911 his appointment was recalled and a new curator bonis was appointed. His accounts were entirely in order, and accordingly the Accountant of Court reported that, in his opinion, "the petitioner may be judicially discharged and warrant granted for delivery of his bond of caution; but that, in view of the short

* The report of the Accountant of Court is quoted in the Lord President's opinion.

¹ Petition Forbes, (1900) 16 S. L. Rev. 268.

² Gordon, (1854) 16 D. 884.

period of acting and the reason given for recall, the expenses of his discharge Feb. 8, 1912. and the new appointment do not form a good charge against the estate." ^{Halliday's} Curator Bonis. Now, the pecuniary effect of that is that the curator will lose his fee and will be about £8 out of pocket. Upon that statement *prima facie* this case ^{Ld. President.} would appear to be one of some hardship, but I have come to be of opinion that the Accountant is right and that your Lordships should not interfere with his finding. It is quite evident that when an appointment is going to be made upon a small estate, if the gentleman proposed by the Lord Ordinary said frankly that he was willing to act but that he could not hold office for more than fifteen months, the Lord Ordinary would not appoint him. A person when accepting such an appointment gives thereby an implied undertaking that he will go on with it, I will not say for an indeterminate period, for no person can give a guarantee that he will not die or get into bad health, but he does give a guarantee that he will not act capriciously in the matter; and under caprice I think you must include steps which the party appointed may be entitled to take in his own interest, but which conflict with the interest of the estate. Now, all these considerations when they come to be applied will often turn out to be questions of degree, and they are accentuated in the case of a small estate. The office of Accountant of Court and the discretion given to him are designed to save small estates from expenses that should not truly be incurred in the administration of such estates. In a small estate like this, if you had a new curator appointed every few months the ward would never have any income from the estate at all, and I think it is certain from the terms of the Accountant's report that he would not have come to the conclusion stated in his report if the estate had been larger and the period of the curator's service longer. That just shows that it becomes a question of degree, which may well be left to the Accountant to determine. In this case I think that the expenses of the discharge and new appointment should not be allowed, and accordingly I think we are bound, in the interest of the ward whose estate is in our keeping, to adhere to the interlocutor of the Lord Ordinary.

LORD KINNEAR, LORD JOHNSTON, and LORD MACKENZIE concurred.

THE COURT adhered.

H. B. & F. J. DEWAR, W.S., Agents.

CALEDONIAN RAILWAY COMPANY, Complainers (Objectors).—

Hon. W. Watson.

No. 75.

GLENBOIG UNION FIRECLAY COMPANY, LIMITED, Respondents.—

H. P. Macmillan.

Feb. 10, 1912.

Expenses—Taxation—Fees to counsel—Fees to skilled witnesses.

In a case, brought to determine whether fireclay was or was not a mineral and involving an elaborate investigation of the state of scientific knowledge on the subject, judgment was given in favour of one of the parties with expenses. The unsuccessful party objected to the Auditor's taxation of these expenses, on the ground that the fees allowed to counsel in the Court of Session and the fees allowed to skilled witnesses for preparation for the proof, including the expenses of research in the British Museum, were too high.

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The Court, having consulted the Auditor and being satisfied that he had directed his attention to the particularity of the case, *repelled* the objections and *approved* of the report.

Observed (1) that counsel's fees must be considered, not necessarily with a view to the day for which they are allowed, but with a view to remuneration upon the case as a whole; and (2) that fees for research in London were properly allowed where the books required for the purpose were only to be found in the British Museum.

1ST DIVISION. (REPORTED on the merits 1910 S. C. 951 and 1911 S. C. (H. L.) 72.)

An action of suspension and interdict was brought by the Caledonian Railway Company against the Glenboig Union Fireclay Company, in which it was sought to have the respondents interdicted from working seams of fireclay under the complainers' property.

The case was decided against the complainers by the Lord Ordinary (Skerrington) on 28th November 1908, after a proof lasting four days and a hearing on evidence which occupied two days. The complainers were found liable in expenses to the respondents.

The complainers reclaimed, and after a hearing lasting three days, the First Division, on 15th July 1910, adhered to the Lord Ordinary's interlocutor, and found the complainers liable in additional expenses, and remitted to the Auditor to tax and report.¹

The complainers appealed to the House of Lords, and the appeal was dismissed with costs on 28th April 1911.²

The Auditor having reported on the respondents' account of expenses, the complainers presented a note of objections to his report, in which they objected to the amount of the following fees allowed to senior and junior counsel respectively, viz.:—(1) Fees of twenty guineas and fifteen guineas for each of the second and third days of the proof, and fifteen and twelve guineas for the fourth day; (2) Fees of fifteen and ten guineas for the second day of the hearing on evidence; (3) Fees of twenty-five and twenty guineas for the first day of the hearing in the Inner House, and fifteen guineas and ten guineas for the second day, and ten guineas to senior counsel for the third day.

The complainers further objected, *inter alia*, to fees of six guineas per day allowed to skilled witnesses for preparation for the proof, and to the number of days for which these fees were allowed; and also to the allowance of a sum for time occupied by one of the skilled witnesses in consulting authorities in London.*

It was submitted in the note of objections that the fees allowed should have been as follows, viz.:—(1) Fees of fifteen and ten guineas to senior and junior counsel respectively for the second and third days of the proof, and ten guineas and seven guineas for the fourth day; (2) Fees of ten guineas and seven guineas respectively for the

¹ Reported 1910 S. C. 951.

² Reported 1911 S. C. (H. L.) 72.

* The fees allowed for skilled witnesses were as follows:—

1. James Henderson, C.E., Glasgow, . . .	£18	10	0
2. Joseph Dickinson, Manchester, . . .	28	3	0
3. Professor Gregory, Glasgow, . . .	163	3	6
4. Professor Kendall, Leeds, . . .	88	5	0
5. R. R. Tatlock, Glasgow, . . .	52	12	0
6. Dr Fawsitt, Glasgow, . . .	68	16	0
7. Dr Mellor, Stoke-on-Trent, . . .	85	19	6
8. W. Wade, Burslem, . . .	38	16	9

second day of the hearing on evidence; (3) Fees of fifteen and ten guineas for the first day of the hearing in the Inner House, and ten guineas and seven guineas for the second day, and seven guineas to senior counsel for the third day.

It was also submitted that the skilled witnesses ought not to have been allowed more than two days each for preparation for the proof, and that the fees allowed should have been at a rate not exceeding two guineas per day, in addition to time occupied by travelling and attendance at Court.

Parties were heard before the First Division on 11th January 1912.

Argued for the complainers (objectors);—The fees of counsel which the Auditor had allowed for the proof and for the hearings were abnormal and unjustifiable.¹ The fees suggested by the complainers were themselves above the normal, and were appropriate to the complexity of the case. As to the fourth day of the proof, the fees suggested were reasonable, because that was a short day. With reference to the fees allowed to the skilled witnesses, the Auditor had not subjected the accounts for preparatory investigation to a sufficiently close scrutiny, and the Court should remit back to him for further scrutiny.

Argued for the respondents;—Counsels' fees as allowed by the Auditor were not extravagant, looking to the importance and complexity of the question at issue in the case.² Where, as in the present case, questions were raised as to the mineralogical character of any substance, each case had to be considered and determined according to the individual features which it presented.³ Accordingly, careful research into the character of the stone and into the state of scientific knowledge on the subject was necessary, and for that purpose, in the present case, one of the skilled witnesses was obliged to visit the British Museum. The Auditor had been fully informed as to the labours of the skilled witnesses, and in such circumstances it was not customary for the Court to interfere with his report.² The remit to the Auditor suggested by the complainers was not in accordance with usual practice.

At advising on 10th February 1912, the opinion of the Court (consisting of the Lord President, Lord Kinnear, Lord Johnston, and Lord Mackenzie) was delivered by the

LORD PRESIDENT.—We have consulted with the Auditor upon this matter of the objections to his report on the question of the fees in this case.

The question of counsels' fees must, within certain limits, always be a question of degree, and they must be considered, not necessarily with a view merely to the day for which the fee is allowed, but with a view to remuneration upon the case as a whole. Now, after seeing the Auditor, we have come to be of opinion that he has directed his attention to what I

¹ Goodwins, Jardine, & Co. v. Brand & Son, 1907 S. C. 965.

² Boyd & Forrest v. Glasgow and South-Western Railway Co., 1911 S. C. 1050.

³ North British Railway Co. v. Budhill Coal and Sandstone Co., 1910 S. C. (H. L.) 1.

Feb. 10, 1912. may call the particularity of the present case, and that it would be inadvisable to disturb the figures at which he has arrived for the remuneration of counsel.

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clay Co.,
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Then, so far as the fees to witnesses are concerned, it is a case where we think that the fee objected to for the witness going to London to the British Museum was really unavoidable. The question that was being mooted was not merely the state of scientific knowledge, but the state of scientific knowledge at a certain date. No man could be expected to be familiar with that as part of what I may call his general professional information; and therefore it was a matter which necessitated special preparation. And inasmuch as it was admitted that the books required are—so far as this country is concerned—only in the British Museum, and as the British Museum could not come here, it was necessary for the gentleman to go to the British Museum.

Therefore we do not propose to disturb the Auditor's report.

THE COURT repelled the objections, and approved of the Auditor's report.

HOPE, TODD, & KIRK, W.S.—MORTON, SMART, MACDONALD, & PROSSER, W.S.—
Agents.

No. 76. THE MOOR LINE, LIMITED, Pursuers (Appellants).—*Sandeman, K.C.*
—*C. H. Brown.*

Feb. 8, 1912. THE DISTILLERS COMPANY, LIMITED, Defenders (Respondents).—
Murray, K.C.—W. T. Watson.

Moor Line,
Limited, v.
Distillers Co.,
Limited.

*Ship—Affreightment—Charter-Party—Demurrage—Exemption of any
“claim for damages” for delay “by reason of” a strike—Claim for demur-
rage—Congestion at port of discharge following on termination of a strike.*

A charter-party, which allowed ten days on demurrage beyond the lay days at a certain rate, contained a clause providing that the days for discharging should not count during the continuance of a strike, and also providing that in case of delay “by reason of” a strike no “claim for damages” should lie. The ship was detained at the port of discharge for four days beyond the lay days, not owing to the continuance of a strike, but owing to congestion following on the termination of a strike.

In an action for demurrage for these four days, *held* (1) (following *Leonis S.S. Company v. Rank*, (1908) 13 Com. Cas. 295) that the detention was a “delay by reason of” a strike, which excluded claims for damages, and (2) that claims for damages for delay were not limited to claims for detention beyond the demurrage period, but included claims for demurrage.

Observed that “demurrage is agreed damages to be paid for delay of the ship in loading or unloading beyond an agreed period”; the distinction between demurrage and damages for detention being “that the one is liquidated damages and the other unliquidated.”

2D DIVISION. THE MOOR LINE, LIMITED, the owners of the steamship “Zurichmoor,”
Sheriff of brought an action in the Sheriff Court at Glasgow against the Dis-
Lanarkshire. tillers Company, Limited, in which they claimed payment of £100
as demurrage incurred through delay in the discharge of the vessel.

The following facts were admitted on record:—The “Zurichmoor”

was chartered by charter-party, dated 19th May 1911, between the Feb. 8, 1912.
pursuers and M. Neufeld & Company, to load a cargo of grain at Kherson and Nicolaieff and carry it to Leith and/or Glasgow. M. Neufeld & Company shipped on board the vessel a cargo of grain, and received bills of lading which were endorsed to, and presented by, the defenders. It was provided in these bills that the grain was to be delivered to the orders of M. Neufeld & Company or their assigns, they paying freight and demurrage, if any, and that all conditions and exceptions of the charter-party were incorporated therewith. Moor Line,
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The charter-party (which was in the form known as "The 1890 Black Sea Charter-party") contained the following clauses:—"(7) Twenty-two running days, Sundays, Good Friday, Easter Monday, Whit Monday, and Christmas Day excepted, are to be allowed the said freighters (if the steamer be not sooner despatched), for loading and unloading, and ten days on demurrage over and above the said lay days, at twenty-five pounds per running day. Lay days at port of loading are not to count before the next (new style), unless both steamer and cargo be ready earlier. The freighters have the option of cancelling this charter if the steamer does not arrive at port of loading, and be ready to load on or before midnight of 6th June next (new style), unless the steamer has been detained, waiting for orders as to loading port longer than six hours, in which case the date last mentioned shall be extended so far as to cover the time the vessel was detained for orders over and above the six hours, and if by reason of such detention the vessel is prevented reaching her loading port, the charterers shall pay demurrage for each day detained over the said hours, whether the vessel is ultimately loaded or not. . . . (13) If the cargo cannot be discharged by reason of a strike or lock-out of any class of workmen essential to the discharge of the cargo, the days for discharging shall not count during the continuance of such strike or lock-out. A strike of the receiver's men only shall not exonerate him from any demurrage for which he may be liable under this charter, if by the use of reasonable diligence he could have obtained other suitable labour, and in case of any delay by reason of the before-mentioned causes, no claim for damages shall be made by the receivers of the cargo, the owners of the ship, or by any other party under this charter. This clause also to apply to the loading of the steamer."

Eleven days in all were occupied in loading the "Zurichmoor" with grain at Kherson and Nicolaieff. The vessel arrived at Leith on 4th July 1911. A strike of dock labourers was in progress which terminated at midday on 12th July. The gear was hung the same afternoon, and discharging began on 13th July. The discharge of the Leith portion of the cargo was completed on the evening of 21st July. The 16th July being a Sunday, eight days were thus occupied in discharging at Leith. The vessel then proceeded to Glasgow, and discharging began there on, and time began to count from, 25th July. The discharge was finished on 31st July. Seven days were thus occupied in discharging the cargo at Glasgow; and the whole time occupied in loading and discharging was twenty-six days.

The defenders averred that "in consequence of the congestion following on and caused by the strike of dock labourers at Leith, it was impossible to obtain the number of men necessary to work the full number of tackles, or to discharge the said cargo at the ship's fullest capacity. Further, and in consequence of said congestion, the

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supply of railway wagons necessary for the regular discharge of the cargo was insufficient, and the wagons when loaded were delayed in removal, owing to the same cause. There was no avoidable delay in the discharge of said cargo at Leith. If said delay at Leith had not occurred, the vessel would have arrived at Glasgow in time to discharge the balance of her cargo within the time allowed for loading and discharging, in terms of the charter-party."

The pursuers denied these averments, and averred that, if there was a congestion of wagons after the strike, the cargo could have been discharged into a shed at the berth in which the vessel was lying, and thus any delay in respect of wagons might have been avoided. In answer to this averment the defenders explained that grain cargoes were never discharged into shed at Leith, and this would not have been practicable with the cargo in question; and that, if this method had been adopted, further delay would have been caused owing to lack of accommodation and scarcity of labour.

The pursuers pleaded, *inter alia*;—(2) The defences are irrelevant.

The defenders pleaded, *inter alia*;—(2) The excess of four days over the twenty-two running days being due to delay in the discharge of the "Zurichmoor" at Leith, by reason of the said strike, and said delay being an exception under the charter-party, the defenders are entitled to absolvitor with expenses.

On 19th December 1911 the Sheriff-substitute (Fyfe) repelled the pursuers' second plea in law, allowed a proof, and granted leave to appeal to the Court of Session.*

* "NOTE.—As the record stands, I think the proper order in this case is to allow a proof, because there are certain facts not admitted on record, although I understand that there is no real dispute, and that the whole question at issue between the parties really arises upon the relevancy pleas. That question is, in brief, whether congestion following a strike of dock labourers at Leith is within the charter-party exemptions in favour of the charterers—a cause of delay precluding a claim for demurrage.

"The cargo in question was carried under the bill of lading No. 7/1 of process. But that bill of lading imports into the contract the terms of charter-party No. 7/2 of process. Clause 7 of the charter-party allows twenty-two running days for loading and unloading, and ten days on demurrage. Read alone, that clause is clear and unqualified. But there is a qualifying clause, No. 13, and the charter-party must be construed as a whole. If, therefore, clause 13 is unambiguous, it qualifies clause 7. No question arises under the first part of clause 13, because it is agreed that the delay in discharging did not arise 'during the continuance of the strike referred to.' The question arises alone upon the words in clause 13, 'in case of any delay *by reason of* the before-mentioned causes, no claim for damages shall be made by the receivers of the cargo, the owners of the ship, or by any other party under this charter.' On the face of it, this case would appear to be ruled by the case of *The Leonis Steamship Company, Limited, v. Rank, Limited*, (1908) 13 Commercial Cases, 295, which is an authority I think I am bound to follow, although, as applied to the present case, it carries the exemption clause very far, and practically absolves the charterer from liability for demurrage if the delay is in any way occasioned '*by reason of*' the strike, although that delay may occur subsequent to the strike having ended. The pursuers contend, I think rightly, that it is a very important factor in the case that the charter-party fixes the exact loading and discharging time and the exact demurrage period.

"I accept the argument that clause 7 of this charter-party cannot be qualified by the exemption clause 13, unless that clause is perfectly clear

The pursuers appealed to the Court of Session, and the case was heard before the Second Division on 25th and 26th January 1912.

Argued for the appellants;—The Sheriff-substitute was wrong in holding that the present claim was “a claim for damages” within the meaning of clause 13 of the charter-party. On a sound construction of that clause, it did not support the respondents’ contention. The first sentence of the clause provided that “the days for discharge”—which must be taken to include both lay days and the demurrage period—were not to count during a strike. This sentence and the first part of the second sentence, which referred to a strike on the part of the receiver’s men, were the only provisions in the clause as to demurrage. The latter part of the second sentence dealt with a “claim for damages.” That did not include demurrage. It referred to the damages proper which would be due if the vessel were detained beyond the demurrage period. According to the authorities “demurrage” meant the stipulated allowance for detention of the vessel for a certain period,¹ and was not of the nature of damages. Demurrage arose *ex contractu*; damages *ex delicto*. Demurrage was of the nature of rent or hire, and it was no breach of the contract to occupy the demurrage days. The distinction between demurrage and damages was present to the minds of those who framed the charter-party, for in clause 7, for example, the term “demurrage” was employed when demurrage was meant; and “damages” was used in the earlier part of clause 13 in sharp contrast to “demurrage” as used in the concluding words of the clause. The second branch of the second sentence of that clause could not be construed as including demurrage; for, in the first place, it was

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and unambiguous (*Elderslie S.S. Company v. Borthwick*, [1905] A. C. 93; *Nelson Line, Limited, v. Nelson & Sons, Limited*, [1908] A. C. 16), but I think clause 13 is quite clear.

“One of the things to which clause 13 of the charter-party applies is a claim for damages made by the owners of the ship. The pursuers’ agent drew a fine distinction between a claim for demurrage arising (as is the case here) within the ten demurrage days specified in clause 7, and some other claim of damages by the shipowner which might have arisen, as for instance a claim for detention of the ship after the expiry of the ten demurrage days. I think that this is one of that class of refined distinctions which was rejected in the *Leonis* case, in which Fletcher Moulton, L.J., said, ‘this is a business document, drawn up by business men, to be used in a business sense, and there is no room for those very fine distinctions.’

“In my opinion the claim made in the present action is a claim of damages by the owners of the ship, in the sense of clause 13 of the charter-party. Demurrage is, in its nature, a claim of damages, and although the last part of clause 13 does not expressly mention demurrage, I think it is covered. In other words, I am of opinion that the legal principles laid down in the cases referred to, when applied in the present case, mean that if the congestion at Leith which caused the delay in discharging the s.s. ‘Zurichmoor’ is proved by the defenders (upon whom the onus rests) to have been a reasonably direct result of the preceding strike of dock labourers at Leith, then that was delay which fell within the exemption clause 13 of the charter-party, and, accordingly, that the defence stated is relevant.”

¹ *Moorsom v. Bell*, (1811) 2 Camp. 616; *Dunlop & Sons v. Balfour, Williamson, & Co.*, [1892] 1 Q. B. 507; *Gardiner v. Macfarlane, M’Crindell, & Co.*, (1889) 16 R. 658, *per* Lord Trayner, at p. 660; *Bell’s Prin.* (10th ed.), sec. 431 *et seq.*; *Bell’s Com.* (7th ed.), i. 622; *Carver’s Carriage of Goods by Sea* (5th ed.), secs. 609, 648.

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highly improbable that the parties, after providing that the days on demurrage should not run during a strike, should in a subsequent and disjointed sentence add a wider exemption for the same period; and, in the second place, the stipulation in clause 7 as to the period of discharge being in itself absolute, whatever impediments might occur,¹ a clause introduced by way of exception was always to be strictly construed.² The purpose of the clause, on the appellants' construction, was clear and intelligible. It apportioned the loss due to strikes between the shipowners and the charterers. Where a strike occurred during the lay days or demurrage period the whole loss fell on the ship (under the first sentence of the clause), as the running of the days was suspended; where the strike was not during these days, but where there was merely delay "by reason of a strike," the charterers were liable, but their liability was limited to the total amount of demurrage exigible under the charter—in this case £250—and any further loss fell on the ship and was not recoverable from the charterers. The case of *Leonis Steamship Company v. Rank, Limited (No. 2)*,³ on which the Sheriff-substitute relied, was not in point, because the charter-party in that case clearly covered the case of delay during the demurrage period.

Argued for the respondents;—The appellants' claim was excluded by clause 13 of the charter-party. The delay was occasioned "by reason of" a strike,⁴ and the claim made was a "claim for damages." It was erroneous to say that demurrage was rent or hire of the ship in terms of the contract; it was damages due "for the delay of the ship caused by a default of the charterers."⁵ At one time demurrage was used in the limited sense which the appellants attributed to the word, but the modern tendency was to extend that meaning. The strict sense of the word now was "agreed damages to be paid for the delay of the ship in loading or unloading beyond an agreed period,"⁶ and the popular sense was damages, whether liquid or illiquid, for detention of the ship.⁷ In the cases where a lien for demurrage was given it had been more than once held that the lien extended to illiquid damages due for detention.⁸ There was no difficulty in holding that demurrage fell within the latter part of clause 13. The first sentence referred to "the days for discharging," which could only mean the lay days; and that sentence and the first branch of the second sentence provided for the period during which a strike continued. The second branch of the second sentence provided for the after-consequences of a strike, and gave the charterers

¹ *Postlethwaite v. Freeland*, (1880) 5 App. Cas. 599; *Budgett & Co. v. Binnington & Co.*, [1891] 1 Q. B. 35.

² *Elderslie Steamship Co. v. Borthwick*, [1905] A. C. 93; *Nelson Line (Liverpool), Limited, v. Jas. Nelson & Sons, Limited*, [1908] A. C. 16; *Beal's Cardinal Rules of Legal Interpretation* (2nd ed.), 208.

³ (1908) 13 Com. Cas. 295.

⁴ *Leonis Steamship Co. v. Rank (No. 2)*, 13 Com. Cas. 295; *The "Diamond"*, [1906] P. 282, at 287.

⁵ *Harris v. Jacobs*, (1885) 15 Q. B. D. 247, *per Brett, M.R.*, at p. 251.

⁶ *Scrutton on Charter-Parties* (6th ed.), p. 140, note (n).

⁷ *MacLachlan's Law of Merchant Shipping* (5th ed.), pp. 393, 578; *Carver's Carriage of Goods by Sea* (5th ed.), p. 858.

⁸ *Gray v. Carr*, (1871) L. R., 6 Q. B. 522, *per Bramwell, B.*, at p. 551; *Kish v. Cory*, (1875) L. R., 10 Q. B. 553, *per Brett, L.J.*, at p. 560. Reference was also made to *Salvesen & Co. v. Guy & Co.*, (1885) 13 R. 85.

ete immunity as regards any delay thereby occasioned. The F
ants' construction of the clause would lead to the absurd result
he charterers would be liable for delay during the demurrage L
but would be exempt as regards any longer delay; and it E
produce the further anomaly that under the first branch of the L
sentence the charterer would be liable in what was truly
es but not in demurrage, whereas under the later branch of the
ce he would be liable in demurrage but not in damages. The
at the word "demurrage" was used in the earlier part of clause
d the word "damages" in the subsequent part did not prove
ne latter word was used with the intention of excluding demur-
or it appeared on a sound construction of clause 7 of the charter-
that "demurrage" was employed when the parties meant to
e damages generally for detention of the ship.¹

advising on 8th February 1912,—

D SALVESEN.—This case raises an interesting question on the con-
on of the charter-party of a vessel belonging to the pursuers. The
n which the pursuers base their demands for four days' demurrage
disputed; and but for clause 13 there would be no answer to their
Under the contract twenty-two running days (with certain excep-
were allowed for loading and unloading the steamer, "and ten days
urrage over and above the said lay days at £25 per running day."
essel, in point of fact, was not discharged within the lay days, but was
d for four days thereafter before the discharge was finally completed.
ause 7, therefore, of the charter-party, which contains this provision,
one, there would have been no defence to the action. The charterers
ook that the operations of loading and unloading would not occupy
an twenty-two days, and became bound to pay demurrage for every
ereafter, although it might be shown that in the circumstances which
y prevailed during the discharging they could not have finished the
ge within the stipulated lay days. This absolute obligation, however,
ified by clause 13; and it is really on the construction of this clause
e whole controversy turns. The first part of the clause presents no
ty. It says,—“If the cargo cannot be discharged by reason of a
or lock-out of any class of workmen essential to the discharge of the
the days for discharging shall not count during the continuance of
rike or lock-out.” This clause plainly contemplates a strike occurring
the expiry of the lay days. If such a strike occurs, the running of
days is suspended during its continuance, but when it ceases the
rs again commence to run. The only matter on which parties differ
ne construction of this clause is not really material to the decision of
e. The pursuers maintained that “days for discharging” included
n days for which the charterers were entitled to detain the ship on
the stipulated rate of demurrage. I cannot so read them. “Days
urrage” are not “lay days” or “days for discharging,” but are days
which the vessel is detained beyond the time within which the
ers undertook that she should be completely discharged.

The following cases were also referred to:—Lilly & Co. v. Stevenson
(1895) 22 R. 278; *Little v. Stevenson & Co.*, (1895) 22 R. 796.

Feb. 8, 1912. I pass over for the present the second part of clause 13, and then follows the part with regard to which the true issue arises. "In case of any delay by reason of the before-mentioned causes no claim for damages shall be made by the receivers of the cargo, owners of the ship, or by any other party under this charter." The pursuers maintained that a claim for demurrage is not a claim for damages, and that accordingly, while this provision would protect the charterer from a claim of damages for detention after the days on demurrage had expired, it confers no protection from a claim for demurrage strictly so called. If this view be sound, the charterer would not be protected during the very period when the operation of discharging would most likely be affected by reason of a strike which had terminated before the days on demurrage commenced to run. This would be an unreasonable view to take of the intention of the contract, and is not readily to be adopted unless the language admits of no other construction.

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Lord Salvesen.

The whole basis of the argument, however, depends on the view that "demurrage" in the strict sense is not a claim for damage, but is in the nature of a payment in respect of the continued use or hire of the vessel for the charterer's purposes after the expiry of the lay days. That is a theory of demurrage which at one time received some countenance, and which is certainly supported by Lord Trayner's opinion in the case of *Gardiner v. Macfarlane, M'Crindell, & Company*.¹ In my opinion, however, the more correct view is that demurrage is "agreed damages to be paid for delay of the ship in loading or unloading beyond an agreed period." In other words, the distinction between "demurrage" and damages for detention is that the one is liquidated damages and the other unliquidated. A claim under either head is a claim in respect of detention, and is in the nature of a claim of damages. Amongst mercantile men, indeed, "demurrage" is often used in a wider sense as including both demurrage strictly so called and damages for detention, although it is not necessary in order to affirm the decision of the Sheriff-substitute to hold that the term is so used in this particular clause. If, then, demurrage is regarded as liquidated damages for detention, I think there is no difficulty in holding that it is not excluded from the third part of clause 13, but is covered by the words "no claim for damages." The word "demurrage" could not have appropriately entered this clause, because it exempts from liability not merely the receivers of the cargo, but the owners of the ship, in case of any claim being made against them because of delay. But, further, it is quite obvious from a study of the charter-party as a whole that the term "demurrage" is not used in any invariable sense. In the last part of clause 7 "demurrage" is used to describe liability for detention arising before the vessel reaches her loading port owing to the failure of the charterers to give her her sailing orders within the six hours allowed for that purpose. Such detention is to be paid for at the stipulated rate of £25 per day, even although the charter-party is otherwise cancelled and no loading takes place. Again, in clause 13 there is a provision that "a strike of the receiver's men shall not exonerate him from any demurrage for which he may be liable under this charter if by the use of reasonable diligence he could have obtained other suitable labour." To my mind it

¹ 16 R. 658, at p. 660.

plain that "demurrage" occurring in this clause must also cover Feb
for detention.

nk, therefore, that we are not entitled to read the third part of the Moc
in the limited sense for which the pursuers contend so as to exclude Lim
operation a claim in respect of demurrage proper. It is according Dist
good sense, and, I think, also according to the strict language of the Lim
that in the case of delay arising as a consequence of a strike which Lon
minated, but the effects of which on the rate of discharge still con-
that to the extent that that delay is attributable, not to want of
diligence on the part of the receiver, but to the after-effects of a
lock-out, he shall not be answerable for any delay, whether it
during the running of the ten days or after the expiry of that

as were agreed that if this be the true construction of the contract
riff-substitute was right in allowing a proof, as the case of *Leonis*¹
he refers is a clear authority in favour of the relevancy of the
's averments. I am accordingly of opinion that we should affirm
locutor appealed from, and remit the case to the Sheriff Court for
procedure.

LORD JUSTICE-CLERK, LORD DUNDAS, and LORD GUTHRIE concurred.

THE COURT dismissed the appeal.

J. & J. ROSS, W.S.—BOYD, JAMESON, & YOUNG, W.S.—Agents.

NCIS C. CHALMERS, Pursuer (Respondent).—*Horne, K.C.*—*Macquisten.* 1

AY, PERKINS, & COMPANY, LIMITED, Defenders (Reclaimers).— Feb
G. Watt, K.C.—*Munro, K.C.*—*H. P. Macmillan.*

tion—*Malicious prosecution*—*Private prosecutor*—*Want of probable* Cha
Slander—*Privilege*—*Sufficiency of averments of malice.* Bar
Perl
Co.,

a pursuer, a wholesale bottler, received in July 1910 a letter from
solicitors of the defenders, a firm of brewers, stating that certain
nt, which had been sold by him as their stout, had proved on
lysis to be of lower original gravity than the stout manufactured by
m. The letter also stated,—“This discloses that a very serious
upering in the way of adulteration has taken place with the stout
aed to you by” the defenders, “and we have their instructions to
e proceedings against you for that offence”; and invited the pur-
r to apologise, in which case no proceedings would be taken
inst him.

The pursuer having repudiated the charge, the defenders, with the
currence of the Procurator-fiscal, prosecuted him, in the following
ptember, on a complaint which charged him with having, on the
asion to which the letter referred, sold stout which he had falsely
plied was manufactured by the defenders and was of their standard
quality, contrary to the Merchandise Marks Act, 1887. In the
al which followed the pursuer was acquitted.

In an action of damages for slander and malicious prosecution,
nded on the letter and prosecution respectively, the pursuer averred

¹ (1908) 13 Com. Cas. 295.

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that the defenders had acted maliciously, recklessly, and without making a sufficient investigation into the facts of the case; that the tests applied by them to the stout in question had been inadequate; and that they had failed to allow him an opportunity of checking their analysis of it.

Held (altering interlocutor of Lord Ormisdale) (1) that the pursuer was not entitled to an issue of malicious prosecution, as the defenders were privileged in their action and there were no facts set forth from which malice and want of probable cause could be inferred; and (2) that he was not entitled to an issue on the letter, as it merely led up to, and formed a step in, the prosecution.

Observations (*per* Lord Salvesen and Lord Guthrie) as to the degree of privilege allowed to a private prosecutor.

2D DIVISION. ON 15th April 1911 Francis Christie Chalmers, wholesale bottler and aerated water manufacturer, Aberdeen, brought an action of damages for defamation and malicious prosecution against Barclay, Perkins, & Company, Limited, brewers, London.

The pursuer, who set forth that he had been a customer of the defenders since 1905, averred:—(Cond. 4) "One day in the end of May 1910 the pursuer, on going into his premises, was told that a Mr Bain had ordered four dozen bottles of defenders' stout, and that these had been despatched to him. Said bottles had, the pursuer believes, been taken from the stock of bottled stout lying on the shelves of the pursuer's store. The pursuer attached no importance to said purchase, and heard no more thereof until on or about 5th July 1910, when he received from the defenders' law-agents in Aberdeen a letter dated 4th July 1910, which is produced and referred to. Said letter, which was written on the instructions of the defenders, stated that the stout bought by Mr Bain was in bottle, one lot bearing pursuer's name, and the other the number '1241,' and that all the samples bearing the label with pursuer's name proved, on analysis, to have an original gravity of from 1064·09 to 1067·46 instead of 1073. The letter then proceeded in the following terms:—'This discloses that a very serious tampering in the way of adulteration has taken place with the stout issued to you by Messrs Barclay, Perkins, & Co., and bottled by you, and we have their instructions to take proceedings against you for that offence. Before taking the matter into Court, however, they have accepted our advice to give you an opportunity of suitably apologising, and we are therefore instructed to say that if you will give them a letter acknowledging the fault complained of, and apologising therefor, to be advertised at the discretion of our clients, and will pay a sum of say Ten guineas to the Aberdeen Royal Infirmary, and the expenses to which our clients have been put in the matter, they will take no further proceedings with regard to it. Failing your consenting to this course, however, we shall have no help but take the matter into Court, when we need not say the consequences must be much more serious to you.' By said letter the defenders represented that the pursuer had adulterated stout supplied to him by them, and had, for his own profit, dishonestly and fraudulently sold the adulterated mixture to his customers as stout of the defenders' manufacture, and that he was thus guilty of an offence for which he was liable to prosecution. The said charge against the pursuer contained in said letter was false and calumnious, and was made with gross recklessness and with malice. The pursuer was much hurt in his feelings that any such accusation should be made against him,

occasioned him very great anxiety and disturbance of mind, Feb. 1
 ly looking to the fact hereinafter referred to, that, owing to Chain
 out in question having been entirely disposed of, he was Barch
 d of the means of instantly proving his innocence. The Perkin
 was, and is, entirely unable to understand for what Co., L
 the said charge was made. There was no ground for
 h charge, and no person acting with due care and without
 recklessness could have made it. The pursuer through his
 immediately repudiated the charge made against him."
 5) "By 5th July 1910, the date of receipt of said letter, the
 or barrels of defenders' stout from which said four dozen
 had been drawn had been returned empty to defenders, and
 stout which had been bottled therefrom had been disposed of.
 rsuer had thus no opportunity of making any comparison
 the quality of the stout alleged by the defenders to have
 ntained in said bottles, and the bulk from which the bottles
 n filled in the previous month of May." Cond. 6 set forth that
 ember and October 1910 the pursuer had stout supplied to
 the defenders analysed, and that the analysis showed that the
 specific gravity varied from 1066 (allowing for acidity
 to 1071.3 (allowing for acidity 1072.3). (Cond. 7) " . . .
 upon the variation of gravity from their alleged standard of
 nd that alone, that the charge of tampering by way of adultera-
 s founded by defenders. It is very difficult from analysis
 o identify any particular sample of stout as of any particular
 cture, and it is impossible for a manufacturer, as the defen-
 ll knew, to say by a mere gravity test whether any specific
 s the stout of his own manufacture. The term 'original
 ' applied to stout means the density or gravity of the wort in
 rmented state. As is well known to all chemists and brewers,
 course of the process of fermentation of the wort, certain
 d changes occur which have the effect of altering the gravity
 iquid, and after fermentation it is not possible even by the
 ureful analysis and calculation, to ascertain accurately what
 original gravity of the particular stout. Any such attempt
 the original gravity is always subject to a certain margin of
 e variation depending upon a number of factors, the effect of
 cannot be determined with accuracy. Accordingly, a manu-
 of stout or beer who wishes to ascertain with any approxi-
 to accuracy whether a particular stout is a stout manufactured
 is in the habit of adopting other well-known scientific tests
 tion to the gravity test. Even if all the known tests are
 it cannot be affirmed with certainty from mere analysis that
 nt is the stout of a particular manufacturer. These facts are
 n knowledge to persons engaged in brewing, and were well
 to defenders. Further, even if the defenders could have deter-
 by the result of the gravity test whether the stout in question
 nt of their manufacture as supplied to the pursuer, the defen-
 emists in performing the said test failed to take into account
 l factors which must be considered before an attempt can be
 o estimate 'original gravity,' and the defenders knew, or ought
 known, that the said test was absolutely inadequate for the
 of determining whether or not the pursuer was guilty of
 ating the stout supplied by them, and fraudulently selling it
 stout. Nevertheless, upon no other ground than the abso-

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lutely inadequate foundation of an alleged gravity test, the defenders made the charge in the said letter of 4th July 1910, and instituted the prosecution hereafter referred to. Further, the defenders make and deal very largely in a stout of a lower specific gravity than that which had been ordered from them by the pursuer, and they did not adopt in their brewery any specific precautions to secure with certainty that on every occasion the stout they were sending to the pursuer was not said stout of a lower grade of gravity, and the individual barrels of stout which they sent to the pursuer were not sampled or tested before being despatched to him. In point of fact the stout consigned to the pursuer was frequently of the lower standard of specific gravity." (Cond. 8.) "On or about 23rd September 1910 a complaint under the Summary Jurisdiction (Scotland) Act, 1908, was served upon the pursuer at the instance of the defenders.* The complaint charged the pursuer, at the instance of the defenders, with having, on 28th May 1910, in response to an order by Alexander Henry Bain, spirit dealer, 82 Regent Quay and 2 Commerce Street, both in Aberdeen, sold four dozen reputed pint bottles of stout which had been bottled by pursuer, and that prior to said sale and delivery the pursuer had falsely applied to seven or one or more of said reputed pint bottles of stout the defenders' registered trade mark (blue label), thereby implying, contrary to the fact, that the stout contained in said seven or one or more reputed pint bottles was the brown stout manufactured by the defenders, and of the standard of quality of the stout so manufactured and sold by the defenders as their brown stout (blue label), contrary to the Merchandise Marks Act, 1887, section 2 (1) (b), whereby the pursuer was alleged to be guilty of an offence against the said Act, and had become liable on summary conviction to the penalties set forth in section 2 (3) subsection (ii.) of the said Merchandise Marks Act, 1887, and in terms of section 14 of said Act, to the costs of the prosecution. . . . Proof was led [on certain dates]. On 22nd December 1910 the Sheriff gave judgment finding the pursuer not guilty, and the defenders liable to him in the costs of the prosecution." (Cond. 9) "At the trial of said case, although the pursuer was charged with having sold seven bottles of stout not manufactured by the defenders, or not of the standard of quality of defenders' stout, evidence was led in regard to only four of said bottles. No evidence whatever was led by the defenders in regard to the other forty-four bottles which had been purchased by the said Mr Bain. At the trial it transpired that the only ground which the defenders had for making the said charge and instituting the said complaint against the pursuer was the allegation by them that the stout in said four bottles was not of the original specific gravity of 1073 or at the lowest 1072. The defenders failed to prove in said proceedings that all the stout despatched from their brewery had an invariable standard of not less than 1073 or 1072 original specific gravity, and it was admitted that the defenders did manufacture a special draught porter of not more than 1068 original specific gravity. Moreover, it was not proved that the stout supplied to the pursuer was not or might not have been defenders' said draught porter, no identification of individual barrels sent to customers having ever been attempted." (Cond. 10) " . . . During the period between the beginning of Sep-

* The complaint bore to be at the instance of the defenders with the consent and concurrence of the procurator-fiscal of Court.

and the end of October 1910, they themselves supplied to the Feb. 8,
upon orders for the same stout as previously supplied to him, —
a lower standard of gravity than 1072, although they were Chalme
point of prosecuting him for adulterating or tampering with Barclay
out, for no other reason than that it did not reach the standard Perkins
Co., Ltd
y." (Cond. 11) "The prosecution against the pursuer, who
ll-known citizen of Aberdeen, was extensively reported in
nshire newspapers, and as it extended over a number of
ublic attention was widely drawn to it. During the whole
at said prosecution was pending, the defenders published
week in each of the *Aberdeen Journal* and *Aberdeen Free*
advertisement in the following terms, viz. :—

' CAUTION TO THE PUBLIC.

BARCLAY, PERKINS, & CO.

buying London stout, ask for Barclay, Perkins', and insist upon
their name on the label, as other stouts are being sold with
similar in colour and appearance, which deceive the eye.
Perkins' London stouts are the best, and have stood the test
e than 200 years.' Although said advertisement did not men-
d prosecution or pursuer's name, yet it conveyed to the ordi-
ders of said newspaper, as it was intended to do, that the
was one of those who was guilty of the offence specified in
d advertisement, or of some similar fraudulent act, and that
as some intimate connection between the said prosecution of
suer and the terms of the advertisement." (Cond. 12) "The
tion of said complaint and the grave charge of fraud therein
as caused the pursuer serious loss and damage in addition to
l suffering. His reputation as a business man has been very
y injured. Other brewers, such as Messrs Bass & Company,
on-on-Trent, have raised difficulties as to continuing to supply
h their goods, and his whole credit and character as a man
rader have been shaken. There was not a vestige of founda-
the charge made in said letter of 4th July 1910, or in the
int lodged against pursuer. Both the letter and the complaint
ritten and formulated without any adequate investigation on
t of the defenders. If the defenders had made such careful
equate investigation as the circumstances called for, and as
uld without difficulty have made, they would themselves have
red that there were no grounds whatever for charging the pur-
th adulterating the said stout. The defenders made said false
umnious charge and instituted said complaint recklessly and
usly, and without caring whether the same was true or false,
hout probable or any cause. The very slightest inquiry would
vealed to the defenders that the stout supplied by them to
suer was not of a uniform standard of gravity, but they took
as to confirm the basis on which the whole charge rested, and
sly and wantonly launched into proceedings against the pur-
hich were certain for the time at least to cause him great
e and discredit. This they did in the belief that said prosecu-
hether successful or unsuccessful, would advertise their stout
ist them in pushing their wares in the Aberdeen market. In
g the defenders showed a malicious and wicked disregard of
rsuer's interests, character, and position."

pursuer proposed the following issues for the trial of the

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cause:—(1) [It being admitted that the letter of 4th July 1910 was sent on the instructions of the defenders]—“Whether the said letter is of and concerning the pursuer, and falsely and calumniously represents that the pursuer had fraudulently adulterated stout supplied to him by the defenders, and that he was thus guilty of an offence for which he was liable to prosecution,—to the loss, injury, and damage of the pursuer.” (2) “Whether on or about 23rd September 1910, the defenders maliciously and without probable cause served or caused to be served upon the pursuer and prosecuted to a final issue a complaint in the terms set forth in the schedule hereto annexed, to the pursuer’s loss, injury, and damage.” The schedule set forth the complaint summarised in cond. 8.

The Lord Ordinary (Ormidale) disallowed the first issue but approved of the second, and appointed it to be the issue for the trial of the cause.*

* “OPINION.—In this case the pursuer has proposed two issues, but I have come to the conclusion that there is only room for one. Fairly considered, I think that the letter of 4th July 1910 must be read as merely leading up to, and forming a step in, the prosecution which followed in September. There was, no doubt, an interval of ten or eleven weeks between the receipt of the letter and the service of the complaint, and in this respect the present case differs from the cases of *Ferguson v. Colquhoun*, 24 D. 1428, and *Hassan v. Paterson*, 12 R. 1164. But this arises really from the nature of the charge. It was not an accusation of theft or some other criminal offence with which the police are familiar, and which, in ordinary course, would be followed up at once by lodging a complaint with the police and then leaving the Public Authorities to deal with it. The letter contained a notice that if certain proposals were not accepted, proceedings would be instituted in Court. The proposals were not accepted and proceedings were taken in Court. The delay was considerable but I cannot hold it was undue. Both the letter and the prosecution were concerned with precisely the same incident, the alleged tampering with the defenders’ stout before putting it into the bottles which were sold to Mr Bain as containing the stout of the defenders as supplied by them. It seems to me, therefore, that the letter and the prosecution form parts of the same occurrence, and that the pursuer has suffered only one wrong for which he seeks reparation. The proposed issues are in no sense alternative, but the pursuer sues only for one sum of damages and makes no attempt to appraise the extent of the several injuries sustained by him in respect of what he now contends were distinct and separate wrongs. Accordingly I shall disallow the first issue proposed.

“It is not disputed by the pursuer that malice and want of probable cause must go into the second issue, but the defenders maintain that there is no record for malice, that the averments thereanent amount to no more than a general allegation of malice and that such is not relevant where, as they contend is the case here, the occasion is privileged. There must be, they say, specific averments of facts and circumstances from which malice can be inferred, and they further contend that these facts and circumstances must be extrinsic to and independent of the incident or incidents which constitutes or constitute the wrong. Many authorities were quoted. I have read and considered them all. I do not propose here to resume them. They appear to me to be not in all respects consistent, but there are two classes of cases in which facts and circumstances must be averred. *First*, cases of judicial slander, and, *second*, cases directed against public officials. The present is not in either of these classes. It is said that a higher degree of privilege exists in the case of a private prosecutor than in the cases embraced in these two classes. In my judgment that is not so. It seems to me that

defenders reclaimed, and the case was heard before the Second F
n on 24th and 25th January 1912.

ed for the reclaimers;—The Lord Ordinary was right in dis-^C
g an issue on the letter, but he had erred in giving the respon-^B
n issue in regard to the prosecution. In prosecuting the^P
ent the reclaimers were acting in the public interest,^C and in
ases there was a high degree of privilege. It behoved the
ent, therefore, to aver facts inferring malice, and these facts
e antecedent to, and independent of, the statement and action
ined of.² There were no such facts here. All that was
was that the tests which were made by the reclaimers were
t and their investigations inadequate. This was quite
ient as an averment of facts inferring malice.³ The circum-
showed that there was no malice on the part of the reclaimers.
osecution was not precipitate, and it was instituted with the
t of the procurator-fiscal, which would not have been given
e motive of the prosecution been malicious.¹

e prosecutor, as in this case, is primarily at least acting in his own
in the public interest, and that to lodge and follow forth a com-
charging another man with an offence involving the imposition of a
ious penalty, is an essentially different proceeding from the raising
ding a civil action. At the same time, in my judgment, the occasion
e privileged but the privilege was not of so high a degree as in cases
ial slander or those in which public officials are the defenders, and
e the pursuer is not to be held to such strict averments of facts and
stances as are required in cases of that class.

regard to the contention that there are here no facts and circum-
evidencing an oblique motive independent of the prosecution and
d up to it, I had at first some difficulty in not giving effect to it in
the dicta of Lord McLaren in the case of *Campbell v. Cochrane*,
5. But a careful perusal of these satisfies me that his Lordship
his mind the particular circumstances and the kind of slander with
that case was concerned. It was a case moreover in which the
held that the presumption of privilege was of the highest order. It
o me that the way in which a person sets about the institution of
te prosecution may very clearly disclose malice, and that a reckless
d of the alleged offender's interests as evidenced by a want of
ble care and adequate investigation in preparing his charge is a
nt averment on which to found malice. Many of the averments in
se are undoubtedly of a somewhat general nature, but I am not pre-
o dismiss the action without giving the pursuer an opportunity of
g what he alleges. The letter of 4th July is in the most absolute
No opportunity for excuse or explanation is offered. Then there
umption or continuance of trading for ten or eleven weeks. There
er *alia*, averments that the proper means of testing the stout had
n adopted, that in fact the defenders' stout is of varying gravity,
t up to the figure alleged by the defenders, and that the stout sup-
o the pursuer was frequently of the lower standard of gravity.
s also the matter of the advertisement referred to in cond. 11, and
t appears to deal not with adulteration but with simulate labels, it
red that it was intended to convey, and did convey, to readers of

urns v. Turner, (1897) 25 R. (J.) 38, 2 Ad. 450.

mpbell v. Cochrane, (1905) 8 F. 205; A v. B, 1907 S. C. 1154; Shaw
ns, 1911 S. C. 537.

v. H., 1908 S. C. 1130.

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Argued for the respondent;—The respondent was entitled to the issue on the letter which the Lord Ordinary had refused because he was of opinion that the letter and the prosecution formed one proceeding. In point of fact there was no real connection between the letter and the prosecution. The former charged the respondent with a common law offence,¹ while in the complaint the respondent was charged with an offence against the Merchandise Marks Act, 1887.² The letter was clearly defamatory, and, as there was no privilege in regard to it, malice need not be put in issue.³ Further, the respondent was entitled also to an issue *quoad* the prosecution. In *Hicks v. Faulkner*⁴ Hawkins, J., defined what was meant by want of probable cause, and according to that definition, there was no probable cause in this case. All that was required in the way of malice was "reckless disregard of the interests or feelings of the individual"⁵; and the complete absence of probable cause was sufficient evidence from which a jury might justifiably infer malice.⁶ In the present case the reclaimers had acted with the utmost recklessness. They were themselves not clear as to the specific gravity of their stout; they initiated the charge without sufficient investigation and without asking for an explanation; they gave the respondent no opportunity of examining the stout which they alleged was adulterated; and, further, while the prosecution was in progress, they inserted advertisements in the newspapers which were clearly aimed at the respondent although he was not named.⁷ In these circumstances, while it was not disputed that malice and want of probable cause must be put in issue, it was not necessary that extrinsic facts inferring malice should be averred.

At advising on 8th February 1912,—

LORD JUSTICE-CLERK.—The circumstances out of which this case has arisen are, that the defenders, the well-known brewers' firm of Barclay, Perkins, & Company, had been for some time supplying stout to the pursuer to be bottled for the purposes of his trade, and supplying him with their labels, on which the pursuer's name also appeared, to be fastened on the bottles in which they sold the stout to customers who purchased by bottle. In the month of May 1910, the defenders, by an agent, bought a quantity

the newspaper that the pursuer—whose prosecution was proceeding intermittently in the Sheriff Court at the time—was guilty of the offence specified in the advertisement.

"Holding as I do that there must be some inquiry, I see no reason for not sending the case to a jury. I shall approve of the second issue as the issue for the trial of the cause."

¹ Macdonald's Criminal Law (3rd ed.), 85.

² 50 and 51 Vict. cap. 28.

³ *Wilson v. Purvis*, (1890) 18 R. 72; *Reid v. Moore*, (1893) 20 R. 712; *Ingram v. Russell*, (1893) 20 R. 771; *Laidlaw v. Gunn*, (1890) 17 R. 394; *Finburgh v. Moss' Empires, Limited*, 1908 S. C. 928.

⁴ (1878) 8 Q. B. D. 167.

⁵ *Urquhart v. Dick*, (1865) 3 Macph. 932. Reference was also made to *Quartz Hill Gold Mining Co. v. Eyre*, (1883) 11 Q. B. D. 674, at p. 691, and *Pollock on Torts* (8th ed.), 316.

⁶ *Musgrove v. Newell*, (1836) 1 M. & W. 582, at p. 587; *Brown v. Fraser*, (1906) 8 F. 1000; *Lundie v. MacBrayne*, (1894) 21 R. 1085.

⁷ *Hulton & Co. v. Jones*, [1910] A. C. 20.

from the pursuer, which he sold as the defenders' stout. The Fet
 rs' solicitors some little time after wrote to the pursuer, stating that
 mination the stout the pursuer sold was several degrees lower in ^{Chf}
 gravity than the stout the defenders sold to him. They then in the ^{Bar}
 wrote thus: "This discloses that a very serious tampering in the way of ^{Per}
 tion has taken place," and added, "we have instructions to proceed ^{Co.}
 you for that offence." The letter then proceeded to say that they ^{Lor}
 suaded their clients to give the pursuer an opportunity for apologis- ^{Cle}
 apology to be advertised at the defenders' discretion, a sum of say
 be paid to the Aberdeen Royal Infirmary, and the defenders'
 a. The letter concluded by saying that if these things were done,
 nders would take no further proceedings. The pursuer declined to
 e things, and denied that there had been any tampering. The
 id not proceed further till 23rd September 1910 when a complaint
 defenders' instance was served on the pursuer, the terms of which
 orth in the condescendence. The case was tried, and the Sheriff-
 ce gave a verdict of Not Guilty.

Upon the pursuer raised the present action for slander, and asked
 might have two issues, one for the statement made in the letter,
 her for the statements made in the complaint. The Lord Ordinary,
 that, although there was a considerable interval of time between
 r and the complaint, the letter and the complaint were parts of one
 and if a wrong was committed, it was one wrong and one injury,
 the first issue proposed. An argument was addressed to us for the
 against that view, but it did not impress me. I think upon the
 of one issue or two, the Lord Ordinary came to a right conclusion.
 gely, the question now is,—Shall the pursuer be allowed an issue
 the complaint upon the record as it stands? The true question
 is whether, as the nature of the case is such that the question of
 must be directly put in issue, the averments of malice to be found in
 escondence are such as to give him a right to the issue he asks for.
 question is always one of some nicety, particularly where the slander
 o a charge preferred before a Court of Justice, in which, as Lord
 said in the case of *Musgrove*,¹ questions of probable cause and of
 re mixed together.

It be kept in view that every slander has the element of malice in
 a case of gratuitous slander, where the person uttering can have no
 that he acted from an interest that he had, or from a duty lying
 n, no question of proving malice arises, and no such question is put
 sue. The law implies malice in such a case. It requires no special
 On the other hand, in cases of privilege, the insertion of the word
 usely" is essential to the issue. It is to be proved by the pursuer
 ively. He cannot succeed unless he brings proof to show that
 s malice. In such a case the law does not presume malice. The
 must by evidence oust the defender from his position of privilege
 ng that he acted from antecedent malice, to gratify which he gave
 the slander; in other words, that the evidence shows that gratifica-

¹ 1 M. & W. 582.

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tion of his own malicious feeling, and not the doing of duty or the assertion of interest, was the motive of his action. I adopt the words of Lord M'Laren in the case of *Campbell*,¹ when he said: "In order to make a relevant case of malice there must be facts alleged which are . . . independent of the immediate cause of circulating the slander, from which the jury might legitimately infer some antecedent ill-will or indirect motive as the origin or cause of the slander." I differ from the Lord Ordinary when he rejects the case of *Campbell*¹ as not ruling the present case. It is true that that case was a slander of a servant, but I am unable to understand how such a case differs from this case as regards the necessity for setting forth facts from which specific malice may be inferred. I cannot read Lord M'Laren's statement as being applicable to some privileged cases and not to others. To me it appears that, whenever it is admitted that a case is one which, from its nature, requires that the pursuer must present the question whether what was done was done maliciously as a fact which he must prove, he must set forth alleged facts which, if established, will prove it,—prove, that is, that when the defender did what he is said to have done, he did so to gratify malice conceived against the party wronged.

In saying this, I do not wish to be understood as suggesting that the way in which the slander is put forth may not in certain cases be sufficient to enable a jury to imply antecedent malice. For example, if a defender not only makes a charge in the proper quarter, or brings a complaint where the law allows him to prosecute, but goes about gratuitously uttering his accusation broadcast to people who have no interest in the matter, acting in gross recklessness and in a manner indicating a vindictive spirit—I do not suggest that such facts, if set forth, may not justify the granting of an issue in a privileged case. Such facts may be sufficient to imply that the defender acted from positive malicious motive, and was gratifying a formed malice. There is an illustration of this in the case of a banker who made an accusation in the presence and hearing of a number of clerks, having no occasion to do so. But here there is no such case. The defenders took no action except causing a letter to be written to the pursuer, and, when the pursuer refused to admit what it was alleged he had done, bringing the complaint to have the matter tried in a Court of Justice. There is nothing of the nature of malice to be implied from these acts. I see nothing in the record to suggest that the defenders went beyond what was reasonably to be held to be within their right, and that was held to be a sound criterion in *Ingram v. Russell*² and *Douglas v. Main*.³

The case of *M. v. H.*⁴ is important in the consideration of the present question. There the co-defender was assoilzied for want of evidence corroborating the wife's confession, yet the co-defender was not allowed to take an issue of slander against the husband without averments of circumstances inferring malice. Here it is admitted that the pursuer was found not guilty of the complaint made against him. But that does not at all imply want of probable cause. The many cases passed by the *probabilis causa* reporters do not all result in the success of the party for whom prob-

¹ 8 F. 205.³ (1893) 20 R. 793.² 20 R. 771.⁴ 1908 S. C. 1130.

has been found. Therefore the acquittal of the pursuer cannot be relied on to establish that there was no probable cause. I should be inclined to hold that, if a case occurred in which a total want of probable cause was shown, it might be possible to infer specific malice from that fact. There is no such case here.

The final question is—Are there any averments made on this record setting forth facts which, if proved, would set up a case of malice entered? I cannot find any. The word "maliciously" and the word "malice" are used over and over again, but no specific or extrinsic facts of any kind are set forth as a foundation for an issue involving malice as applicable to the particular case.

I think it right further to notice in a word that I cannot give any weight to the averments in cond. 11, relating to an advertisement warning the public to see, when buying the defenders' stout, that their name was on the label, as other stouts were being sold with labels similar in colour and appearance. This, it appears to me, can have no bearing whatever on the issue. It is not suggested anywhere that the pursuer had used labels which had not the defenders' name on them, but were similar in appearance to the defenders' labels, in order to sell stout as being the defenders' which had been brewed by them. I cannot myself see how the pursuer, by suing the defenders for slander on that advertisement, could have introduced it so as to make it apply to him.

The conclusion is that the pursuer has failed to set forth any such averment of malice upon the record as to entitle him in this privileged case to the issue which he demands.

DUNDAS.—I also think that the pursuer is not entitled to an issue, and that the action should be dismissed.

SALVESSEN.—This is an action of damages arising out of the failure of the prosecution at the instance of the defenders against the pursuer for an offence under the Merchandise Marks Act; the particular offence charged is that the pursuer had applied the defenders' label to certain bottles of stout which were either not manufactured by the defenders or had been manufactured so as to be below the standard of quality which they supply. After the trial before the Sheriff the pursuer was found not guilty, and he now seeks compensation for the injury to his trade and feelings which such proceedings and the publicity which they obtained were likely enough to cause. It is admitted that, although the prosecution was not at the instance of the procurator-fiscal, but at the defenders' own instance with their concurrence, both malice and want of probable cause must go into the issue. The question is whether the pursuer's averments disclose a relevant averment of malice or of such recklessness in the institution of the prosecution as in the eye of the law to amount to malice.

In considering this question it is of course important to consider what is the degree of privilege to which the defenders are entitled. The Lord Ordinary has held that their privilege was not of such a high degree as in the case of judicial slander or those in which public officials are defenders. I am able to concur in this opinion. In a case of judicial slander malice

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alone goes into the issue, whereas it is admitted here that the pursuer cannot succeed unless he proves malice and want of probable cause. This clearly demonstrates that the privilege is of the highest order, and the reason is not far to seek. It is against the public interest that persons who have information leading them to suppose that an offence punishable under the criminal law has been committed should be deterred from taking steps to secure the offender's punishment by the fear that, if the prosecution failed, they would be civilly answerable in damages. It is for this reason that the motive with which information is given or such a prosecution instituted is of less importance than in ordinary actions of slander. A person who has probable ground for believing that another has committed a crime has a duty as a citizen to set the machinery of the law in motion against him, and will be protected even though it can be shown that he was actuated by malice in so doing. This differentiates a claim arising out of a prosecution which proves to be unfounded from most cases of privileged slander.

The law nevertheless recognises that an action of damages will lie for an abuse of criminal proceedings; but before an issue is allowed the pursuer must aver facts and circumstances which, if proved, disclose a clear case of abuse. In the present case I think he has failed to do so. Malice in the sense of spite or animosity entertained by the defenders against the pursuer is here entirely out of the question. The pursuer had been the defenders' customer for years, and there is nothing in the record to suggest that there had been any break in friendly relations. Nothing could be more against the defenders' interests in their dealings with other customers than that they should be known to have preferred an unfounded charge of adulteration against a customer, especially one of old standing, in the knowledge that the charge was false; and the suggestion made at the debate that they might conceivably do so for the purpose of advertising the quality of their goods is almost fantastic. If, then, malice in the ordinary sense is excluded, the pursuer must aver that the information which the defenders possessed when they preferred this charge against him was such that it could not have induced the belief in the mind of any reasonable man that an offence had been committed. In my opinion the averments fall far short of this, and indeed amount to nothing more than that the defenders did not make an adequate investigation into the facts; in other words, did not make certain of securing a conviction before they preferred the charge. Similar averments might be made in every case where a prosecution had in fact failed. It appears from the letter founded on by the pursuer that the defenders based their charge of adulteration on an analysis of certain pints of stout which had been bottled by the pursuer and sold under their label. That analysis established that the specific gravity of the stout in question varied from 1064 to 1067 instead of 1073, which the defenders say is the gravity of the stout which they had sold to the pursuer. If it had been averred either that no such analysis was ever obtained, or that the defenders had no reasonable grounds for believing that the original gravity of the stout which they sold was 1073, the pursuer's case might have been relevant, but there are no averments of this kind. All that the pursuer says is quite consistent with a *bona fide* mistake having been made by the

ers, either as to the original gravity of the stout which they supplied Feb. 1
 the inference which they draw from the lower original gravity of Chalm
 at which the pursuer sold under their label. If so, there is nothing Barch
 which malice can be inferred, and we have therefore no option but to Perki
 an issue. Co., I

h stress was laid on the absolute and positive nature of the charge Lordi
 ed in the letter of 4th July, and on the stringent terms which the
 rs imposed as a condition of not taking proceedings against the pur-
 These, however, are quite consistent with the view that the defen-
 na *fide* believed that only one inference could be drawn from the
 tion before them, although this must now be taken to have been a
 on belief. I therefore agree with your Lordships in holding that we
 call the interlocutor of the Lord Ordinary and dismiss the action.

GUTHRIE.—I concur. In this case both parties object to the Lord
 ry's interlocutor. In regard to the respondent's ground of objection,
 the Lord Ordinary's disallowance of a separate issue on the letter of
 ly 1910, I think the Lord Ordinary was right in holding that, if
 was a case for inquiry before a jury, the letter and subsequent unsuc-
 prosecution must be taken together, and only one issue allowed.
 I think, with your Lordships, that the pursuer has failed to make a
 t case for inquiry. The Lord Ordinary's judgment depends on two
 s—first, that in a case of alleged malicious prosecution the privilege
 ivate prosecutor is less than in a case of judicial slander, or in a case
 ic prosecution. I agree with your Lordships' grounds for rejecting
 ew. But, second, the Lord Ordinary holds that the law's undoubted
 ment, in a case of alleged malicious prosecution where no antecedent
 aneous malice is suggested, of facts and circumstances showing such
 ness in word or deed as will infer malice can be satisfied by an
 nt that, before the prosecution was raised, no adequate investigation
 de into the ground of complaint. As I read the pursuer's averments,
 o not amount in substance to anything more.

nsel did not, and could not, found on the mere fact of an unsuccessful
 tion. Their points were (1) charging an offence in the letter of 4th
 910, without first asking for an explanation. But this element has
 d in many previous cases, and has never been held to affect the
 n of privilege. It might have been kinder on the part of the
 ers, as well as more politic in dealing with an old customer, to ask
 explanation before making a charge; but the reclaimers did not
 their position of privilege by not doing so.

The reclaimers, it is said, showed malice by failing to give the respon-
 n opportunity of testing the liquor on which they founded their
 int. But if the respondent was put to a disadvantage thereby it was
 n fault. On receipt of the letter of 4th July, had he asked for a
 , and been refused it, there might have been some ground for this
 int. But he made no such request.

The reclaimers are charged with failure to make "adequate investiga-
 before writing the letter and instituting the prosecution. Seeing the
 asness of this point as a fact or circumstance inferring malice, the

Feb. 8, 1912. respondent's counsel tried to construe the record as in substance charging that no antecedent investigation whatever was made. In view (a) of what is averred by the respondent; (b) what is not denied by him; and (c) his failure to suggest what the reclaimers should have done in the way of tests, I think this attempt failed. I may add that the respondent's averments in cond. 7, as well as much of his counsel's argument, proceeded on the mistaken view that the reclaimers' complaint against him was that he was supplying stout not of their manufacture. That charge was involved in their complaint, but the essence of the charge was that he was supplying stout not of the quality of their manufacture.

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(4) Respondent's counsel maintained, as a fact inferring malice on the part of the reclaimers, that they made their charge and instituted their prosecution against the respondent for selling stout as theirs which was under their standard quality, when, in point of fact, to their own knowledge, they had no standard of quality whatever. Such an averment might well have been relevant as a fact inferring malice. It would have involved knowledge on the reclaimers' part that no prosecution properly defended could possibly succeed. Obviously such an improbable averment would require very clear statement. I shall only say that I am unable to find it on record, and no motion was made for amendment.

On the whole matter I am unable to find any averments by the respondent inconsistent with the reclaimers' good faith, and with their having had probable cause for writing the letter and instituting and carrying through the prosecution complained of. This being a privileged case, the respondent is, therefore, not entitled to proceed with the action, and the action must be dismissed.

THE COURT recalled the Lord Ordinary's interlocutor, and dismissed the action.

ALEX. MORISON & Co., W.S.—MACPHERSON & MACKAY, S.S.C.—Agents.

No. 78. THOMAS WILSON, Pursuer (Respondent).—*Chree*—J. Macdonald.

Feb. 8, 1912. THE SCOTTISH TYPOGRAPHICAL ASSOCIATION AND OTHERS, Defenders (Reclaimers).—*Sol.-Gen. Anderson*—*Hon. W. Watson*—J. H. Henderson.

Wilson v.
Scottish
Typographical
Association.

Trade Union—*Unregistered trade union*—*Objects*—*Legality of objects*—*Promotion of parliamentary representation*—*Ultra vires*—*Trade Union Act, 1871 (34 and 35 Vict. cap. 31)*—*Trade Union Act Amendment Act, 1876 (39 and 40 Vict. cap. 22), sec 16.*

The decision of the House of Lords in the case of *Amalgamated Society of Railway Servants v. Osborne*, [1910] A. C. 87, to the effect that a rule which purports to confer on a trade union power to levy contributions from members for the purpose of promoting parliamentary representation is *ultra vires* and illegal, applies equally whether the trade union is or is not registered under the Trade Union Acts of 1871 and 1876.

So held in an action at the instance of a member of an unregistered trade union for declarator that such a rule, and payments made thereunder out of the funds of the trade union, were *ultra vires* and illegal, and for interdict against such payments being made; and declarator and interdict granted.

tion of printers' societies. . . . *Quoad ultra* denied and that the Association is not registered as a trade union under the Trade Union Acts, 1871 and 1876, and is a voluntary association of printers and others associated for such purposes and objects, and that from time to time be determined by the members." (C.

Scottish Typographical Association was formed in 1850, and in 1909 its membership was 4696. The pursuer is, and has been, a member of the said Association. The objects of the Association before its rules were altered as after mentioned in [rule 2]:—'To unite and protect the members of the printing profession in Scotland; to regulate and maintain the rates of wages and hours of labour; to restrict the number of apprentices; to provide assistance to members removing or emigrating; and to provide for members in permanent disablement, out-of-work, superannuation, and in other contingencies. It shall also endeavour to adjust differences (by arbitration, or otherwise), promote the cause of trade unionism by encouraging the establishment of branches, and generally exercise supervision of all matters affecting the printing trade. There shall be a fund of the Association shall consist of the minimum sum of £1000, to enable the executive council to carry out the rules.' In answer to the statements in answer hereto, the rules of the Association are referred to.* *Quoad ultra* denied. . . ." (Ans. 1.) When the complainer became a member of the Association, the rules as stated in the rules were:—'To unite the members of the printing profession in Scotland; to regulate and maintain the rates of wages and hours of labour; to restrict the number of apprentices; to provide assistance to members removing; and provide for members in contingencies for deceased members. It shall also endeavour to adjust differences, promote the cause of trade unionism by encouraging the establishment of branches, and generally exercise supervision of all matters affecting the printing profession. In order to maintain intact the conditions already gained, the consolidated fund of the Association shall consist of the minimum sum of £1000, to enable the executive council to carry out the

the rules of the Association, so far as material to this report are stated in the averments of parties, were as follows:—The rule 1, "Rules of the Scottish Typographical Association, as amended by a general delegate meeting assembled at Perth, on the 8th, 9th, 10th, 11th, and 13th June 1903, and drawn up and revised by the revision committee on the 10th October 1903."

"39.—*Delegate Meetings.*

A meeting of Association delegates, extending over six days, if possible, shall be held every four years."

"102.—*Rules and Decisions of Delegate Meeting.*

The foregoing rules, together with the decisions of delegate meetings, therewith, shall be considered the governing rules of the Scottish Typographical Association, and binding on all its members and branches. The rules concluded with a docket in these terms: "The foregoing rules, as amended by the delegate meeting assembled at Perth, on 8th, 9th, 10th, 11th, 12th, and 13th June 1903, and drawn up and revised by the revision committee on the 10th October 1903, are hereby confirmed, and will, from 1st January 1904, be the governing rules of the Scottish Typographical Association."

It was admitted that the rules contained conditions which were in

regulations.' . . . Under the constitution of the Associa-
 meetings of delegates from the constituent branches are held
 at every four years. A delegate meeting has absolute and
 ited power to alter the rules and increase or decrease the
 of the Association as each meeting may see fit. . . .

4) "At a delegate meeting of said Association, which was held
 marnock in June 1907, the following pretended rules and addi-
 to the rules of the Association were adopted, namely:—(a) Rule
 said rules was amended so as to include in the objects of the
 ation the following:—'To promote Labour Representation in
 ment'; (b) Rule 53 of said rules was amended so as to provide
 the Association shall be represented annually at.....

Labour Party Conference by two delegates.....
 tes (except general secretary) to all meetings under this rule
 receive 14s. per day and third-class return railway fare. Dele-
 osing time through travelling shall be paid at the same rate';

The following five rules, called 'Association Labour Repre-
 ion Rules,' were added:—'1. The Association shall pay one
 g and sixpence per year per member towards a Parliamentary
 entation Fund. 2. The objects of the fund shall be—To pay
 necessary expenses incurred in running one candidate for the
 of Commons; to pay such parliamentary representative (if
) a sufficient sum for maintenance and travelling expenses as
 hereafter decided by the members of the Association. 3. Each

shall have the right to nominate one candidate as a parlia-
 ry representative; all such nominations to be put to the vote of
 mbers of the Association, as provided by rule 39. The principle
 nd ballot to be followed in such case, the successful candidate
 declared the nominee of the Association for the position of parlia-
 ry representative. 4. Any person nominated as parliamentary

ate must sign an agreement to the effect that he will stand as
 ependent labour candidate, and shall not be allowed to be
 ated by either the Liberal or Conservative Party. He shall
 himself entirely free from both of these political parties, and
 from offering any support to any other candidate who is the
 ee of said political parties. 5. The duties of the parliamentary

entative shall be to watch over the interest of the trade and all
 and other legislation affecting the interest of the worker.
 g the parliamentary recess his services shall be at the disposal
 Executive Council for the purpose of organising and other work.'

pretended rules and amendments were afterwards included in
 les of the Association dated 1907. The pretended new rules
 iterations complained of in this article are *ultra vires* the
 ation in respect that they are outwith the objects of a trade
 and they are illegal and invalid. They are further illegal as
 unconstitutional and contrary to public policy. The statements

wer are denied." (Ans. 4) "Admitted that at the said delegate
 g the said rules and addition to rules of the Association were
 d, and afterwards given effect to in the rules of the Association
 1907. *Quoad ultra* denied. The said new rules and additions to

were duly and validly adopted in accordance with the constitu-
 the Association as above described, and thereupon validly formed
 the rules of the Association. They were *intra vires* of the Associa-
 nd are neither unconstitutional nor contrary to public policy."

5) "In pursuance of the purposes of the pretended rules and

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parts of rules complained of the Association has affiliated itself to the Labour Party, which is a federation of trade unions, trades councils, socialist societies, and local labour associations, and has accepted its constitution. The objects of the Labour Party as set forth in the said constitution are 'To secure the election of candidates to Parliament and organise and maintain a Parliamentary Labour Party, with its own whips and policy.' The Labour Party by its said constitution imposes the following conditions upon its parliamentary candidates and members:—'III.—1. Candidates and members must accept this constitution; agree to abide by the decisions of the Parliamentary Party in carrying out the aims of this constitution; appear before their constituencies under the title of labour candidates only; abstain strictly from identifying themselves with or promoting the interests of any parliamentary party not affiliated or its candidates; and they must not oppose any candidate recognised by the national executive committee of the party. 2. Candidates must undertake to join the Parliamentary Labour Party, if elected.' The report of the Labour Party for the year 1909 is produced herewith and referred to. The conditions imposed by the Labour Party upon candidates and members are unconstitutional and contrary to public policy." (Ans. 5) "Admitted that the Association has been affiliated to the Labour Party, and has thereby accepted its constitution. Admitted also that the objects of the Labour Party are as stated, and that it imposes the conditions stated on its parliamentary candidates and parliamentary members.* *Quoad ultra* denied. The conditions are not illegal as alleged." (Cond. 6) "In furtherance of said pretended rules and parts of rules complained of, the Association has been making payments out of its funds to the Labour Party, and to other bodies, for political purposes, and has commenced to accumulate the Parliamentary Representation Fund referred to in said 'Labour Representation Rules.' During the years 1908 and 1909 the following payments for these purposes were made:—

Year 1908.

To the Labour Party,	£34 18 0
To Parliamentary Committees,	7 10 0
and	5 0 0
Total,	<u>£47 8 0</u>

Year 1909.

To the Labour Party,	£44 0 10
To Parliamentary Committees,	7 10 0
and	4 10 0
Total,	<u>£56 0 10</u>

. . ." (Ans. 6) "Admitted that payments have been made and sums transferred as therein stated. Admitted that the payments to the Labour Party are for political purposes, and that the purpose of the Parliamentary Representation Fund is political. *Quoad ultra* denied. . . . The payments entered as made as to 'Parliamentary Committees' are made to the Trades Union Congress, and are not for political purposes. . . ."

* This sentence was deleted in the Inner House and other words were substituted, *vide infra* pp. 541-3.

Feb. 8, 1912. *Wilson v. Scottish Typographical Association.* parliamentary election expenses: Holds the production satisfied, and reduces the said rules and parts of rules before mentioned, and decerns: Interdicts, prohibits, and discharges the defenders by themselves, or by their officers, agents, servants, or other persons acting by their authority or on their behalf, from making payments out of the funds of the said Association, or out of the moneys already contributed by or levied from, or to be contributed by or levied from, its members or branches, to the Labour Party or for parliamentary election expenses, and decerns." *

* "OPINION.—The pursuer is a compositor, and he has been since the year 1877 a member of an unregistered trade union called the Scottish Typographical Association. This body, along with its officials and trustees, are the defenders in the present action. At a delegates' meeting of the Association held in 1907 the Association amended its rules by adding as one of its objects the promotion of 'Labour Representation in Parliament.' In pursuance of this new object the rules were at the same time amended so as to provide for the Association being represented annually at the Labour Party Conferences by two delegates, who are to receive certain payments out of the funds of the Association; and rules were also adopted establishing a parliamentary representation fund to which the Association was to pay 1s. 6d. per year per member, the object of the fund being to pay the expenses of running one candidate for the House of Commons and to pay for his maintenance (if elected). The pursuer asks for a declarator to the effect that these new rules are *ultra vires*, illegal, invalid, and not binding upon him, and that the Association is not entitled to make payments out of its funds either to the Labour Party or for parliamentary election expenses. The Labour Party, to which the defending Association is now affiliated, is a federation of trade unions and other bodies. Its constitution was considered and discussed by Lord Shaw in his opinion in the case of *Amalgamated Society of Railway Servants v. Osborne*, [1910] A. C. 87. The House of Lords there approved of the judgment of the Court of Appeal in England, which is reported in [1909] 1 Ch. 163.

"The question in the present case is whether the remedy which the House of Lords gave to Mr Osborne as a member of a registered trade union is equally available to the pursuer as a member of a similar but unregistered trade union. Obviously this question must be answered in favour of the pursuer if the view stated by Lord Shaw as his ground of judgment in the *Osborne* case is held to be law, and if (as seems probable) there is no substantial difference between the rules which Mr Osborne's trade union attempted to adopt and the rules adopted by the defending Association in 1907. The pursuer is plainly entitled to prevent an association otherwise lawful, of which he is a member, from adopting rules which are 'unconstitutional and contrary to public policy,' and it is irrelevant in that view to inquire whether the union has or has not been registered under the Act of 1871.

"Of the five noble Lords who gave judgment in the *Osborne* case, the majority (Lord Halsbury, Lord Macnaghten, and Lord Atkinson) expressed no opinion upon the 'constitutional question' which Lord Shaw adopted as his ground of judgment. They held that the society having placed itself by registration under the Trade Union Acts, 1871 and 1876 (34 and 35 Vict. cap. 31, amended by 39 and 40 Vict. cap. 22), its constitution and powers fell to be determined according to the same principles as if it had originally been established or even incorporated by Act of Parliament. Lord Halsbury said, 'The Act' (of 1871) 'is as it were the charter of incorporation,' and he referred to *Ashbury Railway Carriage Company v. Riche*, L. R., 7 H. L., p. 653, as having settled the law in a manner which disposed of the case under consideration. Lord Macnaghten and Lord Atkinson

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organise and maintain in Parliament and the country a political Labour Party.' Further, the clause defining the duties of candidates and members, and quoted by the pursuer and respondent, was wholly deleted, and in its place the following clause was inserted:—'Candidates and members must maintain this constitution; appear before their constituencies under the title of labour candidates only; abstain strictly from identifying themselves with or promoting the interests of any other party; and accept the responsibilities established by parliamentary practice.'"

The pursuer answered the defenders' amendments (1) by deleting the word "are" in the sixth line of article 5 of the condescendence for the pursuer (as printed *supra*), and inserting after the word "constitution" in the same line the following words, viz.:—"which was in force at the date of raising this action were." (2) By deleting the word "imposes" in the ninth line of that article, and substituting therefor the word

manner as if they were the constitution of a statutory body, or as if they formed the contract of copartnery of a mercantile firm. Voluntary associations for charitable or other objects usually begin in a small way and under a reserved power to amend their rules. They from time to time enlarge their objects in a manner which in the language of company law might be described as 'altering the memorandum of association,' and that without obtaining the consent of every individual member. To hold that this familiar practice is illegal would lead to great inconvenience and injustice, because in many cases nothing short of a private Act of Parliament would in that view entitle a voluntary association to enlarge its objects. Accordingly, had it not been for one consideration which applies only to certain unregistered trade unions including, as I think, the particular Association now in question, I should have decided that the Association acting by its delegates did not infringe the pursuer's contractual rights when it altered its rules so as to enable it to adopt political action for the furtherance of its ends. The judgment which ought to be pronounced in the present case depends, in my opinion, upon the answer which ought to be given to a question which was not argued before me, viz., Are the defenders an unlawful association according to the common law of Scotland? If the defenders' Association is illegal at common law, and if its legality depends entirely upon the Acts of 1871 and 1876, then, according to my understanding of the *Osborne* judgment, the change in the rules adopted at the delegates' meeting in 1907, if binding and effectual, would deprive the Association of all benefit from these Acts, and would relegate it once more to the position which it occupied before 1871 as a society which could receive no recognition or help from a civil Court. Such a change in the status of the Association would, of course, materially affect the patrimonial rights of its members. On the other hand, if the defenders' Association is and has always been a legal Association at common law, and independently of the statutes, then the loss of any benefit to be derived from registration under the Act of 1871, or from the legislation of 1906, does not seem to me to be so material as to make the adoption of the new rules an infringement of the pursuer's rights. All trade unions are not illegal at common law—See *Russell v. Amalgamated Society of Carpenters and Joiners*, [1910] 1 K. B. 506. After reading the printed rules of the defenders' Association as it existed prior to 1903, I am of opinion that one of its objects was to interfere with freedom of contract between masters and men in the printing trade, and that it is therefore similar to the union which was decided by the Court of Session to be illegal at common law in the case of *Aitken v. Associated Carpenters and Joiners of Scotland*, (1885) 12 R. 1206. According to the common law, therefore, the defenders' Association is unlawful as being in restraint of trade, and a civil Court will not recognise it or

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Argued for the reclaimers;—(1) The decision in *Osborne v. Amalgamated Society of Railway Servants*¹ had no application to the present case. The ground of that decision was that a registered trade union was in effect a statutory corporation, and, accordingly, that its objects were limited to those permitted or contemplated by the statute which created it.² Such a decision had no application to the case of an unregistered trade union, which was not incorporated inasmuch as it was not registered. On the contrary, it was in the position of a common law corporation which was entitled to do anything, not in itself illegal, which an individual could do.³ Throughout the opinions in *Osborne*,¹ registration was treated as equivalent to statutory incorporation, and the distinction between registered and unregistered trades unions was not expressly drawn because it was not necessary to do so for the decision of the case. But in the Act itself the distinction was marked. The first thing which a registered trade union was required to

sufficient to say that the Association cannot, without violating its contract with the pursuer, adopt rules which place itself and its property outside of the protection of the civil law.

"It now only remains to consider whether the *Osborne* judgment has the effect which I have attributed to it. In the first place, it should be noticed that the decision did not rest in any way upon the specialty that political action was a new departure in the case of the particular society to which Mr Osborne belonged. Lord Macnaghten stated in so many words that a rule empowering a registered trade union to collect and administer funds for political purposes was *ultra vires* and illegal, whether it was an original rule of the union or a rule subsequently introduced by amendment. Unless that had been so the House of Lords could not possibly have pronounced the judgment which it delivered. The society had a rule empowering it to amend, alter, or rescind its rules, and as Lord Selborne pointed out in *Murray v. Scott*, 9 App. Cas., p. 538, 'The only real and true limit' of such a power is that 'the power cannot be so exercised as to make the society a thing different from a . . . society formed for the purposes and in the manner defined by the Act.' He was there speaking of a building society enrolled under the Act 6 and 7 William IV. cap. 32, but Lord Macnaghten quoted the saying as equally applicable to a trade union registered under the Act of 1871. Accordingly, the *Osborne* case decides that a trade union which provides in its rules for political action is not a trade union within the meaning and scope of the Act of 1871. Of course it may be said that such a trade union, though excluded from the benefit of registration in terms of section 6 of the 1871 Act, is none the less a trade union within the meaning of sections 2 and 3, and entitled to the benefit of those sections. I can find no trace of such a distinction in the opinions delivered in the *Osborne* case, which proceeded upon the broad ground that the expression 'Trade Union' as used in the Acts meant not merely a combination which fell within the original or the amended statutory definitions, but was confined to societies which were trade unions in the ordinary sense of that term as used in 1871. In short, as Lord Macnaghten said, when Parliament used what was at the time a common expression, it did not mean a trade union, 'and anything else in the world not in itself illegal which may be tacked on to it.' To suggest

¹ [1909] 1 Ch. 163, *aff.* [1910] A. C. 87.

² [1910] A. C., *per* Lord Macnaghten, at p. 94, *per* Lord Atkinson, at p. 103.

³ *Ashbury Railway Carriage and Iron Co. v. Riche*, (1874) L. R. 9 Ex. 224, *rev.* (1875) L. R. 7 H. L. 653; *Baroness Wenlock v. River Dee Co.*, (1885) 10 App. Cas. 354, *per* Lord Watson, at p. 362.

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"pledge," which Lord James and Lord Shaw¹ found illegal, had been abolished and was no longer part of the constitution of the Labour Party. There was nothing in that constitution as it now stood to which any objection could be taken. (3) The alterations in the rules were within the power of a delegates' meeting. Although there was no express power providing for a change in the constitution, such a power could be inferred, from rule 102 and the docket at the end of the rules, to reside in a delegates' meeting, and the respondents were prepared to prove that, according to the custom of the Association, such changes had always been made at meetings of the delegates. For instance, the provision of sick benefits had been added to the original objects of the Association by a resolution passed at a delegates' meeting. There was no limit to the extent to which the rules and objects might be altered; and in any case, the alterations in question were sufficiently akin to the original objects of the Association to make them competent. Parliamentary action was as much a recognised way of carrying out the purposes of a trade union as a strike. At least it could not be said that the alteration in question was "so inconsistent with the objects and spirit of the partnership that no majority of shareholders, however great, can bind the minority to it," which was the test applied by Wickens, V.-C., in the case of *Pickering v. Stephenson*.² (4) Apart from the question whether the alterations were valid, the Court had no jurisdiction to entertain the present action. It was a legal proceeding instituted with the object of directly enforcing an agreement for provision of benefits,³ for the only patrimonial interest which the pursuer could have was to preserve the funds of the Society in order that his benefits might be more secure, and so far as he was concerned, this could be the only purpose of the action. On this ground alone the action should be dismissed.⁴ Admittedly the case of *Aitken*⁵ could not be reconciled with the English decisions quoted by the respondent, but, this being really a question of jurisdiction, the Scottish decision was to be preferred.

Argued for the respondent;—(1) The decision in *Osborne*⁶ was directly in point and ruled the case. That decision applied to all trade unions, without distinction between registered and unregistered. There was nothing in the opinions of any of the Judges, either in the Court of Appeal or in the House of Lords, to suggest that such a distinction was meant, or that the decision was not intended to apply generally to all trade unions.⁷ Nor was there any reason why such a distinction should be taken. The principal effect of the Act of 1871 was to confer a legal status on all trade unions, and the definition clause, both in that Act and

¹ [1910] A. C., at pp. 98 and 109.

² (1872) L. R., 14 Eq. 322, at p. 339.

³ Trade Union Act, 1871, sec. 4 (3) (a).

⁴ *Aitken v. Associated Carpenters and Joiners of Scotland*, (1885) 12 R. 1206; *M'Kernan v. United Operative Masons' Association*, (1874) 1 R. 454; *Shanks v. United Operative Masons' Association*, (1874) 1 R. 823; *Rigby v. Connol*, (1880) 14 Ch. D. 482; *Russell v. Amalgamated Society of Carpenters and Joiners*, [1910] 1 K. B. 506.

⁵ 12 R. 1206.

⁶ [1910] A. C. 87.

⁷ Cf. [1910] A. C., per Lord Halsbury, at p. 93, [1909] 1 Ch., per Cozens Hardy, M.R., at p. 175, *Fletcher Moulton*, L.J., at p. 185, *Farwell*, L.J., at p. 191.

Act of 1876, applied to trade unions whether registered or not. Registration did not effect incorporation. It was a comparatively important formality. It did not even stereotype the rules of an association, for even though it was registered the rules could still be altered.¹ If the reclaimers' contention were sound, there would be two classes of trade unions, one of which could, while the other could not, extend its objects indefinitely, and, by merely cancelling its registration under section 8 of the Act of 1876, a trade union could pass from one class to the other. It would further mean that the privileges and immunities conferred by the Trade Disputes Act, 1906,² could be enjoyed by an association, formed for any purpose—such as a fishing concern—which chose to bring itself within the definition of a trade union by including among its purposes one in restraint of trade. (2) With regard to the "constitutional" question, the main ground of objection was, as stated by Farwell, L.J.,³ the injustice of compelling all the members of a trade union to contribute for the support of a Member of Parliament with whose views some of them did not agree. This objection was unaffected by the change in the constitution of the Labour Party. In any case, that alteration was only verbal, and a member of that party was in effect still pledged to vote as to which way his vote was to be given. For this reason the new rules were still illegal. (3) Further, the proposed alterations went beyond the power of the delegates' meeting. While such a meeting admittedly could make alterations in detail on the rules, they had no power to make such a fundamental change in the objects. There was no provision for the alteration of the rules, and, at common law, the majority of the members of a voluntary association had no power to make such an alteration as the present against the wishes of a minority.⁴ (4) The action was competent, and within the jurisdiction of the Court. It was well settled by authority that any member of a trade union was entitled to bring an action to prevent the misapplication of trade union funds.⁵ Such an action could never be treated as a legal proceeding for the purpose of "directly" enforcing an agreement for benefits. In so far as *Aitken*⁶ conflicted with this it was overruled by *Howden*.⁷ The other cases relied on by the appellants were all cases of "directly enforcing" an agreement.

Advise on 8th February 1912,—

MR. JUSTICE DUNDAS.—I have considered this case with all the attention due to its interest and importance, as well as to the able arguments which were presented at our bar. In the result, I agree with the Lord Ordinary that the decision must be adverse to the defenders; but I prefer to rest my judgment upon a simpler and (to my own mind) more satisfactory ground than that on which his Lordship has proceeded.

¹ Trade Union Act, 1871, sec. 16.

² 6 Edw. VII. cap. 47.

³ [1909] 1 Ch., at p. 194.

⁴ *Stratton v. Sendall*, [1903] 1 Ch. 921.

⁵ *Yorkshire Miners' Association v. Howden*, [1905] A. C. 256; *Amalgamated Society of Railway Servants for Scotland v. The Motherwell Branch*, (1880) 7 R. 867; *Wolfe v. Matthews*, (1882) 21 Ch. D. 1; *Osborne v. Amalgamated Society of Railway Servants*, [1911] 1 Ch. 1; *Baker v. Ingall*, [1911] 2 K. B. 132; *Wilkie v. King*, 1911 S. C.

R. 1206.

⁷ [1905] A. C. 256.

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It seems to me that the matter is really concluded by the judicial reasoning upon which the *Osborne* case¹ was decided. The decision, if applicable, as I think it is, is binding upon this Court. It is true that the defenders here are not, and that the defendants in that case were, a trade union registered under the Acts of 1871 and 1876. But I am unable to hold, as the Lord Ordinary seems to do, that this difference in fact constitutes a material distinction, or that the *Osborne* case¹ would have been differently decided, if the trade union there under consideration had not been so registered. The Lord Ordinary says that the majority of the noble and learned Lords who gave judgment in the *Osborne* case¹ "held that the Society having placed itself by registration under the Trade Union Acts . . . its constitution and powers fell to be determined according to the same principles as if it had originally been established or even incorporated by Act of Parliament"; and that "it is apparent that this ground of judgment has no application to a society which has no statutory constitution, and which is merely a voluntary association, such as an unregistered trade union." To my mind, this interpretation of the judgment is narrow and inadequate. I am of opinion that the decision, both in the Court of Appeal and in the House of Lords, involved much wider grounds, which are applicable to unregistered as well as to registered trade unions. The rubric of the report of the *Osborne* case in the Court of Appeal² bears that "the definition of a trade union contained in the Trade Union Act, 1871, section 23, or the amended definition in the Trade Union Act Amendment Act, 1876, section 16, is a limiting and restrictive definition, and it is not competent to a trade union either originally to insert in its objects, or by amendment to add to its objects, something so wholly distinct from the objects contemplated by the Trade Union Acts as a provision to secure or maintain parliamentary representation." The decision of a Divisional Court in *Steele*,³ which held, in the words of Phillimore, J., "that section 16 is not a limiting section at all," was overruled on this point. The language of the rubric is taken almost verbatim from, and forms the gist of, the opinion of the Master of the Rolls. That opinion proceeds upon a wide and general consideration of the nature of trade unions, with reference to the Acts of 1871, 1876, and 1906, having regard particularly to the definitions of "trade union" in the first and second of these Acts, which have application equally to trade unions registered under them and to those not so registered. The same observation may be made upon the opinions of Fletcher Moulton, L.J., and Farwell, L.J., which further dealt with the "constitutional" aspects of the matter. I find nothing at all to indicate that any one of the learned Judges intended his opinion to be limited to trade unions registered under the Acts; on the contrary, their reasoning (with which I entirely agree) seems to me to be equally applicable to both classes of trade unions which are legalised and defined by the Acts of Parliament. The House of Lords unanimously affirmed¹ the decision of the Court of Appeal. Three out of the five noble and learned Lords who took part in the judgment (viz., Lord Halsbury, Lord Macnaghten, and Lord Atkinson) followed

¹ [1910] A. C. 87.

² [1909] 1 Ch. 163.

³ [1907] 1 K. B. 361.

ness indicated in the rubric at the same broad and general ground of the Rolls and his colleagues upon a special ground. I taken up by the majority was ex do not decide"; but he prefers of what has been called the "con" ment starts by citing the defin and 1876, and making referenc all of which apply to unregist lordship calls the Act of 1871; and, while indicating a "clo those relating to statutory trac that the Act does not make the ly distinctive word used, a 'c legalises a combination for an the charter for all such 'con of that statute is, I think, p nation. . . . It is manif purposes protected by the for ces of a trade union as defin cts, and it is impossible to upl d the purposes for which the ti n proceeds upon the same unr ned in the passage where he e union" in the Acts of 1871 a s, no doubt, open to objectio a true definition. When Parl the time, and assigns to it a t can be argued that the expre ses of the Act does not mean but means that and anything may be tacked on to it." An hing in any of the Trade Unio ed that trade unions, as defin the power of collecting and ad Atkinson's opinion is in effe ury and Lord Macnaghten.] b that the judicial reasoning is directly applicable to the registered trade union; and, . It follows that the "rules" he payments to which he ob isation, and invalid. This is, t d for the decision of the case a I am right in this view, it is u which it was argued that the

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I do not propose to say much about them. The Lord Ordinary, while he considered that the *Osborne* case¹ did not directly apply here, decided against the defenders, because he held that the change in their "rules" was such as in effect to relegate the Association to the position it occupied before 1871, as a society which could receive no recognition or help from a civil Court, and was therefore a violation of the pursuer's contract, to the material prejudice of his patrimonial rights. I am not prepared to say that I should differ from the Lord Ordinary's view, upon the assumptions I understand him to postulate; but I am not sure that I agree with, or indeed fully appreciate, all the somewhat subtle reasoning upon which it is based; and the ground I have indicated seems to me to afford a more solid and a safer basis of decision. I should, perhaps, say that, if it were necessary to decide the question, I entertain, as at present advised, more difficulty than the Lord Ordinary appears to have felt about the validity, as a question of machinery and powers, of the alterations alleged to have been effected by the delegates upon the "rules" of the Association. These "rules" appear to me to be very loosely drawn up, and very obscure in their meaning and effect; but it is unnecessary, in the view I take, to say more upon this topic.

A great deal of argument was addressed to what has been called the "constitutional question," which was also discussed in the *Osborne* case.¹ I recognise the force and importance of the opinions expressed on this aspect of the matter by Fletcher Moulton, L.J., and Farwell, L.J., and by Lord Shaw. But if the question had to be decided in this case—which, in my view, it has not—it would require to be considered under somewhat different circumstances, owing to the alterations which have quite recently (since the date of the Lord Ordinary's interlocutor) been made on the constitution of the Labour Party, as shown in the amendments of the pleadings allowed at our bar, admittedly with the object, and, as the defenders' counsel urged, with the result, of eliding the adverse effect of the opinions I have referred to. Upon all this I desire to offer no opinion, and indeed have formed none. My position is aptly expressed in Lord Macnaghten's words: "I do not think it is necessary, and I doubt whether it is expedient or profitable, to discuss the so-called constitutional question."

The defenders maintained an argument in support of their second plea in law, which, if well founded, would exclude the action from the jurisdiction of this Court. I think the argument fails, because the matter seems to be concluded by adverse authority—(*Amalgamated Society of Railway Servants for Scotland*²; *Howden*³).

For the reasons stated, we ought, in my judgment, to recall the interlocutor reclaimed against, and to pronounce decree in the pursuer's favour in the terms concluded for, or in such modified terms as the parties may agree on, with expenses in the Outer House and in this Court.

LORD GUTHRIE.—I agree with your Lordship in thinking that the pursuer and respondent is entitled to decree of declarator, and to reduction and interdict as craved.

¹ [1910] A. C. 87.

² 7 R. 867.

³ [1905] A. C. 256.

respondent challenges the reclaimers' right to make the alterations on the rules of the Scottish Typographical Association on four grounds:—First, as *ultra vires*; second, as involving breach of contract; third, as contrary to public policy; and fourth, because the alterations were not lawfully passed. The record discloses only the first and third of these grounds. The Lord Ordinary has negatived the first, and found it unnecessary to decide the third; and he does not refer to the fourth. He has decided the case in the respondent's favour on the second ground.

I agree with your Lordship that the respondent is entitled to decree on the first ground, namely, that the alterations made by the reclaimers were *ultra vires*, and would have been invalid as rules of a trade union, whether registered or unregistered, whether forming part of its original constitution or subsequently inserted, and whether passed unanimously or by a majority. I am in holding that the grounds of the *Osborne* judgment¹ do not rest on the element of registration, and are equally applicable to the case of an unregistered trade union, like the Scottish Typographical Association, now before us.

As regards the Lord Ordinary's ground of judgment, namely, that of breach of contract, altering the patrimonial rights of the respondent, I do not follow his reasoning. He holds that the grounds of judgment of the majority in the House of Lords in the *Osborne* case¹ have no application to the case of an unregistered society like the trade union in question, and at the same time he holds, as the effect of the *Osborne* judgment,¹ that the reclaimers' alterations took the Association out of the category of trade unions recognised by statute, and relegated them to the position of voluntary associations, which are illegal at common law. Such action on the reclaimers' part would not imply breach of contract involving patrimonial loss as between the Association and any objecting member, but I am not satisfied that there was any breach of contract on the reclaimers' part, of the nature intended by the Lord Ordinary, which is separable from the *ultra vires* ground already affirmed.

The ground of breach of contract was, however, maintained by the respondent on a different ground. He argued that, even if the case of *Osborne*¹ did not apply, and whether the reclaimers were to be dealt with on the footing of a registered trade union under the Acts or of a voluntary association untrammelled by statutory restrictions but possessing a constitution which protected patrimonial interests in the members) while a majority, proceeding in accordance with the rules, might possess certain powers of alteration in relation to non-essential matters, the alterations in question were beyond any power inherent in the majority of the members of any voluntary association with a detailed constitution which did not contain any express powers of alteration. He did not dispute that, so far as mere matters of regulation were concerned, such as increasing or decreasing the amount of sick benefits, a majority might be able to bind a minority, but he argued that the reclaimers' action in favour of absolute power to make any alteration on the rules proposed was manifestly untenable, and, in particular, that the introduction of an object, which could only have a remote and indirect bearing on

¹ [1910] A. C. 87.

Feb. 8, 1912. the objects which the Association was designed to promote, could not be passed against the opposition of a minority, at all events so as to affect their patrimonial rights. It is not necessary to decide this point, but I am inclined to agree with the respondent's argument. I incline to think that the effect of such an alteration would be in Lord Selborne's words in *Murray v. Scott*¹ (quoted by the Lord Ordinary) "to make the Society a thing different from a . . . society formed for the purpose and in the manner defined" by its constitution. That observation seems to me as applicable to a voluntary association, with a detailed constitution involving pecuniary interests in its members but not containing any express power to alter, as it is to a statutory society. In addition, it must be observed that the Association was not founded to promote the interests of labour as a whole, but, to quote the words both of the present and former rules, to "exercise a supervision of all matters affecting the printing trade." Yet the reclaimers' alterations compel every member of this Typographical Association to pay money in connection with the return and support of Labour members, whose duty, in relation to labour as a whole, might compel them, as for instance in a question between Free Trade and Protection, to promote or support legislation which, although favourable to labour interests generally, happened to be detrimental to the interests of the printing trade.

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Lord Guthrie.

I was at first inclined to doubt whether the alteration of rule 53 was open to the same objections as the other alterations, either as *ultra vires* or as involving breach of contract. But the averments in condescendence and answer 6, as explained at the bar, satisfy me that no distinction can be drawn. The respondent's counsel explained, in regard to the payments to "Parliamentary Committees" challenged in condescendence 6, that he does not object to them, if the reclaimers' explanation is correct, namely, that they apply to payments to the Trades Union Congress, and are not for political purposes, and do not apply (as the name of "Parliamentary Committees" would suggest) to Labour Party conferences, which are for political purposes. On the footing of this explanation it thus appears that the alteration on rule 53 must stand or fall with the other alterations, because the Labour Party conferences therein referred to are primarily, if not entirely, for political purposes.

In regard to the other grounds which were argued, namely, the constitutional question, as the amended record now presents that question, and the question whether, assuming the Association was entitled to make the alterations, they did so in proper form, it is unnecessary to decide either of them. But, in regard to the first question, I may say that my impression is in favour of the reclaimers.

LORD JUSTICE-CLERK.—I concur in the opinion of Lord Dundas.

The Lord Justice-Clerk intimated that LORD SALVESEN, who was absent at advising, also concurred in the opinion of Lord Dundas.

THE COURT pronounced this interlocutor :—"Sustain the reclaiming note and recall the said interlocutor: Find and declare that the rules and parts of rules referred to in the first three

¹ 9 A. C.; at p. 538.

Feb. 10, 1912. the charge had it not been for the decision in the case of *Coppack v. Miller*.¹

Smith v.
Watson.

Counsel were heard on the note of objections before the First Division on 17th January 1912.²

At advising on 10th February 1912, the opinion of the Court (consisting of the Lord President, Lord Kinnear, and Lord Mackenzie) was delivered by the

LORD PRESIDENT.—In this case the Auditor had originally allowed—or rather was inclined to allow—this charge paid to the Lord Ordinary's clerk for notes of evidence, but felt himself bound to disallow it in view of a judgment of Lord Ormidale in the case of *Coppack v. Miller*¹ in the Outer House. That judgment seems to us to lay down a general rule which we cannot approve of. The question whether there should be an allowance for getting the notes of evidence must always be a question of circumstances. There is no doubt that if a case proceeds in the way in which it ought ideally always to proceed, the speech is taken immediately at the conclusion of the proof, and there is no opportunity and no right to get notes of evidence. Counsel ought to take such notes as they think necessary for themselves as they go along. But, then, ideal progress of a case is not always possible. Cases have to be continued in quite unavoidable circumstances. The case may take longer than was expected, or the Lord Ordinary's other work may prevent him giving continuous sittings, and sometimes he may not have time for the hearing immediately at the conclusion of the evidence for similar reasons. When a case is complicated and much depends on the facts, it would be putting more than it is possible to put upon the human memory to expect that counsel could in such circumstances properly debate the case without the notes of evidence.

It is, therefore, really a question of circumstances in each case, and I think it would be quite improper to lay down that a certain number of days must elapse before which it was impossible to get the notes and after which it was. We think that that can be judged of in each case, and as the Auditor was originally of opinion in this case that the charge ought to have been allowed, we propose to sustain the objection and allow the charge.

But we propose to say this, as a general rule—the profession will take note of it and we shall communicate it to the Lords Ordinary—in future where the litigant desires the notes of evidence and proposes to charge their cost, if he is successful, against the opponent, he must get the Lord Ordinary's leave to that effect. Of course he could never get the notes of evidence at all without the Lord Ordinary's leave, but he must intimate, in asking for them, that he proposes to charge the cost of them against an opponent; and then, if the Lord Ordinary chooses to allow it upon that footing, well and good. If he asks for them without that

¹ 1911, 2 S. L. T. 65.

² *The following authorities were referred to:*—For the defender and objector—*Birrell v. Beveridge*, (1868) 6 Macph. 421; *Gunn v. Muirhead*, (1899) 2 F. 10. For the pursuer—*Girvin, Roper, & Co. v. Monteith*, (1895) 3 S. L. T. 192; *Coppack v. Miller*, 1911, 2 S. L. T. 65.

ion, then it will be held that he asks for them simply for his own Feb.
ence and must pay for what he gets.

is the judgment of the Court.

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THE COURT sustained the objection.

WILLIAM DOUGLAS, S.S.C.—GILL & PRINGLE, W.S.—Agents.

WILLIAM BASTABLE, Pursuer (Appellant).—*Constable, K.C.*—
Young.

NORTH BRITISH RAILWAY COMPANY, Defenders (Respondents).—
Cooper, K.C.—*E. O. Inglis.*

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ion—*Negligence—Carriage of goods—Railway—"Wilful miscon-*
-Overloaded wagon—Breach of regulations—Failure of railway
to gauge load.

railway company contracted to convey the plant of a switchback
way at a special reduced rate, one of the conditions of the contract
ng that the proprietor of the goods should relieve the company of
liability except for damage arising from the "wilful misconduct"
the company's servants. One of the company's regulations directed
at all loads must be gauged "when there is any reason to doubt that
y are not within the dimensions" specified for the lines over which
y have to travel. The station-master at the station of departure
not gauge the load, but merely judged the height of it with his
e and concluded that it did not exceed the dimensions. In this,
wever, he was mistaken, and part of the load, in the course of
nsit, came in contact with the smoke-board of a bridge beneath
ich the train was passing, and was damaged.

Held by a Court of five Judges (*diss.* Lord Johnston) that the
amage was due to "wilful misconduct" of the station-master, for which
company was liable.

Opinion (*per* the Lord President) that "wilful misconduct" is not
omething more than, and opposed to, "negligence," and dicta to the
trary effect in *Graham v. Belfast and Northern Counties Railway*,
01] 2 I. R. 13, and *Lewis v. Great Western Railway*, (1877) 3
B. D. 195, *doubted*.

July 1910 William Bastable, a switchback proprietor, brought
on in the Sheriff Court at Falkirk against the North British
y Company, in which he claimed the sum of £325 as damages
l by him in consequence of the fault and wilful misconduct of
fenders' servants in loading and dispatching certain plant
ng to him upon the defenders' railway.

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pursuer averred that, under a contract entered into between
d the defenders, the servants of the latter trucked the engine,
ery, and plant, of his steam switchback railway for conveyance
enger train from Alva to Grahamston Station.

contract in question was embodied in a "consignment-note
rchandise to be carried by passenger train at owner's risk,"
was in these terms:—"The North British Railway Com-
ereby give notice that they have two or alternative rates
carriage of the undermentioned merchandise, at either of
rates the said merchandise may be carried, at the sender's
one the ordinary rate, when the Company take the ordinary
of a common carrier; the other, a special or reduced rate,

Feb, 10, 1912. *when the sender agrees to relieve the Company and all other companies or persons over whose lines the merchandise may pass, or in whose possession the same may be, from all liability for loss, damage, mis-delivery, delay, or detention, except upon proof that such loss, damage, mis-delivery, delay, or detention arose from wilful misconduct on the part of the Company's servants.*

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" To the NORTH BRITISH RAILWAY COMPANY,

" Alva Station, 1/6/1910.

" Receive and forward the undermentioned merchandise, to be carried at the special or reduced rate, below the Company's ordinary rate, in consideration whereof I agree to relieve the North British Railway Company and all other companies or persons over whose lines the merchandise may pass, or in whose possession the same may be, from all liability for loss, damage, mis-delivery, delay, or detention, except upon proof that such loss, damage, mis-delivery, delay, or detention arose from wilful misconduct on the part of the Company's servants, and I also agree to the conditions on the back of this note. This agreement shall be deemed to be separately made with all companies or persons parties to any through rate under which the merchandise is carried." It was signed by the pursuer, and annexed was a schedule giving details of the goods to be dispatched and their destination, &c.

The pursuer further averred:—(Cond. 5) "While said train was being shunted under the bridge to the west of Grahamston Station and under Hope Street, Falkirk, the top of the loaded wagons came in contact with the roof of said bridge or with a smoke-board suspended from said bridge, and considerable damage was done to the pursuer's property. The engine, machinery, and plant were rendered unfit for use, and the pursuer has been unable to fulfil his engagements." (Cond. 6) "The said damage to the pursuer's plant was caused by the gross negligence and wilful misconduct of defenders or their servants for whom they are responsible. Their servants at Alva piled the plant far too high in the trucks, or used unsuitable trucks, utterly and wilfully disregarding of whether the trucks so loaded could pass under the bridges between Alva and Grahamston. There is a gauge at Alva for measuring the height to which trucks can safely be loaded, but on this occasion the defenders' servants wilfully failed to use the said gauge. Had they used it the damage to the pursuer's plant would have been avoided. In any event, it was clear to the defenders' servants at Grahamston Station that the trucks could not safely pass under the bridge at Hope Street, but notwithstanding this they wilfully and recklessly, and not caring whether the plant might be injured or not, shunted the loaded trucks under the bridge, with the result that the pursuer's plant was damaged as stated. A similar occurrence took place at the same bridge in or about April last, and the defenders' servants at Grahamston were well aware of the conditions of the bridge and that it was dangerous for trucks, loaded as the trucks in question were, to be shunted under it. Since the damage to the pursuer's plant, said bridge has been improved by the removal of the smoke-board in question."

In answer the defenders admitted that part of the load had suffered damage through coming in contact with the smoke-board of the bridge in question. They averred that the pursuer had consigned

his goods at a special rate, being 25 per cent less than the ordinary rate of carriage, under a contract which absolved the Company of all liability for damage, &c., except that arising from the wilful misconduct of its servants, and denied that the damage in question was so caused.

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The defenders pleaded, *inter alia*;—(2) The goods having been carried by the defenders under the special contract produced, the defenders are not liable to the pursuer except upon proof that the damage arose from wilful misconduct on the part of the defenders' servants. (3) The damage not having arisen from wilful misconduct on the part of the defenders' servants, the defenders ought to be absolved.

The pursuer founded on certain regulations of the defenders' Company which were in force at the time of the occurrence, viz:—

"*Dimensions of Loads*.—These must not exceed those given in the Railway Clearing House Classification Book for the line or lines over which they have to pass, and all loads must be gauged when there is any reason to doubt that they are not within the dimensions. . . .

"*Threshing Machines, Agricultural and Traction Engines*, and all *Engines and Machines* of a like kind must be passed under the gauge"

A proof was allowed and led, and thereafter, on 27th December 1910, the Sheriff-substitute (Moffatt) pronounced this interlocutor:—
"The Sheriff-substitute having advised the cause—Finds in fact (1) that on 1st June 1910 the pursuer, who is owner of a steam switch-back railway with which he visits shows, fairs, and similar functions all over the country, by special contract, No. 9 of process, signed by himself, contracted with the defenders to convey this switchback plant from Alva Station to Falkirk (Grahamston) Station, both on the defenders' line; (2) that the said plant was loaded upon defenders' trucks, which trucks were attached to a passenger train which left Alva in the afternoon of the said 1st of June; (3) that the trucks were not put through the gauge at Alva Station; (4) that the station-master at Alva saw the trucks, considered whether it was necessary that they should be gauged, and decided that it was not necessary; (5) that the train arrived safely at Grahamston Station, having passed without mishap through a bridge named the Hope Street Bridge, a little to the west of the station, and the trucks were thereafter detached and shunted into a siding; (6) that in order to reach the siding the trucks had again to pass twice under Hope Street bridge; (7) that on passing for the last time under Hope Street bridge, on the northmost line the funnel of the pursuer's engine caught a smoke-board which depended from the bridge; (8) that the bridge is lower at the north end than at the south end; (9) that the truck on which the engine was loaded, was loaded too high at Alva Station; (10) that by the funnel coming in contact with the smoke-board the pursuer's plant was seriously damaged; (11) that the pursuer has suffered damage to the extent of £100 sterling; (12) that the special contract, No. 9 of process, under which the goods were conveyed, contains, *inter alia*, a clause freeing the defenders from liability for damage to the goods except upon proof that such damage arose from wilful misconduct on the part of the defenders' servants: Finds in fact and in law that there is no proof of wilful misconduct on the part of the defenders' servants: Finds in law that the defenders are not liable in reparation to the pursuer: Therefore repels the pursuer's

Feb. 10, 1912. pleas in law : Sustains the second and third pleas in law stated for defenders, and assolizies the defenders. . . .” *

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* “NOTE.—[After a narrative of the facts]—There can, I think, be no doubt that there was fault and negligence on the part of the defenders’ servants ; in fact I think I might say that there was gross negligence. To allow very highly loaded wagons to leave Alva Station without passing them under the gauge appears to me to amount to neglect of duty of a very serious kind, especially when one remembers that these wagons were to be attached to a passenger train. Of course with that aspect of the matter, *i.e.*, the safety of a passenger train, I have nothing to do in this case, which is only concerned with the defenders’ duty to the pursuer’s property in their care ; but one would imagine that the fact of the wagons going as part of a passenger train would have made the defenders’ servants at Alva very particular. The pursuer and his son state in their evidence that the pursuer asked a railway porter at Alva if they were not going to gauge the trucks. They are not able to identify the porter, and both porters employed at Alva deny that they were so interrogated. I am inclined to believe the pursuer and his son, principally because of their saying that the porter said it was too much trouble, as the gauge was at the other side of the railway from where the wagons were, and there was no engine to shunt them. This was the case (see evidence of Beveridge). The pursuer or his son could hardly have invented this statement. It is curious that none of the railway employees, porters, station-masters, or guards, should have had any doubts about the loads safely passing the bridges on their journey, when clearly it was only a question of an inch or two. At Alva I think the railway employees were lulled into a feeling of false security by the fact that the things had come to Alva from Dunblane in safety, passing under several bridges on the way. But of course it is the lowest bridge that is the important one. This load might perhaps have travelled all over Scotland for all I know and never come to harm had it not been shunted at Grahamston. Be the explanation of the carelessness what it may I think it was clearly the duty of the railway servants to have passed the trucks under the gauge. They were manifestly very highly loaded ; above all, they did stick at Grahamston Bridge and cause an accident. Had the defenders been carrying the goods under their common law liability or under a contract where they were responsible for the fault or negligence of their servants, there could be no doubt of their responsibility. The contract here, however, was a special contract such as is permitted and contemplated by the seventh section of the Railway and Canal Traffic Act, 1854 (17 and 18 Vict. cap. 31).—[The Sheriff-substitute here referred to the terms of the contract.] No question of this contract not being ‘just and reasonable’ is raised or could well be raised in this case. The stipulations, although far from being just and reasonable in themselves, are made so by the alternative of common law liability being offered—(*Manchester, &c. Railway v. Brown*, (1883) L. R., 8 App. Cas. 703 ; *G. W. R. v. M’Carthy*, (1887) L. R., 12 App. Cas. 218)—and the ordinary rate as distinguished from the special rate is not so high as to be prohibitive.—(See opinions of L. P. Inglis in *Finlay v. N. B. R.*, July 8, 1870, 8 Macph. 959, 970 ; and Lord Watson in *Manchester, &c. Railway, sup. cit.*, at p. 716.) The ordinary rate is 25 per cent higher than the special rate. That does not appear on the face of the contract, but is spoken to in evidence. . . . The question then remains : has the pursuer proved that the damage to his goods arose from wilful misconduct on the part of the defenders’ servants ? I think this question must be answered in the negative. I do not think that the pursuer has proved that the defenders’ servants have been guilty of wilful misconduct. ‘Where a railway company agrees to carry at a reduced rate (the contract being *bona fide* and not colourable) upon condition of being relieved of the ordinary liability for negligence and to be responsible only for the consequences of the wilful misconduct of

The pursuer appealed, and the case was first heard before the First Division (consisting of the Lord President, Lord Johnston, and Lord Skerrington) on 14th November 1911, when it was ordered to be reheard before a Court of five Judges. The case was accordingly heard before the Lord President, Lord Kinnear, Lord Johnston, Lord Mackenzie, and Lord Skerrington on 21st December 1911.

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Argued for the appellant;—The facts proved were sufficient to show that there was in law wilful misconduct on the part of the defenders' servants. It must have been obvious to the skilled eye of the station-master at Alva that this load was near the limit of height, yet he did not put it through the gauge as in the circumstances it was his duty to do. Even in the absence of regulation such breach of duty amounted to wilful misconduct: much more so in view of the terms of the Company's rule.¹ Such conduct amounted to more than negligence. It was proved that he had considered the dimensions of the load, and had deliberately refrained from putting it under the

their servants, it will be for the plaintiff, in an action for injury to the goods carried, to prove more than culpable negligence. There must be evidence of actual wilful misconduct causing the injury.'—(*G. W. Ry. v. Glenister* (1873) 22 W. R. 72.) The rubric above quoted seems to be a correct statement of the law. As confirming this, reference may be made to the opinion of Lord Alverstone, C.J., in *Forder v. G. W. R.*, [1905] 2 K. B. 532, 535, approving of the definition of wilful misconduct given by Mr Justice Johnson in Ireland in the case of *Graham v. Belfast and Northern Counties Railway Company*, [1901] 2 I. R. 13. Mr Justice Johnson says, 'Wilful misconduct in such a special condition means misconduct to which the will is party as contra-distinguished from accident and is far beyond any negligence, even gross or culpable negligence, and involves that a person wilfully misconducts himself who knows and appreciates that it is wrong conduct on his part in the existing circumstances to do, or to fail or omit to do (as the case may be), a particular thing, and yet intentionally does, or fails or omits to do it, or persists in the act, failure, or omission, regardless of consequences.'

"These being the rules of law, can it be said that the pursuer has proved that the defenders' servants have been guilty of wilful misconduct? The proof does not bear it out. I was at first impressed by the evidence given by the pursuer and his son about the pursuer's request to have the wagons gauged, and I was inclined to think that the railway porter's failure to gauge them when so requested might amount to wilful misconduct. But it seems to me, apart from the slight doubt which I have as to whether this occurred or not, that the evidence of the station-master, Mr Blackwood, is conclusive against the pursuer's contention. Mr Blackwood was the responsible official; it was not to the porters that the pursuer had to look, it was to the station-master. The station-master in his evidence says that he examined the vehicles and came to the conclusion that they did not require to be gauged. I cannot say that I am altogether satisfied with the evidence given for the defenders, but I cannot, on the whole, see my way to hold that there was any wilful misconduct on the part of any of their servants.

"The defenders must therefore be assolized.

"I have thought it right to make a finding of the amount of damage I think due, in case, should there be an appeal, a different view of the law might be taken as to the responsibility of the defenders. It seems to me that £100 would compensate the pursuer. . . ."

¹ *Dobson v. United Collieries*, (1905) 8 F. 241, per Lord President Dunedin, at p. 247.

Feb. 10, 1912. *Bastable v. North British Railway Co.* gauge. Actual intention of misconduct was not necessary. Mere omission to do a necessary act coupled with knowledge of danger was sufficient.¹ There was not in law the exclusive distinction which it was sought to introduce between wilful misconduct and negligence; an act of negligence might quite well be one of wilful misconduct.² Cases where the circumstances had been held not to amount to wilful misconduct³ sufficiently illustrated the principles of law, and these principles necessarily involved a finding of wilful misconduct in the present case. In any event, the defenders were liable under the second branch of the rule dealing with threshing machines.

Argued for the respondents;—All that had been proved was an error in judgment on the part of the station-master, and that, at most, was an act of negligence, and not wilful misconduct in the sense that was recognised by law. There must be something in the act which was beyond and above mere negligence⁴; something involving a deliberate performance of a wrongful act, as contrasted with the failure, with negligent disregard of consequences, to perform some necessary act.⁵ The regulation founded on did not apply, as it had been found that the station-master had considered the load in question, and had decided that there was no reason to doubt that the load was within the dimensions of safety. The portion of the rule as to threshing machines could not be appealed to. It plainly did not apply here, and no evidence with regard to it had been led.

At advising on 10th February 1912,—

LORD SKERRINGTON.—(In his Lordship's absence his opinion was read by the Lord President)—Upon the facts, as these were established at the proof, the only question raised by this appeal is whether the station-agent at Alva was guilty of wilful misconduct when he failed to use the gauge for the purpose of testing whether the loaded wagons containing the pursuer's engine and switchback plant were of such dimensions that they would certainly pass safely under all the overhead bridges of the defenders' railway on their journey from Alva to Grahamston. The Sheriff-substitute has assoilzied the defenders apparently upon the ground expressed in his fourth finding in fact, viz., "That the station-master at Alva saw the trucks, considered whether it was necessary that they should be gauged, and decided that it was not necessary." I agree in thinking that this finding is justified by the evidence; but the question remains whether the conduct of the station-master in failing to gauge the load did or did not, in the circumstances, amount to misconduct. If this question is answered

¹ *Forder v. Great Western Railway*, [1905] 2 K. B. 532; *Gordon v. Great Western Railway*, (1881) 8 Q. B. D. 44; *Lewis v. Great Western Railway*, (1877) 3 Q. B. D. 193; *Graham v. Belfast and Northern Counties Railway*, [1901] 2 I. R. 13.

² *Hoare v. Great Western Railway*, (1877) 37 L. T., N. S. 186.

³ *Webb v. Great Western Railway*, (1877) 26 W. R. 111; *Haynes v. Great Western Railway*, (1879) 41 L. T., N. S. 436.

⁴ *Lewis v. Great Western Railway Co.*, (1877) 3 Q. B. D. 195; *Manchester and Sheffield Railway v. Brown*, (1883) 8 App. Cas. 703.

⁵ *Graham v. Belfast and Northern Counties Railway*, [1901] 2 I. R. 13; *Foster v. Great Western Railway Co.*, [1904] 2 K. B. 306.

in the affirmative, there is no difficulty in arriving at the conclusion that the station-master acted deliberately and intentionally, or, in other words, wilfully.

The defenders' counsel argued that the station-master had committed a mere error of judgment in coming to the conclusion that the wagons would pass through the gauge. He founded specially upon the fact that the height of the load exceeded by very little the height of the gauge; that the same load (though in Caledonian Railway wagons) had come in safety to Alva Station; and lastly, that at Grahamston, where the accident occurred, the whole seven wagons containing the pursuer's goods passed twice under the bridge in safety, and that it was only on the third occasion, when the wagons were being shunted under the extreme north side of the bridge, that one of them came in contact with an overhead smoke-board. I see nothing in the evidence to suggest that the station-master's estimate of the height of the wagons was made carelessly; but this very fact emphasises the importance of the rule which he was admittedly bound to obey, and which required that "all loads must be gauged when there is any reason to doubt that they are not within the dimensions." The meaning and object of this rule are clear, viz., that whenever a load is such as to suggest a reasonable doubt whether it is of the specified dimensions, the question must be placed beyond doubt by applying the gauge, and must not be decided according to the skilled, though fallible, judgment of the official responsible for the safety of the train. In the present case the height of the load was so slightly in excess of the height of the gauge that according to the evidence of Mr Roderick, the defenders' assistant engineer, "no one with the naked eye could be expected to detect it." To quote the language of other witnesses for the defenders who saw the wagons before the accident, the load struck them as being "just about the maximum." If that was not a case where the official responsible for the safety of the load had some "reason to doubt" that his eye might possibly be mistaken, I do not know in what circumstances the rule would be applicable. The rule cannot mean that the responsible official is not to send forward a load which he has reason to believe may imperil the train. It would be idle to make a rule to the effect that a railway servant must not knowingly and intentionally expose life and property to what he himself regards as a possible peril. Accordingly, it was the duty of the station-agent at Alva to apply the gauge, and not to trust to his eye. The station-master at Grahamston was asked, "Do you ever allow a load like this to go out of your yard without being gauged?" to which he replied, "It is impossible, it cannot. We can tell pretty well by the eye, but I would not rely on it." The station-master at Alva chose to interpret the rule as meaning that he was entitled to dispense with the gauge and to rely on his eye alone in every case where he personally entertained no doubt that the load was within the maximum dimension. In so perverting the plain meaning of the rule, and in deliberately choosing to trust to his eye (which might be, and actually was, mistaken) rather than to use the gauge, I am of opinion that the station-master wilfully failed to do his duty, and wilfully exposed the pursuer's goods to injury during the transit. For this wilful misconduct the defenders must pay damages, the amount of which has been assessed by the Sheriff without objection at £100.

Feb. 10, 1912. LORD KINNEAR.—I agree.

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LORD JOHNSTON.—(In his Lordship's absence his opinion was read by Lord Mackenzie)—I do not think that there is any doubt about the facts here. The Sheriff says "that the station-master at Alva saw the trucks, considered whether it was necessary that they should be gauged, and decided that it was not necessary." Substantially this is what happened, though I think that the words "considered" and "decided" are rather high-pitched. I think that the station-master's consideration was perfunctory and hardly deserves the name. Mr Blackwood, the station-master, was influenced by the fact that trucks with the same load had come safely from Dunblane, and—his eye not calling in question that similar trucks similarly packed with the same load would make the journey to Grahamston equally safely—he did not think himself called on to gauge the truck in question. Seeing that at best there was a very narrow margin, and that an irregularly-shaped article such as the engine of a showman carried on a lorry, the lorry being mounted on a truck, was a much more difficult subject of which to judge the height by the eye than an ordinary sheeted wagon, I agree with the learned Sheriff "that there was fault and negligence on the part of the defenders' servants; in fact, I think I might say that there was gross negligence." But something more is necessary to make wilful misconduct. Were it proved that the defenders' servants had been called on to gauge the wagon, or been remonstrated with for not doing so, the case would have been different. But though there is some proof to this effect, it is insufficient.

I do not think that authorities relating to the interpretation of the words "serious and wilful misconduct," occurring in the Workmen's Compensation Acts, are altogether applicable to the present case. But all the authorities bearing directly on the present question are agreed that "wilful misconduct" is something "beyond any negligence, even gross or culpable negligence."¹ "Wilful misconduct means misconduct to which the will is a party, something opposed to accident or negligence; the misconduct, not the conduct, must be wilful."² In wilful misconduct, then, the will must be party to the misconduct. Negligence, even gross and culpable negligence, excludes the idea of will. Negligence done on purpose is a contradiction in terms. The moment that an act of omission or commission, which involves the neglect of a known duty, is done intentionally, or with the will, in disregard of that duty, it ceases to be negative negligence and becomes positive misconduct and that wilful, and in such wilful misconduct there is, I think, involved a recklessness of consequences. The circumstances of the present case come short of this. The Company's rule says all loads must be gauged when there is any reason to doubt that they are not within the dimensions. This involves judgment, and, as it seems to me, not judgment of this Court, wise after the fact, but of the man on the spot and at the time. It is not an absolute rule, but a guide which

¹ *Graham v. Belfast and Northern Counties Railway Co.*, [1901] 2 I. R. 13, *per* Johnson, J.

² *Lewis v. Great Western Railway Co.*, 3 Q. B. D. 195, *per* Bramwell, L.J., at p. 206.

leaves play to discretionary judgment. The station-master at Alva com- Feb. 10, 1912.
mitted an error of judgment which led him to neglect a precaution, and one which was indicated to him by the rule of the defenders as a proper precaution. But, as I have said, that rule was not imperative. It left something to observation, impression, and discretion. I cannot, therefore, regard the station-master's action, or rather omission, as amounting to misconduct and that wilful, or as more, at most, than an error in judgment carelessly arrived at, and equiparate to negligence. It is impossible to conclude that there was anything approaching to recklessness of consequences.

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Ld. Johnston.

I have treated the case as one to which the first rule referred to, viz., that as to "Dimensions of Loads," applied. That rule is not, as I have said, absolute, but discretionary. But it was attempted to bring it under a second and peremptory rule, viz., "Threshing machines, agricultural and traction engines, and all engines and machines of a like kind, must be passed under the gauge." The pursuer's engine is certainly an engine, but this rule does not cover all engines, but only engines of a like kind. And *prima facie* the pursuer's engine from its general description and purpose was not of like kind, and there is no evidence whatever in the case to countervail this impression. I do not think, therefore, that I am called on to consider whether the neglect of a positive direction or rule would amount to wilful misconduct, though I think that it would be impossible intentionally to neglect such a positive rule without the neglect importing a recklessness of consequences.

On the whole matter I am for refusing the appeal and affirming the Sheriff's interlocutor.

LORD MACKENZIE.—The pursuer delivered to the defenders for conveyance on their railway from Alva Station to Grahamston what are described in the consignment note as trucks and roundabouts, and in the proof as a steam switchback railway. The consignment was placed on seven loaded trucks which were attached to a passenger train. In the course of the journey the train passed under several railway bridges, but when it was being shunted into a siding at Grahamston Station the funnel of an engine on a lorry or boiler carriage which formed part of the load came into contact with a smoke board hanging from the roof of a bridge. The question is whether the defenders are liable in damages for the accident.

The North British Railway have two alternative rates for the carriage of such goods. One is the ordinary rate when the Company take the ordinary liability of a common carrier. The other is a special or reduced rate when the sender agrees to relieve the Company from all liability for loss, damage, misdelivery, delay, or detention, except upon proof that such loss, damage, misdelivery, delay, or detention arose from wilful misconduct on the part of the Company's servants. The question in the case is whether the defenders' servants were guilty of wilful misconduct.

The Sheriff-substitute had no doubt that there was fault and negligence on their part. He characterises it as gross negligence to dispatch from Alva station wagons with high loads without passing them under the gauge. He was, however, unable to take the view that there was wilful misconduct. One of the cases cited in his note is that of *Forder v. The Great Western*

Feb. 10, 1912. *Railway*,¹ in which Lord Alverstone, C.J., adopts the definition of wilful misconduct given by Johnston, J., in the case of *Graham v. Belfast and Northern Counties Railway Company*,² The Chief Justice, however, makes a not unimportant addition to the definition, because he says that a man is guilty of wilful misconduct if he acts with reckless carelessness, not caring what the results of his carelessness may be. The law laid down by Bramwell, Brett, and Cotton, L.J.J., in *Lewis v. The Great Western Railway*³ is to the same effect. The facts here appear to me to make the present case one of wilful misconduct within the meaning of this definition. The failure to pass the trucks under the gauge was not an omission due to mere forgetfulness. The station-master at Alva did apply his mind to the point, and deliberately refrained from gauging the load. Nor is it possible to regard his failure as a mere error in judgment. It appears to me to amount to more than this. I think that the facts spoken to by the goods porter, viz., that the gauge was not at the side they were loading on, but, as he explains, "on the other side a good bit away," has something to do with the matter. The Sheriff-substitute says he was inclined to believe the pursuer and his son when they state that one of the porters was asked if he was not going to put the trucks through the gauge, and gave a reply in the following terms:—"No, it is a lot of bother to get to our gauge; it is on the goods siding and causes trouble, and there is no engine here to shunt them."

The pursuer founds on the rules and regulations of the North British Railway. One of the latter runs thus:—"Threshing machines, agricultural and traction engines, and all engines and machines of a like kind must be passed under the gauge." I do not think this regulation applies to a case like the present, as it plainly refers to engines of a different type altogether. The other regulation is to the following effect:—"Dimensions of Loads.—These must not exceed those given in the Railway Clearing House Classification Book for the line or lines over which they have to pass, and all loads must be gauged when there is any reason to doubt that they are not within the dimensions." I think it was not possible for anyone who looked at the loads in question, as the station-master admits he did, to consider that there was no reason for doubt. It is proved that the height of the gauge in the centre is 12 feet 11 inches from the rails. The average height of a carriage is 12 feet. It must have been apparent that there was reason to doubt whether the funnel in question, which proved to be more than 11 inches above the average height of a carriage, would pass safely under all the bridges. The foreman yardsman at Grahamston says the pursuer's load struck him as being near the maximum height. The goods guard at Grahamston said that if he had been loading two of the wagons in question which were a little higher than the others, he would have passed them under the gauge, and admits that all the wagons must have been very near the maximum. Now, the station-master at Alva was an experienced man who had been there for eleven years, and was well acquainted with the gauge. He knew there was a rule which bound him to gauge a load when there was any doubt about it. That he did not so gauge the loads on this

¹ [1905] 2 K. B. 532.

² [1901] 2 I. R. 13.

³ 3 Q. B. D. 195.

occasion appears to me to amount to such reckless carelessness that it comes within the definition of wilful misconduct as contained in the cases above referred to. Feb. 10, 1912.
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I am accordingly unable to agree with the conclusion of the Sheriff-substitute, and am of opinion that the pursuer is entitled to recover damages from the Railway Company. I understand there is no dispute about the amount assessed by the Sheriff-substitute—£100. Lord Mac-
kenzie.

LORD PRESIDENT.—I agree with the majority of your Lordships. I think that what I humbly conceive to be the fallacy of the opposite view is brought about by not sufficiently considering what is the true meaning of the word “negligence.” Now, that there can be negligence which infers no legal liability at all is evident. But, on the other hand, I think that when the word “negligence” is used in actions of damages it is only another word for fault, because it has been laid down again and again that unless there is a duty no amount of negligence will infer liability. Negligence, if liability is to flow from it, must consist in the neglect of a duty, and the existence of a duty must first be established. There is no easier way of bringing that home than by remembering the terms of the issue under which, in our practice, every case of this class is tried, viz., whether so-and-so incurred injury through the fault of the defender?

Now, supposing that in this case there had been no special contract, there would have been an action based upon the fault of the defenders; and I do not suppose that my learned brother who differs from the rest of the Court would doubt that action would have lain upon these facts had there been no such special contract. I think, therefore, that for practical purposes, when we are dealing with liability, we may substitute the word “fault” for the word “negligence.” That is what we find when we refer to the Roman system. I suppose that the proper translation of the word “*culpa*” is “fault,” but it is very often translated as “negligence”; and here it is that there comes in what, in my view, is the fallacy which is expressed in the opinions of the learned Judges which Lord Johnston has quoted, that wilful misconduct must be something beyond negligence and opposed to negligence. I do not look upon it in that way. Wilful misconduct is negligence; it is fault; and therefore to treat negligence as one thing and wilful misconduct as something entirely different is, I think, to look at the matter in the wrong light.

There was in the Roman law a distinction between various degrees of fault—*lata*, *levis*, and *levissima*. I think that it has been authoritatively held that these distinctions do not exist in our law—not, at anyrate, for the purpose of making a distinction in the liability of a defender where an action is based upon fault, that is to say, upon a dereliction of duty. It does not matter whether that fault is what, in the Roman system, would have been called *lata*, *levis*, or *levissima*. But that distinction of the Roman law can be introduced by contract; and I think that is precisely the effect of the class of special contract we are dealing with in this case. Where a special contract says, as this one does, that the railway company is only to be liable for wilful misconduct, it does make a gradation. The question then comes to be, not whether you have negligence on the one

Feb. 10, 1912. hand, or something different from negligence on the other, but what degree of negligence is proved against the railway company. Upon that matter I agree with, and need not repeat, what has been said by my brethren.

I think here there was that degree of negligence which comes under the description of wilful misconduct. Looking at it in that light, I avoid the sort of puzzle which, I cannot help thinking, leads to the judgment to the opposite effect, which may be thus expressed, "How am I to say that this is wilful misconduct when, as a matter of fact, the man was negligent in what he did? Negligence is one thing and wilful misconduct is another, and therefore, to my mind, if I say he is negligent, I must say he is not guilty of wilful misconduct." That does not seem to me a proper way to look at it. I think he is guilty of negligence, and the question is whether he is guilty of gross negligence which comes to be wilful misconduct. I think he was, and therefore I agree with your Lordships.

THE COURT pronounced this interlocutor:—"Sustain the appeal: Recall the interlocutor of the Sheriff-substitute dated 27th December 1910: Repeat the first twelve findings in fact in said interlocutor with the exception of Nos. 3 and 4, in lieu whereof find in fact (3) that the rules and regulations of the defenders' company provide as follows:—'*Dimensions of Loads*.—These must not exceed those given in the Railway Clearing-House Classification Book for the line or lines over which they have to pass, and all loads must be gauged when there is any reason to doubt that they are not within the dimensions . . .'; (4) that there was reason to doubt whether said load was within said dimensions; (4a) that there was in these circumstances a duty on the defenders' station-master at Alva to pass the load under the gauge, which duty he wilfully neglected: Find in fact and in law that there is proof of wilful misconduct on the part of the defenders' station-master at Alva: Find in law that the defenders are liable in reparation to the pursuer: Therefore decern against the defenders for payment to the pursuer of the sum of £100 sterling in name of damages: Find the defenders liable to pursuer in expenses, and remit," &c.

D. C. OLIVER, Solicitor—JAMES WATSON, S.S.C.—Agents.

No. 81. HIS GRACE JOHN DOUGLAS SUTHERLAND, DUKE OF ARGYLL,
First Party.—*Macphail, K.C.*—*Hon. W. Watson*.
Feb. 10, 1912. MRS EMILY ELIZA HARDCASTLE OR GRAHAM AND OTHERS (Robert C. Graham's Trustees), Second Parties.—*Chree*.
Duke of Argyll v. Graham's Trustees. *Superior and Vassal—Casualties—Composition or relief—Conveyance to trustees—Heir of truster having "ultimate beneficial interest"—Conveyancing (Scotland) Acts (1874 and 1879) Amendment Act, 1887 (50 and 51 Vict. cap. 69), sec. 1.*

The testamentary trustees of the last entered vassal in certain lands were directed to retain the residue of his estate including these lands until his eldest child, if a male, should attain the age of twenty-one, or, if a female, should attain that age or be married, and on the arrival of that period, if the truster then had a son or sons surviving, to hold the lands for behoof of his eldest son, and failing him before

attaining the age of twenty-one, for behoof of his next eldest son on Feb. 10, 1912. his attaining that age, and so on for his sons in the order of seniority. By a codicil the truster gave his widow a liferent of the lands, and postponed until her death the conveyance of the lands to the son who should be entitled to take them. In the event of failure of all the truster's issue under age, there was a bequest of residue, including the lands, to the truster's sister whom failing to her children equally among them. The truster was survived by his widow and by two sons, the elder of whom was over twenty-one at his father's death. The trustees having made up a title to the lands by notarial instrument, duly recorded in the Register of Sasines, the superior called upon them for payment of a composition of a year's rent in respect of their implied entry.

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In a special case the Court found that the trustees were liable in relief-duty only, holding that under the terms of the trust they had no power to introduce a stranger to the investiture, and, accordingly, that the truster's heir (even assuming that vesting was postponed till the widow's death) had the ultimate beneficial interest in the lands, in the sense of section 1 of the Conveyancing Amendment Act, 1887.

Magistrates of Musselburgh v. Brown, Feb. 21, 1804, F. C.; M. 15,038, applied.

On 30th May 1911 the Duke of Argyll, superior of the estate of Skipness, of the first part, and the trustees under the trust-disposition and settlement of the late Robert Chellas Graham, the last entered vassal in that estate, of the second part, presented a special case for the opinion of the Court upon the question whether composition or relief was due by the second parties, who had made up a title to the estate by notarial instrument duly recorded in the Register of Sasines.

The following statements were made in the case:—“(1) His Grace the Duke of Argyll, K.T., &c., is immediate lawful superior of the lands and estate of Skipness . . . (2) The last charter by progress of said lands is a charter of resignation, dated 14th May 1845, granted by John Douglas Edward Henry, Duke of Argyll, a predecessor of the first party, in favour of Walter Campbell of Skipness and the heirs-male of his body, whom failing, the other heirs therein mentioned. Infestment was expedite upon said charter conform to instrument of sasine recorded in the General Register of Sasines, Reversions, &c., at Edinburgh on 30th May 1845. The entry of singular successors is untaxed. (3) In the year 1866 the estate was sold and conveyed by Harry Dalgety, S.S.C., Edinburgh, as trustee on the sequestrated estates of William Thomas Fraser of Skipness (the then proprietor), to the testamentary trustees of the deceased Robert Graham, merchant in Glasgow. The said testamentary trustees, by disposition dated 9th, 17th, 19th, and 21st, and recorded in said division of the General Register of Sasines on 30th March 1874, conveyed the said lands and estate of Skipness and others to the now deceased Robert Chellas Graham (hereinafter referred to as ‘the truster’), and his heirs and assignees whomsoever. On 2nd May 1891 the truster paid to the late Duke of Argyll, the first party's predecessor, the sum of £1600 in full of the composition due by the truster for the said lands and estate in respect of the death of the said Walter Campbell, the last entered vassal. (4) The truster died on 22nd November 1908, survived by his widow, the said Mrs Emily Eliza Hardcastle or Graham, and by five children,

Feb. 10, 1912. namely—(1) the said Robert Francis Graham; (2) Mrs Dorothy Susan Mary Graham or Johnston, wife of the said Bertram Vaughan Johnston; (3) Frances Gertrude Graham; (4) Ethel Winifred Graham, and (5) Angus Graham. The elder son, Robert Francis Graham, was born on 16th June 1876, and the younger son, Angus Graham, on 3rd April 1892. Mrs Graham and the said children all still survive.”

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The case further narrated the provisions of the trust-disposition and settlement whereby he directed his trustees as follows: —“In the second place, I direct my trustees [in the event of his wife surviving him] to allow to my said wife, subject to the provision aftermentioned, the liferent use and enjoyment of the mansion-house of Skipness and garden and grounds, and also of the home-farm of Skipness, all as presently occupied by me, . . . but providing that if I shall leave a son who shall be entitled to take the estate of Skipness under the provisions hereinafter contained, then the liferent of the said mansion-house, home-farm, furniture, and others hereinbefore conferred on my said wife shall cease and determine on his attaining the age of twenty-five years: . . . In the fifth place, . . . (second) to hold and retain the whole residue and remainder of my means and estate until my eldest child, if a male, shall attain the age of twenty-one, or, if a female, shall attain that age or be married, whichever of these events shall first happen; . . . (third) upon the arrival of the said period, if I shall then have a son or sons surviving, I direct my trustees to hold and retain for behoof of my eldest son, and failing him before attaining the age of twenty-one years complete, for behoof of my next eldest son on his attaining the said age, and failing him before attaining the said age, for behoof of the next eldest son on his attaining said age, and so on for my sons in the order of seniority, the estate of Skipness as vested in me conform to disposition by John Graham and others, the trustees of my father, the late Robert Graham, in my favour, . . . and also the furniture, plenishing, silver-plate, pictures, books, china, bed and table linen, agricultural and other implements, and other articles in or about the said mansion-house, gardens, ground, and home-farm, the liferent of which is hereinbefore conferred upon my said wife, but subject to the liferent of the said mansion-house and home-farm, furniture and others hereinbefore conferred upon my said wife for the period until my son, for whom the said estate shall be so held, shall attain the age of twenty-five years complete, when I direct that the said estate, furniture, plate, and others so directed to be held for his behoof shall (freed from the liferent of any part thereof by his said mother) be disposed and made over to him; (fourth) I direct my trustees to hold and retain the residue and remainder of my means and estate, other than and except the said estate, furniture, and others, so to be held for and made over to my son (if I shall leave any such), but including the said estate of Skipness and others if I shall not leave such son, and including also all sums or subjects which may be retained to provide for annuities and provisions, furniture, and others on termination of liferents, for behoof of the child or children I may leave, equally among them: . . . Declaring that my son for whom the said estate of Skipness shall be so held shall be entitled to have the whole income thereof (subject to his mother's said liferent interest) applied for his behoof from the time of the same falling to be held for his behoof till he attain majority, that is the age of twenty-one years complete, and after attaining that

age he shall be entitled to receive the same, and that he and my other son or sons shall be entitled to receive the whole income of their respective shares of the residue of my estate, including accumulations of income, after attaining the said age of twenty-one complete, and shall respectively have power at any time after attaining the said age of twenty-one years to dispose of the said estate and of their several shares of the residue of my estate by deed or other writing to take effect at decease: But so long as the said estate and others, and the said shares of residue effeiring to my sons or any of them, or any part thereof, shall continue in the hands or under the control of my trustees not conveyed or unpaid, the same shall be held as not having vested in such sons (except to the effect of giving efficacy to any of the directions, conditions, and provisions herein contained), and to be alimentary provisions for such sons respectively: . . . And I do hereby provide and declare that in the event of my son for whom the said estate of Skipness shall be so held dying after attaining the age of twenty-one and before attaining the age of twenty-five years complete without leaving any deed or writing disposing of the said estate the same shall fall to his eldest son, and failing his leaving a son to his daughter or daughters, if any, if more than one equally among them, and failing his leaving issue the said estate shall fall to my next eldest son, and failing him between the age of twenty-one and twenty-five without leaving any deed or writing as aforesaid, the said estate shall fall to his eldest son, and failing his leaving a son to his daughter or daughters, if more than one, equally among them, and so on to my sons in the order of seniority, any one of whom who may succeed to the said estate and dying between the age of twenty-one and twenty-five without leaving any deed or writing disposing of same being succeeded by his eldest son, and failing his leaving a son then by his daughter or daughters, if more than one, equally among them, and failing any son or issue of sons as aforesaid, the said estate shall fall into the residue of my estate and be disposed of as such: . . . And in the sixth place, In the events of all my children being sons dying before attaining majority or having attained majority dying before attaining the age of twenty-five complete, without leaving any deed disposing of their interest in my estate, and of the decease of all my children being daughters before attaining majority or being married, in each case without leaving lawful issue, and of my said wife then surviving, I direct my trustees to allow to her the free liferent use and enjoyment of the whole residue and remainder of my means and estate, paying to her the whole annual income and proceeds thereof as and when the same shall arise, and on her decease to pay, convey, and make over the said residue and remainder to the said Mrs Gertrude Graham or Ramsay, my sister, whom failing to her children equally among them if more than one child."

In 1903 the truster, by codicil, directed his trustees as follows:—"To hold and retain, after implementing any prior purposes of trust, the whole residue of my means and estate, heritable and moveable, real and personal, including specially my whole estate of Skipness and the mansion-house and home-farm thereon, and all furniture and plenishing, plate, pictures, implements, and other articles therein or thereon, all as more particularly mentioned in my said trust-disposition and settlement, and to allow to my said wife during all the days and years of her life after my death the free use and enjoyment

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Feb. 10, 1912. and the annual income and produce of the said residue for her life-rent use alienably, and the division of the said residue among my children, and the conveyance of my said estate of Skipness and others to my son who shall ultimately be entitled to take the same in terms of my said trust-disposition and settlement, shall accordingly be postponed until the death of my said wife."

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After narrating the above provisions the case stated:—“(6) The trustees have made up title to the said lands and estate of Skipness and others conform to notarial instrument in their favour, recorded in said division of the General Register of Sasines on 22nd October 1909, and are accordingly impliedly entered with the superior in virtue of the Conveyancing (Scotland) Act, 1874; and since the truster's death they have in terms of said trust-disposition and settlement and codicils retained the whole residue, including said lands and estate, for behoof of the truster's widow in liferent and the other purposes of the trust. (7) The Duke of Argyll, as superior of the said lands and estate of Skipness, has claimed payment from the trustees, as vassals therein, of a composition of a year's rent or value thereof for the year 1909-1910 after making the usual deductions. The trustees deny liability therefor, and in order to have the question determined the parties have agreed to present this special case, to which the Duke of Argyll is the party of the first part, and the trustees are the parties of the second part. The parties are agreed that the net amount of said composition, if due, is £1317, 14s. 6d.”

The contentions of the parties were stated as follows:—“The first party contends that the second parties are singular successors of the truster—who was the last vassal paying composition as aforesaid—in the fee of said lands and estate, and that they do not hold them for the heir of the truster in the sense of section 1 of the Conveyancing (Scotland) Acts (1874 and 1879) Amendment Act, 1887,* to the effect of limiting the casualty due by them on their entry to one of relief-duty, and that they are accordingly bound to make payment to him, as superior, of a composition of a year's rent or value of the said lands and estate, less the usual deductions, amounting as aforesaid to the sum of £1317, 14s. 6d. The second parties contend that, upon a sound construction of the truster's will and codicils as a whole, they are at the present time truly holding Skipness estate for the heir in the sense of the last-mentioned Act. Alternatively they contend that they merely hold said estate for the truster's widow in liferent, and that their infestment is only a burden on the title of the heir who is entitled to enter as such. They therefore contend that only relief-duty is payable.”

* The Conveyancing (Scotland) Acts (1874 and 1879) Amendment Act, 1887 (50 and 51 Vict. cap. 69), enacts:—Sec. 1. “Where by a trust-disposition and settlement, or other *mortis causa* writing, any heritable estate is conveyed to trustees for behoof of, or with directions to convey the same to, the heir of the testator, whether forthwith or after the expiration of any period of time not exceeding twenty-five years, or by virtue of which the heir of the testator has the ultimate beneficial interest in such estate, the trustees under such trust-disposition and settlement, or other *mortis causa* writing, shall not, upon their entering, or by reason of their having prior to the date of this Act entered, with the superior, by infestment or otherwise, be liable for any other or different casualty than would have been payable by the heir if he had taken the estate by succession to the testator without the same having been conveyed to trustees.”

The question submitted for the opinion of the Court was as follows:—"Are the second parties liable to make payment to the first party of said sum of £1317, 14s. 6d., a composition of one year's rent or value of the lands and estate of Skipness and others for the year 1909-10, or is relief-duty only payable?" Feb. 10, 1912.
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The case was heard before the First Division (without Lord Johnston) on 8th December 1911.

Argued for the first party;—The codicil postponed distribution until the widow's death, and the effect of that, when read along with the provisions of the will as to vesting, was to postpone vesting also till that event. Accordingly, the person entitled to take the estate of Skipness could not be ascertained till the widow's death, and at that date it was not necessarily the heir of the old investiture who would take; it might be his disponent or his creditors, or even, as residuary legatees, the family of the truster's sister, and these were not the heirs of the old investiture. Further, even, if at that date the heir took, he took in the character of a beneficiary under the trust, not as the heir.¹ Accordingly, it could not be maintained that the trustees were merely holding for the heir of the old investiture; they were holding under the terms of the trust-deed, and it might eventually turn out that they were holding for strangers to that investiture. They were therefore themselves infeft as singular successors, and were liable for a composition of a year's rent.² Section 1 of the Act of 1887 did not affect the question, as, for the reasons just stated, it could not be held that under the trust-deed the heir had "the ultimate beneficial interest" in the lands.

Argued for the second parties;—The trust purposes for which the second parties had made up a title to the estate of Skipness merely created a burden on the fee of the estate.³ These purposes did not alter the old destination, for the fee was held by the trustees for the heir of that destination, and for the successive heirs in order, and for no one else. Accordingly relief-duty only was due to the first party.⁴ The circumstances of *Magistrates of Edinburgh v. Irvine's Trustees*,⁵ and *Moir's Trustees v. Duke of Argyll*,⁶ relied on by the first party, were entirely different from the circumstances here, and these cases had no application. The provision in the codicil interposing a liferent to the widow did not affect the question, for that provision did not in any way alter the destination contained in the trust-disposition and settlement.

At advising on 10th February 1912,—

LORD PRESIDENT.—In this special case the question is whether the second parties, who are the trustees of the late Mr Robert Graham of Skipness, are bound to pay a composition of a full year's rent, or merely a

¹ *Stuart v. Jackson*, (1889) 17 R. 85, Lord President Inglis, at p. 96.

² *Rankin's Trustees v. Lamont*, (1880) 7 R. (H. L.) 10; *Magistrates of Edinburgh v. Irvine's Trustees*, (1902) 4 F. 937, Lord President Kinross, at p. 941; *Moir's Trustees v. Duke of Argyll*, (1903) 6 F. 218, Lord Moncreiff, at p. 229.

³ *Lord Home v. Lyell*, (1887) 15 R. 193.

⁴ *Stuart v. Jackson*, (1889) 17 R. 85; *Duke of Athole v. Stewart*, (1890) 17 R. 724; *Duke of Athole v. Menzies*, (1890) 17 R. 733.

⁵ 4 F. 937.

⁶ 6 F. 218.

Feb. 10, 1912. relief-duty, for the estate of Skipness to the first party, the Duke of Argyll, who is the superior.

Duke of
Argyll v.
Graham's
Trustees.

Ld. President.

The late Mr Robert Graham was a duly entered vassal with the Duke, and he died in 1908, leaving a trust-disposition and settlement by which he appointed the second parties trustees. The purposes of the trust, so far as material, were these: The trustees were directed to retain the whole residue of his estate, which included the heritable estate of Skipness, until his eldest child, if a male, should attain the age of twenty-one, or if a female, should attain that age or be married, and "upon the arrival of the said period, if I shall then have a son or sons surviving, I direct my trustees to hold and retain for behoof of my eldest son, and failing him before attaining the age of twenty-one years complete for behoof of my next eldest son on his attaining the said age, and failing him before attaining the said age, for behoof of the next eldest son on his attaining said age, and so on for my sons in the order of seniority, the estate of Skipness." A certain liferent of the mansion-house was given to the truster's wife until the attainment of the age of twenty-five by the son succeeding, but nothing else was given to her which directly affected the heritable estate. There were certain clauses, with which I need not trouble your Lordships, dealing with the possibility of the first son dying between the ages of twenty-one and twenty-five, and there was a declaration as to non-vesting in sons, and it is a declaration upon which argument might be possible; but I shall not enter upon that matter, because in the view that I take of the case it is not necessary to make up one's mind upon it.

By a codicil the truster eventually so far altered his trust-disposition and settlement that he directed his trustees, notwithstanding the provisions of his settlement, to allow his wife the liferent of the estate of Skipness, and accordingly the conveyance to the eldest son or, failing the eldest son, to the second son, and so on, was postponed until the death of the wife.

Now, I shall assume that under the law as it stood before the Conveyancing Amendment Act of 1887 composition would have been due by the second parties. I do not say that that is necessarily so, but upon the assumption that there was no vesting in the eldest son, it would certainly have been a possible result under the law before 1887 that a composition would have been due. But the Act of 1887 was undoubtedly passed as a remedial Act to get over what was considered a hardship upon vassals which had been brought upon them by the operation of the Act of 1874, in so far as the Act of 1874 prevented vassals employing the device which was common before that Act of putting forward the heir to take up the mid-superiority. I need not remind your Lordships of the whole series of cases—*Ferrier's Trustees v. Bayley*,¹ and *Rankin's Trustees v. Lamont*²—by which it was settled that that device was no longer available. The first section of the amending Act is this:—[His Lordship quoted the section].

Now, I think the proper meaning to be given to the expression, "by virtue of which the heir of the testator has the ultimate beneficial interest in such estate," is tested thus—and the true test is the test applied long ago in the

¹ (1877) 4 R. 738.

² 7 R. (H. L.) 10.

Magistrates of Musselburgh v. Brown,¹—viz., Could the trustees introduce Feb. 10, 1912.
 a stranger heir, or could they not? If there is an intermediate period during which subordinate rights such as liferents or the rights of creditors are introduced, that does not matter, provided that the person who is ultimately to take is the heir of the old destination and that the trustees could not use their conveyance for the purpose of introducing a stranger. Tried by that test, I think this is a case where the trustees so hold that the heir of the testator has the ultimate beneficial interest in the estate, for the eldest son must take, or if he is not alive the next, and so on, and whoever takes eventually will be the heir of the old destination.

Duke of
 Argyll v.
 Graham's
 Trustees.

Id. President.

Accordingly, I am of opinion that we should answer the question by saying that relief-duty only is payable.

LORD KINNEAR.—I am of the same opinion. I think that but for the Act of 1887 questions might have been raised as to the effect of this trust-deed upon the right of trustees for heirs to enter. There might have been a question as to whether the trust title was adverse to the title of the heir, or whether it was not a trust for the mere continuance of the old investiture subject to certain interests which would not affect the investiture. But then I think all these questions are superseded by the Act of 1887. They might in certain cases have been questions of difficulty and in others they might have been clear enough, but I do not think we need to consider that now, or the exact form in which they would have been raised in the present case, because I agree entirely with your Lordship as to the construction of the Act of 1887. I think that that statute necessarily contemplated that there should be no immediate investiture of the heir. There is an immediate interposition of a trust for certain purposes which, although they may interfere with the immediate entry of the heir, do not interfere with his ultimate beneficial interest. And then I agree that the only test must be the test applied in the case of the *Magistrates of Musselburgh v. Brown*,¹ and we must inquire whether the trust enables the trustees to introduce a stranger or whether it does not, and I am clearly of opinion with your Lordship that it allows them to introduce nobody except the heir.

LORD MACKENZIE.—The question here is whether by virtue of the trust-disposition and settlement and relative codicils executed by the late Robert Chellas Graham, who died in 1908, his heir has the ultimate beneficial interest in his estate of Skipness. If he has, then the Act of 1887 (50 and 51 Vict. c. 69), sec. 1, provides that the trustee shall not be liable for any other or different casualty than would have been payable by the heir if he had taken the estate by succession to the testator without the same having been conveyed to trustees. That is to say, in that event, the second parties are not now bound to pay a composition to the first party.

Under the settlement and codicils the testator's widow is to have the liferent of the estate of Skipness. She is alive. The eldest son of the marriage had attained majority before the trust came into operation, and is now more than twenty-five years of age. In this state of the facts the direction

¹ Feb. 21, 1804, F. C.; M. 15,038.

Feb. 10, 1912. to the trustees is to convey Skipness to him on his mother's death. There is a declaration that so long as the estate remains in the hands of the trustees the same shall be held as not having vested, although after attaining the age of twenty-one the eldest son has right to dispose of the estate by *mortis causa* deed. It was argued that there was no vesting in the eldest son. Assuming, but not deciding, that there was not, the estate has vested in no one else. The trustees are at present holding the estate for the purpose of conveying to him on the expiry of the liferent, and in the event of his decease there is no direction to the trustees to convey to anyone who would not then be the heir of the truster. It is therefore, in any event, the truster's heir who has, by virtue of the settlement, the ultimate beneficial interest in the estate. By the infestment of the trustees, and their implied confirmation, there is no enfranchisement of a new destination. It is a trust infestment which operates merely as a burden on the title.

Duke of
Argyll v.
Graham's
Trustees.
Lord Mac-
kenzie.

I am accordingly of opinion that a composition is not due.

THE COURT found in answer to the question of law in the case that relief-duty only was payable by the second parties to the first party.

LINDSAY, HOWE, & Co., W.S.—WEBSTER, WILL, & Co., W.S.—Agents.

No. 82.

Feb. 10, 1912.

Lewis's Trus-
tees v. Pirie.

GEORGE MACRITCHIE CRICHTON AND OTHERS (William Lewis's Trustees), Pursuers (Appellants).—*Blackburn, K.C.*—*W. T. Watson.*
ALEXANDER PIRIE AND OTHERS, Defenders (Respondents).—*Lippe.*

Trust—Agent and Client—Trustee acting as law-agent to trust—Appointment—Remuneration.

A law-agent, being one of a body of testamentary trustees who had authority under the testament to appoint a law-agent from among their own number, rendered professional services to the trust with the knowledge of his co-trustees, but without having been formally appointed to be law-agent to the trust.

Circumstances in which the law-agent was held to have been validly employed, and to be entitled to remuneration for his services.

Observed that when trustees intend to exercise a power to appoint one of their number to be law-agent to the trust, the only proper procedure is to make the appointment and to record it in the minutes of the trust, although, as matter of law, the appointment may competently be proved in other ways.

1ST DIVISION.
Sheriff of
Aberdeen,
Kincardine,
and Banff.

ON 25th November 1910 the testamentary trustees of the late William Lewis brought an action of accounting in the Sheriff Court at Aberdeen against certain persons, their predecessors in office as such trustees, in circumstances which were narrated as follows by Lord Dundas:—"The pursuers of this action are the trustees and executors, assumed and acting, under the last will and testament of the late Mr William Lewis, who died on 11th October 1909. The three defenders are the trustees and executors, original and assumed, who formerly acted under the said deed. Two of them, Mr Williamson and Mr Pirie, were nominated by it, along with a Mr Hislop, who declined to act, and the third, Mr Young, was assumed into the trust, apparently at the request of the testator's widow, in November 1909. The defenders resigned office in October 1910. The action is in form

a demand upon the defenders to account for their whole intromissions with the trust-estate, and for payment of the balance due; but the real question is raised by the pursuers' objection to the estate being debited with the amount of certain charges alleged to have been incurred by the trustees for professional services rendered by Messrs Paull & Williamsons, advocates, Aberdeen (of which firm the defender Mr Williamson is a partner), in connection with the winding-up of the trust-estate. The pursuers say that neither Mr Williamson nor his firm were validly appointed to the law agency of the trust. The testator's settlement contained an express power to his trustees and executors 'to appoint a factor and law-agent from among their own number or otherwise at the expense of the executry estate.' It was thus within the trustees' power to appoint Mr Williamson or his firm to the agency, and the question comes to be one of fact, whether or not such appointment was validly made."

Lewis's Trustees v. Pirie.

A proof was allowed and led. The effect of the evidence will be found set forth in the note of the Sheriff-substitute and in the opinion of Lord Dundas.

On 26th May 1911 the Sheriff-substitute (Louttit Laing) pronounced this interlocutor:—"Finds in fact . . . (2) that the said will and testament contained the following clause:—'And I confer all usual powers and privileges on my trustees and executors, including power to appoint a factor and law-agent from among their own number or otherwise at the expense of the executry estate'; (3) that on 18th October 1909 the defenders the said A. M. Williamson and Alexander Pirie as trustees foresaid held a meeting in the office of Messrs Paull & Williamsons, advocates, Aberdeen, of which the said A. M. Williamson is a partner, at which they accepted office as trustees; (4) that after the said Alexander Pirie at said meeting had suggested that the said A. M. Williamson would require to advertise for any claims against the deceased's estate and to look after anything that had to be done by a lawyer, the trustees resolved that 'Mr Williamson's firm should record the will, and insert the ordinary advertisement for claims'; (5) that the minutes Nos. 12 to 22 inclusive of process show the nature of the business transacted at the meetings of the defenders as trustees foresaid, and the instructions upon which the said firm of Messrs Paull & Williamsons acted: Finds in law (1) that in respect of the clause quoted in the second finding in fact *supra*, the defenders as trustees foresaid were entitled to employ the said firm of Messrs Paull & Williamsons as law-agents in the trust, and to remunerate them for their work; (2) that the said firm of Messrs Paull & Williamsons was validly employed by the defenders as trustees foresaid as law-agents in the said trust; and (3) that the defenders are entitled in the account of their intromissions with said trust-estate to charge against said estate the accounts incurred by them to the said firm of Messrs Paull & Williamsons, said accounts however being subject to taxation by the Auditor of Court: With these findings, remits said accounts to the Auditor of Court to tax and report; meantime continues the case for further procedure, and grants leave to appeal."*

* "NOTE.—The main question between the parties is whether the defenders are entitled in the accounts of their intromissions with the estate of the late Mr William Lewis to debit against it the sum of £79, 16s., subject to taxation, that being the amount of the account incurred by them to Messrs

Feb. 10, 1912. The pursuers appealed, and the case was heard before the First Division (consisting of the Lord President, Lord Dundas, and Lord Johnston) on 20th December 1911.

Lewis's Trustees v. Pirie.

Argued for the appellants;—A trustee was presumed to serve the trust gratuitously, and this presumption applied to professional services rendered by a law-agent unless it could be shown that he had received a formal appointment as law-agent to the trust.¹ In the present case there was no formal appointment, nor was there any evidence that the trustees had made such an appointment or authorised the agent to charge for his services. The only piece of law business that he had been instructed to perform was to record the will and to advertise for claims. It could not be argued that all his actings drew back to this isolated instruction.

Argued for the respondents;—The rule that a trustee was not entitled to remuneration for services rendered to the trust was not

Paul & Williamsons, advocates, in connection with the winding-up of the estate. The pursuers object to the inclusion of these accounts in the defenders' account of intromissions on the ground that neither Mr Williamson, who was a trustee under the settlement, nor his firm were validly appointed law-agents to the trustees, and that therefore the work done for behoof of the trust by Mr Williamson or his firm cannot be charged for. It is quite settled in law that a trustee is not either directly or indirectly entitled to make a profit out of the trust-estate under his administration, that 'he cannot by his own appointment or that of his co-trustees secure remunerative employment in the management of the trust,' and that 'the same rule is applicable to the employment of a firm of which the trustee is a partner,' unless under the trust-deed power is conferred upon the trustees to appoint one of their number to be their law-agent—(see opinions in *Goodsir v. Carruthers*, (1858) 20 D. 1141). In the present case the settlement creating the trust contained the clause narrated in the second finding in fact, which empowered the trustees to appoint one of their number as law-agent in the trust, and it is admitted that, had the minutes of the trust borne that the trustees appointed Mr Williamson or his firm as law-agent or law-agents in the trust, no possible objection could be taken to that firm's account being charged against the trust-estate. Standing such a clause in the trust-deed, the objection formulated by the pursuers is that the account cannot be so charged, because no formal appointment of Mr Williamson or his firm was made and minuted in the trust minutes. This objection appears to me to be wholly groundless. The evidence of Mr Williamson and Mr Pirie proves that at the second meeting of the trustees Mr Williamson was asked to perform any work that had to be done by a lawyer, and their evidence and the minute of 18th October 1909 shows that Mr Williamson's firm was instructed to record the will and insert the ordinary advertisement for claims. The other minutes show also that at meetings of the trustees instructions were given to Mr Williamson in connection with trust matters which could only be competently performed by a lawyer. In what capacity was Mr Williamson acting when he carried out these instructions? I think that it is clear that when these instructions were given they were given on the footing that Mr Williamson's firm were the legal advisers of the trust, and that as such they would be entitled to charge for carrying them out. It is true that there is no formal statement in any minute to the effect that the trustees appoint Mr Williamson or his firm as law-agents in the trust, but such an entry, while not unusual, is not, I think, essential for the valid appointment

¹ Lord Gray and Others, (1856) 19 D. 1; *Goodsir v. Carruthers*, (1856) 20 D. 1141; *Lauder v. Millars*, (1859) 21 D. 1353, *per* Lord Justice-Clerk Inglis, at p. 1356.

disputed, but that rule did not apply where, as in the present case, Feb. 10, 1912. the trustees had authority to employ one of their own number as agent to the trust, and had in fact so employed him. The relation of agent and client, and the consequent right of the agent to receive remuneration, was constituted without any special contract, either in writing or otherwise,¹ and there was no authority for the proposition that in such circumstances as the present employment could be proved only by an appointment recorded in the minutes of the trust. It appeared sufficiently from the parole evidence, and from the minutes, that Mr Williamson had been authorised to act as agent to the trust, and that his services had been accepted by his co-trustees on this footing. He was instructed at the first meeting of trustees to take the necessary steps for winding-up the estate, and he had continued to transact necessary law business with the knowledge and approval of his co-trustees.

Lewis's Trustees v. Pirie.

At advising on 10th February 1912,—

LORD DUNDAS.—(In his Lordship's absence his opinion was read by the Lord President)—[After the narrative quoted above]—There is not, I think, much room for doubt as to the law applicable to the case. It is well settled that, apart from special power conferred by the trust-deed and duly acted on, a trustee who is a law-agent and does legal work on behalf of the trust is not entitled to be remunerated for it, but only to receive the amount of his outlays, this rule being only an example of the broad principle that no man with a fiduciary duty can place himself in a position where his own interest may conflict with his duty. And in the absence of any power in the trust-deed, a solicitor trustee cannot claim remuneration for professional services, even though the trustees have in fact appointed him their law-agent, any such payment being *ultra vires*. On the other hand, it is, of course, quite lawful and usual for a testator to permit (as the testator here has permitted) the appointment and remuneration of one of his trustees as law-agent, and it has been held that express power to appoint one of the members of the trust to be law-agent implies, as matter of intention, that he may be remunerated at the expense of the trust. I have no doubt—and

of a trustee as law-agent to the trust in which he is trustee, provided that the trust-deed contains a clause similar to that in Mr Lewis's settlement. The relationship of agent and client is daily constituted without any contract either verbal or written, the mere acceptance of employment creating that relation, and if this relationship in the case of agents and the outside public may be so constituted, I see no reason why it should not also be so constituted between trustees and one of their number, when the trust-deed under which they act empowers them so to employ one of their number. Accordingly, in my view the relationship of agent and client was competently constituted between the defenders as trustees and the firm of Messrs Paull & Williamsons by the trustees' instructions given verbally and minuted in the minutes of the trust meetings. The general law on this subject will be found in *Goodsir v. Carruthers*, (1858) 20 D. 1141, and in *Lauder v. Millars*, (1859) 21 D. 1353. I refer also to the case of *Brown's Trustees v. Horne*, (1905) 12 S. L. T. 614, where, so far as the report shows, there was no formal written appointment of the firm of which one of the trustees was a partner, but merely a letter authorising them to perform certain work in connection with the trust. . . ."

¹ Bell v. Ogilvie, (1863) 2 Macph. 336.

Feb. 10, 1912. I desire to say it clearly, looking to some passages in the evidence in this case—that the correct and proper course where trustees are empowered, and resolve to exercise the power, to appoint one of their number as their law-agent, is to record the appointment in the minutes of the trust. It does not require the example of the present proceedings to demonstrate that any other course is likely to lead to subsequent misunderstanding and disputes, and perhaps litigation. It is true, as the Sheriff-substitute observes, that the relationship of agent and client is often constituted by the mere fact of employment, so as to involve the agent's right to remuneration for his services. That is because the fact of the performance of such services raises, in the ordinary case, an extremely strong presumption that they were rendered upon the usual terms on which professional practice is conducted. But the case of a law-agent who is a trustee does not raise the same presumption; and a solicitor in that position who proposes to do legal work for the trust must walk warily if he is to be sure of his remuneration. Where the trust-deed contains no power to appoint him, as a member of the trust, to be law-agent, he cannot, as already stated, recover any remuneration. Where there is such power, and the trustees resolve to appoint him to the agency, his appointment ought to be minuted; but though that correct and business-like step be neglected, I think he may yet recover his remuneration if it is proved in fact that he did proper professional work for the trust on the instructions of the trustees, or with their knowledge and approval.

The present case is, to my mind, a narrow one on the facts; but I think the Sheriff-substitute's conclusion is sufficiently supported by the evidence, and ought to be affirmed. Mr Williamson clearly believed that he (or his firm) was acting throughout as the authorised law-agent of the trust; and he says that he would not have done the work on any other footing. His omission definitely to record in the minutes the fact that he or his firm held that position seems to have arisen from his views as to the proper practice in such circumstances, which appear to me to be loose and not such as can be judicially approved of. But if he had minuted the appointment, I do not doubt that his co-trustees would willingly have signed the minute. Mr Pirie depones that at the meeting on 18th October 1909 he "suggested to Mr Williamson that he would require to advertise for any claims against the deceased's estate and also to look after anything that had to be done by a lawyer. I saw the advertisement in the newspapers." Strangely enough, the advertisement is not produced, so that we do not know its exact terms. Again, Mr Pirie says,—“It is the case that at the second meeting” (i.e., 18th October) “I asked Mr Williamson to attend to everything that required a law-agent.” Later, he adds,—“I just fall back on what I said before—that I asked him to advertise and to look after the necessary things and keep the trust right. That was after Mr Williamson had seen Mrs Lewis. (Q.) Did you instruct Mr Williamson to act as law-agent at the first meeting? (A.) No; I understood he was law-agent. I thought so when he wrote and told me that the will was in his hands. (Q.) Who appointed him? (A.) There was no more appointing that I know of than what I have said.” Mr Young, the other trustee, depones,—“I understood when I went into the trust that Mr Williamson occupied

the position of law-agent to the trustees. I never thought much about it Feb. 10, 1912. at all, although I knew he was writing and doing the work and giving his advice." One must also keep in view the minutes of the trust down to ^{Lewis's Trusts v. Pirie.} and including that of the meeting on 19th August 1910, at which the three trustees signed the deed containing their own resignations and the assumption of new trustees, and authorised "the agents" to take credit in their account of intromissions for the amount of their business accounts and commission subject to taxation. The whole thing is regrettably loose; but I think it is sufficiently proved that Mr Williamson's firm was authorised by Mr Pirie—the only trustee besides Mr Williamson as at 18th October 1909—to record the will and advertise for claims, and look after all such matters as had to be done by lawyers; and that the firm did perform professional services thereafter for the trust, with the knowledge and approval of Mr Pirie and of the assumed trustee, Mr Young. Accordingly, I consider that the defenders—whose position might apparently have been so easily made clear beyond dispute—are entitled to succeed; and that we should of new find in terms of the interlocutor appealed against. The case will have to go back to the Sheriff Court for taxation of the accounts and disposal of expenses other than those of the appeal.

LORD JOHNSTON.—(In his Lordship's absence his opinion was read by Lord Mackenzie)—I concur in the judgment proposed. At the same time I feel strongly that the procedure in this trust has been most unsatisfactory. I conceive that where a trustee who is a law-agent, even when he has been the law-agent of the testator, contemplates acting as agent in the trust, and under a special clause in the trust-deed charging for his services, he ought, not merely to obtain a definite and minuted appointment from his co-trustees, but also to explain to them, as they are probably laymen and ignorant of the law of trusts and of agency, the position in which he is placed by the law and by the terms of the trust-deed. In the present case I cannot avoid the conclusion that his co-trustees knew Mr Williamson to have been the testator's law-agent, and assumed that he became in succession law-agent in his trust because of that fact, and of the further fact that he was in possession of the settlement, and so called together the nominated trustees to consider whether they would accept.

But I agree that the actings in this trust have been such that, though Mr Williamson and his firm slid, so to speak, into the position of agents in this trust, they have been allowed to do the work in such circumstances that it would be going too far now to deny them their remuneration.

LORD PRESIDENT.—I agree, and I emphasise for the information of the profession that the only proper procedure is to make the appointment and to minute it. But as actual matter of law I cannot say that it is absolutely necessary that there should be a minute of appointment, because it is clear that the appointment may competently be proved in other ways.

Here I am quite satisfied that the law-agents were in fact and knowingly appointed to be agents to the trust by the two other trustees, and I think that to give effect to the contention of the pursuers would be to do no more than to take advantage of what was a slip in the trust management.

Feb. 10, 1912. LORD KINNEAR and LORD MACKENZIE, who were absent when the case was heard, delivered no opinions.
 Lewis's Trustees v. Pirie.

THE COURT dismissed the appeal, affirmed the interlocutor of the Sheriff-substitute dated 26th May 1911, repeated the findings in fact and in law therein, and remitted to the Sheriff-substitute to proceed as accords.

CAMERON & ORR, S.S.C.—DALGLIESH, DOBBIE, & Co., S.S.C.—Agents.

No. 83. MRS CATHERINE GIBB, Pursuer (Respondent).—*Sandeman, K.C.*—*MacRobert.*

Feb. 22, 1912.

Gibb v.
Edinburgh
and District
Tramways
Co., Limited.

THE EDINBURGH AND DISTRICT TRAMWAYS COMPANY, LIMITED,
Defenders (Reclaimers).—*G. Watt, K.C.*—*H. P. Macmillan.*

Reparation—Negligence—Duty to public—Faulty construction of tramway car.

Process—Proof or jury trial—Reparation for personal injuries—Dangerous machine—Construction of tramway car.

In an action of damages for personal injuries brought against a tramway company, the pursuer averred that when she was standing close to a passing tramway car her dress was caught by a stay that projected beneath the car between the front and rear wheels, whereby she was thrown down, and run over and injured. She averred that the accident was due to the faulty construction of the car, in respect that there were no guards covering the space between the front and rear wheels, a precaution that was reasonable and practicable, and almost universally adopted by other car systems.

Held (1) that the pursuer's averments disclosed a relevant case of faulty construction; and (2) that there were no such intricacies in the construction of the tramway car as to render the case unsuitable for trial before a jury; and issue *allowed*.

1ST DIVISION. Lord Guthrie. MRS CATHERINE GIBB brought an action of damages for personal injury against the Edinburgh and District Tramways Company, in which she averred;—(Cond. 2) "About midday, on 14th September 1910, when out shopping, the pursuer had occasion to cross from the east to the west side of Lothian Road at a point some yards to the north of the Edinburgh Savings Bank's Branch Office there, near the top of said street. Pursuer, in so crossing, saw the defenders' car, No. 81, approaching from the south, going in the direction of Princes Street, and she stopped between the two sets of tramway rails with the intention of allowing the car to pass her. There was no car approaching from the opposite direction, that is from Princes Street, near pursuer at the time. The car was travelling at full speed—at the rate of about ten miles an hour. The pursuer had taken up a position midway between the two sets of rails so as to be clear of the car, but when it was about half-way past her the lower part of the skirt of her dress was drawn in by the suction caused by the car and caught by the vertical stay on the right side of the car, or became jammed between the main stay and the body of the car. The pursuer was in consequence thrown violently to the ground and dragged by the car for some distance on the causeway on her face. The right rear wheel of the car passed over her left leg. When the car was brought to a stop it was found that the pursuer and her clothing

were so much entangled with the wheel and other parts of the car that she was not able to be extricated therefrom for about thirty minutes." (Cond. 3) "The said accident was due to the fault and negligence of the defenders. The bottom end of the upright rod of said vertical stay in the car in question projected thereunder to the extent of about 1 inch. Said projection was unguarded and was a source of great danger to a person standing at the side of the car as it passed. It was specially dangerous to a woman, as her dress is liable to be sucked in under the car as it passes and to catch on the vertical projection. Further, the main stay was unguarded, and a woman's dress is liable to be caught between the stay and the car. It was the duty of the defenders to have had both the vertical stay and the main stay guarded, but this they failed to do. Had the stays been guarded the accident would not have happened. Further, and in any event, it was the duty of the defenders to have had the side of the car between the body and between the front and back wheels guarded, and also to have had the wheels themselves guarded. This is usual and customary. The defenders failed in this duty. There was no guard at the side of the car between the wheels to prevent a person who had fallen from getting beneath the car and under the wheels, nor were the rear wheels guarded in front. Had the defenders adopted either of these precautions the accident would not have happened. Both precautions are reasonable and practicable, and are almost universally adopted by other car systems. The usual guard between the wheels consists of a wire netting. Reference may be made to the following systems for such guards:—(1) The St Helens Tramways; (2) The Rothesay Tramways; (3) The Gateshead Tramways; (4) The Burnley Tramways. In these systems the cars have bogie wheels. Where the cars have bogie wheels there is a much greater space between the front and rear wheels, and the greater need for guarding said space. So far as the pursuer can ascertain it appears to be the invariable practice in this country, where the cars have bogie wheels, to have guards of some kind along the sides of the cars to cover in the open space between the front and rear wheels. In some cases horizontal boards are fixed across the open space between the wheels. Where bogie wheels are not in use the front and rear wheels are much closer together. In nearly all the cars of this type the structure of the cars between the front and rear wheels is such as itself to afford a sufficient guard. Reference may be made for illustration to the Glasgow, Lancaster, Liverpool, Sunderland, Huddersfield, Halifax, and London cars. The front wheels are, in fact, guarded in front, and there is no good reason why the same precaution should not be taken as regards the front of the rear wheels. The Edinburgh cars, and in particular the car in question, are particularly dangerous when left unguarded, as above mentioned, in respect of the extent of the open space between the front wheels and the back wheels. Frequent accidents take place by reason of the insufficient nature of the guards of said cars. During the month or thereby before the closing of the record, no less than four fatal accidents took place owing to the defective nature or want of guards on the defenders' cars, viz.:—James McCormick, Richard Jordan, John Morton, and James M. Munro. The Edinburgh system, where cars with bogie wheels are used, is the most dangerous system in this country, judged by the number of accidents per 1000 of population. With regard to the explanations and state-

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Tramways
Co., Limited.

ments in answer, it is admitted that a nut for tightening up the main stay is screwed on to the said lower part of the vertical stay, but explained that the vertical stay projects beyond the nut. In any event, the nut itself when unguarded is dangerous and liable to catch the dress of a person standing at side of car. It is not known and not admitted that the type of car in question was approved of by the Board of Trade, and that it has been annually licensed as stated."

The defenders pleaded that the pursuer's averments were irrelevant.

On 17th December 1911 the Lord Ordinary (Guthrie) approved of the following issue for the trial of the cause:—"Whether on or about 14th September 1910, in Lothian Road, Edinburgh, the pursuer was injured in her person through the fault of the defenders to her loss, injury, and damage? Damages laid at £2000."*

The defenders reclaimed, and the case was heard before the First Division (without Lord Johnston) on 26th January 1912.

Argued for the reclaimers;—The pursuer's averments were irrelevant. The only fault disclosed by the pursuer was her own fault in standing too close to the car while it passed. The defenders could not be charged with faulty construction of their cars seeing that the cars were passed by the Board of Trade and were licensed annually. In any event, the case was not suitable for trial before a jury, being of doubtful relevancy and involving, as it did, a somewhat intricate question as to the proper construction of tramway cars.¹

Argued for the respondent;—The averments as to the unguarded space between the front and rear bogies of the defenders' car, and as to their neglect to adopt well-known and usual precautions for the safety of the public, were relevant averments of fault. Especially was this so where the defenders had good reason, as was averred here, to be aware of the dangerous character of their cars. The defenders' liability for such fault was really determined by statute.² The defenders being in fault were not relieved from the consequences of that fault by the fact that the pursuer was standing close to the car, which she was quite entitled to do. The Lord Ordinary was right in sending the case to a jury, as there were no such intricacies

* "OPINION.—The defenders discussed the question of relevancy and also the mode of trial, if inquiry were ordered.

"It appears to me that the pursuer's averments, as amended, are relevant. The danger to which the pursuer was exposed was not obvious to her. On the other hand, if it be the fact that a series of accidents has happened from a similar cause, then the danger must have been known to the defenders, and if it be the fact that a large number of other tramway systems have adopted means for preventing this danger, there may be material for coming reasonably to the conclusion that the defenders neglected a reasonable and ordinary precaution for the safety of their passengers.

"But for practice I should have thought that this was not a suitable case for a trial by jury. The question turns on the proper construction of the defenders' tramway cars. A jury is apt to hold that if a certain appliance, which the defenders might have fitted on their car, would have prevented the accident, they were therefore bound to have provided it, a conclusion which does not necessarily follow. But the mere fact that an action of damages involved or turned on questions of construction has not by itself been held ground for withdrawing a case from trial by jury."

¹ Cass v. Edinburgh and District Tramways Co., 1908 S. C. 841.

² The Tramways Act, 1870 (33 and 34 Vict. cap. 78), sec. 55.

of mechanical construction involved as to render it unsuitable for that Feb. 22, 1912.
tribunal.¹

At advising on 22nd February 1912,—

Gibb v.
Edinburgh
and District
Tramways
Co., Limited.

LORD PRESIDENT.—In this case the pursuer sues the Edinburgh and District Tramways Company, Limited, in respect of an accident which happened to her on the street. She was standing between the lines,—that is to say, between the two sets of lines in the street,—and a car passed. Her dress was either protruding or was blown out and entangled itself with a portion of the car and she fell over. In her fall her leg slipped forward and the car went over it.

The Lord Ordinary has allowed the ordinary issue of whether the accident happened to the pursuer through the fault of the defenders, and the reclaiming note to your Lordships was directed to the question whether the pursuer's case is relevant.

It is, no doubt, at first sight, somewhat startling to think that there may be a question of negligence against the defenders when, as a matter of fact, the pursuer was not, when the accident occurred, standing in the track of the cars. One fault that she alleges upon the part of the Tramway Company is that underneath the tramway car there was a vertical rod or stay which extended about an inch beyond a nut and made a projection upon which her dress could catch. I confess that if that stood alone I should think the averment totally irrelevant. It is perfectly absurd to suppose that because a nut has a small portion of the screw sticking out beyond it there is faulty construction which should subject the defenders to liability. As a practical question, I should say it was impossible to cut the screws off exactly flush. And even whether that is so or not, there is nothing particular in a screw protruding beyond a nut. It would come to this, that any roughness of surface which possibly could effect a lodgment in the more or less flimsy tissue of a dress, constituted a fault of construction which made the defenders liable for any accident that happened.

But the much more serious averment is an averment that the construction of this particular car is faulty in this respect—that it does not have a guard or screen upon the side, and very pointed averments are made not only that the construction of a guard or screen is easy, but that it is almost universally used on other car systems. Now, the defenders very strenuously argued that such averments should not be admitted to probation. I have not been able to see my way to take up that position. I do not think one is entitled to use what, of course, one cannot help having—one's knowledge of the construction of ordinary tramway cars, and then making oneself into a jury to pronounce a judgment one way or the other upon whether a certain thing is an ordinary and reasonable precaution, the absence of which means fault and negligence. I do not think one is entitled to do that. I think it can only be done by the tribunal that is to try the facts of the case.

I do not think it is advisable to say more, because it would really be

¹ The following cases were referred to:—Wallace v. Culter Paper Mills Co., (1892) 19 R. 915; Mathieson's Tutor v. Aikman's Trustees, 1910 S. C. 11.

Feb. 22, 1912. *sinning in the very direction which we ought to avoid. And, therefore, I think that, seeing that undoubtedly a tramway car is more or less what may be called a dangerous machine, it is not irrelevant to say that that dangerous machine in this present instance was unprotected in a way in which ordinary dangerous machines of the same class are protected.*

Gibb v. Edinburgh and District Tramways Co., Limited.
 Ld. President. That only leaves the question of whether the inquiry should be before a jury. It was pressed upon us that this class of case would be very much better tried by a Judge. That may be so, but, at the same time, a jury is the constitutional tribunal for this class of case, and I do not think that there is any such obvious complication as would make it unsuitable for a jury trial. I can imagine some classes of cases, not resting upon negligence—I mean a certain class of case where the construction of a very intricate machine might come in—where it might be almost impossible to get a jury who could fairly be supposed to understand its intricacies. But there is nothing intricate in this case, and therefore I think the pursuer has the right to the ordinary tribunal which is appointed to try such cases.

Accordingly, upon the whole matter, I am of opinion that the Lord Ordinary's interlocutor is right, and that we should adhere to it, approving of the issue and allowing the trial to go on.

LORD KINNEAR and LORD MACKENZIE concurred.

THE COURT adhered.

CONNELL & CAMPBELL, S.S.C.—MACPHERSON & MACKAY, S.S.C.—Agents.

No. 84.

MRS ANNIE RODGER AND OTHERS, Pursuers (Appellants).—*Sandeman, K.C.—MacRobert.*

Feb. 22, 1912.

THE SCHOOL BOARD OF THE BURGH OF PAISLEY, Defenders (Respondents).—*Crabb Watt, K.C.—Moncrieff.*

Rodger v. Paisley School Board.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 56), sec. 1 (1)—Accident arising out of and in the course of the employment—School janitor injured by falling on the street through faintness.

A school janitor, conveying a message on school business through the streets of Paisley about noon on a hot July day, was overcome by giddiness or faintness brought on by the heat, and fell, struck his head against the pavement, and sustained injuries of which he died.

Held that the accident did not arise out of his employment.

1ST DIVISION. IN an arbitration under the Workmen's Compensation Act, 1906, in Sheriff of Renfrew and Bute, the Sheriff Court of Renfrew and Bute, at Paisley, between the representatives of the late William Rodger, school janitor there, and the School Board of the Burgh of Paisley, the Sheriff-substitute (Lyell) refused to award compensation, and, at the request of the claimants, stated a case for appeal.

The case stated :—“(1) The deceased William Rodger, late husband of the principal appellant, was, for twenty-two years prior to his death on 24th June 1911, a workman in the employment of the respondents, as janitor at the North Public School, Paisley. (2) Shortly after 11 A.M. on 7th June 1911 the said deceased was sent, in the course of his employment, by the headmaster of the said school,

to convey a message on business connected with the school, to the headmaster of Camphill School, Paisley, a distance of a mile and a half. (3) After delivering the said message, the deceased was returning to the North School *via* Storie Street, Paisley, between 12 noon and 1 P.M.; and, when opposite No. 14 Storie Street, he stopped, and facing the wall of the said house, leaned his hands against it. (4) He then fell backwards, striking his head violently on the stone pavement. (5) The said fall caused injury to the brain, in consequence of which meningitis supervened, and the deceased died on the said 24th June 1911. (6) The deceased was 60 years old when he died; and, prior to his injury by the said fall, he enjoyed normal good health. (7) The weather in the town of Paisley and in the surrounding district on the said 7th June 1911 was very hot, the temperature recorded at Paisley Observatory being 75·6° at noon, and 76·8° at 2 P.M. (8) The cause of the deceased's fall was either giddiness or faintness brought on by the excessive heat of the day, acting upon a man of 60 years of age in normal health. (9) There was nothing in the nature of the deceased's employment that exposed him to more than the ordinary risk of weather conditions to which any person on the streets of Paisley was exposed between 12 noon and 1 P.M. that day. (10) All persons in the streets of Paisley, and the surrounding district, whether in the course of their employment or not, were equally exposed at the time in question to the weather conditions which produced giddiness or faintness in the case of the deceased. In these circumstances I found, further, in fact, that the deceased died from injury by accident occurring in the course of his employment, but found in law that the accident did not arise out of the employment, in the sense of the statute."

The question of law was:—"Was the Sheriff-substitute right in holding that the accident did not arise out of the deceased's employment, in the sense of the statute?"

The case was heard before the First Division on 31st January 1912.

Argued for the appellants;—The finding showed that this man had fallen down, through giddiness, at a place where his employment forced him to be. The form of the findings made it clear that the arbitrator considered the attack of giddiness to have been the accident. This was not so. The accident was the fall upon the hard pavement; not the giddiness which resulted in the fall.¹ In this respect the case was distinguished from those of *Blakey v. Robson, Eckford, & Company*,² and *Warner v. Couchman*,³ cited for the respondents. The employment had contributed to the accident in that it had placed the workman in a position which would be attended with danger. It was true that the danger of slipping or falling on a pavement was a danger common to all who used the streets, but this common danger had, in the present case, been imported into the employment, and become one of the risks properly incidental thereto.⁴

¹ *Wicks v. Dowell & Co., Limited*, [1905] 2 K. B. 225; *Owners of Ship "Swansea Vale" v. Rice*, (1911) 27 T. L. R. 440.

² *Supra*, p. 334.

³ [1911] 1 K. B. 351.

⁴ *Moore v. Manchester Liners*, [1910] A. C. 498; *Pierce v. Provident Clothing and Supply Co., Limited*, [1911] 1 K. B. 997; *M'Neice v. Singer Sewing Machine Co., Limited*, 1911 S. C. 12. Lord Mackenzie referred to *Millar v. Refuge Assurance Co.*, *supra*, p. 37. Reference was also made to

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Rodger v.
Paisley
School Board.

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Paisley
School Board.

Argued for the respondents;—It had not been shown that the occurrence in question was an accident which arose out of the employment in the sense of the statute. The loss of balance which was the *causa causans* of the occurrence was due not to accident but to illness. The actual injuries no doubt arose from the fall; but the danger of falling on a pavement could not be said to be a danger reasonably incidental to the employment of a school janitor, even where his employment might force him, on occasion, to traverse the streets.¹ To establish the latter proposition it must be shown that the danger was a peculiar danger to which the circumstances of the employment subjected the workman, or a common danger to which these circumstances subjected him in a peculiar degree. The danger in question had not been shown to have either of these characters. It was a danger common to all who used the streets, and had not been imported into the employment in the sense of the decided cases. The case was not distinguishable from those of *Blakey v. Robson, Eckford, & Co.*,² and *Warner v. Couchman*,³ where the liability of the employer had been negated.

At advising on 22nd February 1912,—

LORD PRESIDENT.—In this case the deceased William Rodger, who was the husband of the principal appellant, was a janitor in the employment of Paisley School Board, at the North Public School at Paisley. On 7th June 1911 he was sent to take a message to the headmaster of another school in Paisley, distant a mile and a half. In the course of returning from delivering that message he was attacked by faintness and, his faintness overcoming him, he fell, and his head came in contact with the street pavement, thereby causing an injury to his brain which brought on meningitis, from which he died. The question is whether he met with an accident arising out of and in the course of his employment.

Now, I take it that there is no question that he had an accident, that is to say, that he had a fall, but the point is whether the accident arose out of and in the course of his employment. I think also there is no question that it arose in the course of his employment. He was discharging a part of his duty. But the point remains, Was it an accident arising out of his employment? The Sheriff-substitute finds two things. He finds that the weather was hot on that day. But it was not any very great heat. And he says, "There was nothing in the nature of the deceased's employment that exposed him to more than the ordinary risk of weather conditions to which any person on the streets of Paisley was exposed between 12 noon and 1 p.m. that day," and "all persons in the streets of Paisley and the surrounding district, whether in the course of their employment or not, were equally exposed at the time in question to the weather conditions which produced giddiness or faintness in the case of the deceased."

Murray v. Denholm & Co., 1911 S. C. 1087, at p. 1102; *Challis v. London and South-Western Railway Co.*, [1905] 2 K. B. 154; and *Kitchenham v. Owners of s.s. "Johannesburg"*, [1911] 1 K. B. 523.

¹ *Murray v. Denholm & Co.*, 1911 S. C. 1087, *per* Lord Salvesen, at p. 1102. The Lord President referred to *Fitzgerald v. W. G. Clarke & Son*, [1908] 2 K. B. 796.

² *Supra*, p. 334.

³ [1911] 1 K. B. 351.

In these circumstances I am of opinion that the accident did not arise Feb. 22, 1912. out of his employment. There was a case the other day here—*Blakey v. Rodger v. Robson, Eckford, & Company*¹—which is almost the same as the present, Paisley School Board. but it was ingeniously distinguished by counsel on the ground that in that case the accident, so to speak, was illness and nothing else. It was the Ld. President effect of the illness which came upon him. Here it is said that the accident is really not in the faintness, but is in the head injury which occurred by his striking the pavement, and I think that that is quite an understandable distinction. But the ground upon which I think it is quite clear that the man's accident did not arise out of his employment is that I do not think that his employment in any way subjected him to the particular class of accident in consequence of which he died.

I need not go through the cases again—we have been through them all very recently. But in one case I suggested that it is helpful to contrast them by what I may call the interrogative method; and I think that if you employ that interrogative method the point comes out very clearly. I contrast this case with the class of case of which the bicycle cases, both here and in England, are examples,² and also with the hypothetical case I have put more than once in illustration—the case of the sandwichman. The danger of the streets to which the bicyclist and the sandwichman were subjected was the danger of being run over. I may also take another illustration from the judgment of Buckley, L.J., in the case of *Fitzgerald v. W. G. Clarke & Son*.³ There may be a danger to which a man's employment specially subjects him which may consist not so much in the actual quality of the thing itself, but in the constant recurrence of certain conditions—I mean the case that he puts of the railway guard. As he says, all of us travel by railway, and, when we do so, we are of course as much exposed to the risk of collision and hurt on that particular journey as the railway servant is; but then the railway servant travels every day and all the day, and we do not. Therefore, putting it interrogatively, if you asked, "What is the class of injuries to which a railway guard's employment subjects him?" the answer would be, among other things, "A collision." In the same way with the sandwichman and the bicyclist, to what class of dangers are they subjected? The answer at once is, "Being run over." But if you said, "To what kind of danger does the janitor's employment (including in that employment having to go messages) expose him?" you might say, "Being run over in the street," but I think you would never say, "The fact that, if he fell down, his head would hit something hard." He might have had this fainting fit in his own room, and fallen against the fender, and he might on the other hand have fallen upon a soft rug in a room, or upon some comparatively soft surface in the street.

And this case is entirely distinguished, I think, from the other class of case where the particular situation in which a man is put makes the fall more than usually dangerous, such as the case where the man was standing

¹ *Supra*, p. 334.

² *M'Neice v. Singer Sewing Machine Co., Limited*, 1911 S. C. 12; *Pierce v. Provident Clothing and Supply Co., Limited*, [1911] 1 K. B. 997.

³ [1908] 2 K. B. 796, at p. 800.

Feb. 22, 1912. near the hold of a ship, being obliged to be there by his occupation, and
Rodger v. fell down the deep hold and hurt himself. In that case¹ the learned
Paialey Judges put the illustration of the man being bound to walk, in the course
School Board. of his employment, along the edge of a precipice. Now, there is nothing
Ld. President. of that sort here. This man was hurt in going along an ordinary street. It
was absolute chance that the paving at that particular place, as it happened,
was paving stone which cracked his head and was not semi-liquid tar
macadam which might not have hurt him at all.

Accordingly, applying that method of interrogation here I come without
any hesitation to the conclusion that this accident did not arise out of the
man's employment; and accordingly I think the Sheriff-substitute was
quite right in his decision.

LORD KINNEAR.—I am entirely of the same opinion. I can see no
reason for saying that the Sheriff-substitute has been guided, in answering
the question of fact, by any wrong construction of the Act of Parliament.
I think that is the only ground upon which we could have disturbed his
judgment, because there is no question raised as to whether there were
sufficient facts before him to justify him in deciding the question in the
way he has done, so far as it is a question of fact only.

Now, I agree entirely with all that your Lordship has said. The counsel
for the appellants argued, with great ingenuity, that all we have to look at is
the immediate cause of the injury to this man, because the law, according
to the dictum which is so often cited, does not judge the cause of causes.
And, accordingly, it is said that, when it has been ascertained that this
man has died in consequence of his head being brought violently into con-
tact with the stone pavement at a time when and in a place where he was
engaged in his employment, everything has been proved that is necessary
to satisfy the statute.

I think everything on that hypothesis has been proved that is necessary
to satisfy the one condition of the statute, that a man should be injured
while he is in the course of his employment. But, then, it is necessary to
go further in order to answer the other question which the statute propounds,
whether the man's injury was caused by accident, and whether, if it was
an accident, it was an accident which arose out of his employment. Now,
these are words of ordinary language, and they have been construed so
often that there can really be no difficulty in determining their meaning,
whatever difficulty there may be—and it is often considerable—in applying
them to the facts of the particular case.

I think it is now well settled that in order to satisfy that condition it
must be shown that the injured man suffered in consequence of a risk
incidental to his employment—that is to say, a risk beyond what ordinary
people incur in the ordinary course of their business, but one to which he
was specially exposed by the nature of his employment. The illustration
your Lordship takes seems to me to be an excellent one because the extrinsic
circumstances are so similar to the present; I mean the case of *Wicks*,¹
where the man was injured, in consequence of an epileptic fit, by falling

¹ *Wicks v. Dowell & Co., Limited*, [1905] 2 K. B. 225.

into the hold of a ship. That was held to be an injury by accident arising Feb. 22, 1912. out of his employment, because his employment made it necessary that he should be stationed at the edge of the hold, and therefore it exposed him to a risk, if he did faint, to which ordinary people are not exposed. It was exactly the case put by Collins, L.J., of a man being stationed, in consequence of his employment, on the edge of a precipice. Another case might be taken as an equally good illustration—the case of *Andrew v. Fallsworth Industrial Society, Limited*,¹ where a man was stationed, in consequence of his employment, in such a position as to expose him to a greater risk of being struck by lightning than ordinary people not employed at that place would be exposed to.

But there is nothing exceptional in the cause of the injury in the present case at all. It is a risk which attends anyone whose business or pleasure takes him into the street—the risk of being injured if he be attacked by a fainting fit and fall. It is quite clear upon that statement that the faint had nothing to do with his employment, and I think the injury from falling was altogether out of relation to his employment also.

I come to the conclusion, therefore, that this poor man suffered from an accident to which all people are liable, and to which his own particular employment did not specially expose him.

LORD JOHNSTON.—The deceased's death was occasioned by a fall in the street and the resulting personal injury, while he was returning from conveying a message on the business of his employers. There can be no doubt therefore that he met with personal injury by an accident in the course of his employment. The accident was not merely the fall, but the violent contact between the pursuer's head and the stone pavement, which was part and parcel of the fall. The resultant personal injury was what is known as concussion.

The immediate cause, then, of the personal injury or concussion was the fall and consequent blow. The immediate cause of the fall and therefore the remote cause of the injury was giddiness or faintness. And the Sheriff-substitute finds in fact that the immediate cause of the giddiness or faintness, and therefore the still more remote cause of the injury, was the excessive heat of the day acting on a man of threescore, in normal health. He has further found that in these circumstances the accident did not arise out of the man's employment. In this I entirely agree, as I think we are only concerned with the immediate or proximate cause of the personal injury.

We have had a good many cases cited, with the relative dicta of Judges, as to the dangers of the street in special reference to the Workmen's Compensation Act, 1906. I refer to one of these, though it is in contrast to the present—*Wicks v. Dowell & Company, Limited*.² The conclusion there came to was that the accident was occasioned by a fall—the fall by a fit. Dissociate the proximate cause, the fall, from the remoter cause, the fit, and the question remained, Did the fall and its consequent accident arise out of the employment? That was answered in the affirmative, because

¹ [1904] 2 K. B. 32.

² [1905] 2 K. B. 225.

Feb. 22, 1912. the employment required the workman to work on the edge of the open hatchway of a vessel's hold. The risk of such a fall, whatever might be the cause of the fall, was a danger peculiarly incident to the man's employment. But a danger peculiarly incident to a workman's employment is in a different position from one which has no necessary connection with his employment, but is common to all or many persons irrespective of employment. Hence the value of the distinction between two other cases—*Andrew v. Faisleworth Industrial Society, Limited*,¹ where a man working on a high and exposed scaffold, and *Kelly v. Kerry County Council*,² where a man working on the high road, were each struck by lightning. To be struck by lightning is a risk common to all and independent of employment, yet the circumstances of a particular employment might make the risk not the general risk, but a risk sufficiently exceptional to justify its being held that accident from such risk was an accident arising out of the employment. In *Andrew's* case,¹ therefore, the accident was held to have arisen out of the employment, in *Kelly's* case² not.

If, then, in the present case the fall is regarded as the proximate cause of the accident, it cannot, I think, be said that the fall of a pedestrian on the street is more incidental to one class of employment than to another, or more likely to occur to a workman than to his employer, or any other passer-by.

I refer to the passage in Lord Salvesen's opinion in *Murray v. Denholm & Company*,³ where he cites from the judgment in *Fitzgerald's* case.⁴ I accept it, therefore, that an accident to arise "out of" the employment, in the sense of the Act, must be an accident reasonably incident to the employment. The accident in the present case cannot possibly come under that expression. To hold otherwise would virtually be to regard the expression "out of" only as a redundant alternative for "in the course of."

LORD MACKENZIE.—I agree with your Lordship, and think that the Sheriff-substitute has arrived at a sound conclusion in this case. I do not think it can be said that the part of the street on which the deceased was at the time of the accident was a place of danger, so that it could be said that he was then exposed to a peculiar risk which was reasonably incident to his employment; and therefore I am of opinion that the accident did not arise out of his employment.

THE COURT answered the question of law in the affirmative.

FYFE, IRELAND, & Co., W.S.—SIMPSON & MARWICK, W.S.—Agents.

¹ [1904] 2 K. B. 32.

² 42 Ir. L. T. 23.

³ 1911 S. C., at p. 1102.

⁴ [1908] 2 K. B. 796.

THE BRITISH GLANZSTOFF MANUFACTURING COMPANY, LIMITED, No. 85.

Pursuers (Reclaimers).—*Murray, K.C.—D. Anderson.*

THE GENERAL ACCIDENT, FIRE, AND LIFE ASSURANCE CORPORATION, Feb. 22, 1912.

LIMITED, Defenders (Respondents).—*Constable, K.C.—M. J. King.* British Glanz-

Contract—Construction—Breach—Damages for delay—Measure of damages stoff Manu-
—Provision for liquidate damages for delay—Failure of contractor to com- facturing Co.,
plete contract—Completion of contract by other parties—Applicability of Limited, v.
provision for liquidate damages. General Acci-
 dent, Fire,
 and Life
 Assurance
 Corporation,
 Limited.

A contract for the construction of certain works by a specified date contained a clause providing for liquidate damages at certain rates Corporation, Limited. to be paid by the contractor for each week's delay beyond that date. It was further provided that if the contractor should suspend the works the employers might take possession of the plant and materials and engage others to complete the contract. The contractor became bankrupt and suspended the works, and the employers thereupon engaged other persons to complete them, but they were not completed until at least six weeks after the date specified in the original contract.

In an action of damages, at the instance of the employers, for the loss incurred by them through the failure of the contractor to fulfil his contract, the pursuers claimed, *inter alia*, damages for six weeks' delay at the rates specified in the liquidate damages clause.

Held that, while the pursuers were entitled to sue for damages for breach of contract, they could not found on the liquidate damages clause, as that clause applied only where the contractor had himself completed the contract and could not apply where the control of the contract, and so of the time taken to complete it, had passed out of his hands.

ON 3rd February 1911 the British Glanzstoff Manufacturing Com- 1st DIVISION.
 pany, Limited, brought an action for £3031, 18s. 9d. against the Lord Dewar.
 General Accident, Fire, and Life Assurance Corporation, Limited, carrying on business at Perth, as guarantors for the fulfilment of a contract entered into between the pursuers and Messrs William Brown & Sons, contractors, for the erection of certain works at Flint.

The pursuers averred;—(Cond. 2) "In the year 1909 the pursuers proposed to erect works for the purposes of their business at a cost of £39,763 at Flint aforesaid. Drawings and specifications of the works required were prepared and issued. The contract was undertaken by Messrs William Brown & Sons, contractors, Salford, Lancaster, and an agreement for the execution of the works was entered into between the pursuers and the said William Brown & Sons. The conditions of the contract between the pursuers and the said William Brown & Sons were embodied in articles of agreement, dated 20th May 1909, a copy of which is herewith produced.* . . ."

* The contract provided, *inter alia*, as follows:—

"*Date of Completion.*

"23. Possession of the site (or premises) shall be given to the contractor on or before the 1st day of May 1909. He shall begin the works immediately after such possession, shall regularly proceed with them, and shall complete the same (except painting and papering or other decorative work which in the opinion of the architect it may be desirable to delay) by the 31st day of January 1910, subject nevertheless to the provisions for extension of time hereinafter contained.

"*Damages for non-completion.*

"24. If the contractor fail to complete the works by the date named in

Feb. 22, 1912. (Cond. 3) "By article 23 of the said articles of agreement it was provided that possession of the site should be given to the contractors on or before the 1st of May 1909, and that they should begin the works immediately thereafter and complete the same by the 31st day of January 1910. Possession was duly given to the contractors on said 1st day of May 1909. By article 24 thereof it was provided that if the contractors failed to complete the works by 31st January 1910, or within any extended period allowed by the architect thereunder, the contractors should be bound to pay to the employer the sum of £250 sterling per week for the first four weeks, and £500 sterling per week for all subsequent weeks during which the works remained unfinished. By article 25 it was provided that in certain cases the architect might grant an extension of the time within which the works were required to be completed. No such extension was asked by the contractors prior to the abandonment of the contract by them

British Glanz-
stoff Manu-
facturing Co.,
Limited, v.
General Acci-
dent, Fire,
and Life
Assurance
Corporation,
Limited.

clause 23, or within any extended time allowed by the architect under these presents, and the architect shall certify in writing that the works could reasonably have been completed by the said date, or within the said extended time, the contractor shall pay or allow to the employer the sum of £250 sterling per week for the first four weeks, and £500 per week for all subsequent weeks as liquidated and ascertained damages for every week beyond the said date or extended time, as the case may be, during which the works shall remain unfinished, except as provided by clause 23, and such damages may be deducted by the employer from any moneys due to the contractor."

24A. [This clause contained provision for payment to the contractor of a bonus of a certain sum per week in the event of the works being completed before the specified date.]

Extension of time.

"25. If in the opinion of the architect the works be delayed by *force majeure* or by reason of [certain specified causes] the architect shall make a fair and reasonable extension of the time for completion in respect thereof. . . .

"Suspension of works by Contractor.

"26. If the contractor, except on account of any legal restraint upon the employer preventing the continuance of the works, or on account of any of the causes mentioned in clause 25, or in case of a certificate being withheld or not paid when due, shall suspend the works, or in the opinion of the architect shall neglect or fail to proceed with due diligence in the performance of his part of the contract . . . the employer by the architect shall have power to give notice in writing to the contractor requiring that the works be proceeded with in a reasonable manner and with reasonable dispatch If the contractor shall fail for fourteen days after such notice has been given to proceed with the works as therein prescribed, the employer may enter upon and take possession of the works and site, and of all such plant and materials thereon (or on any ground contiguous thereto) intended to be used for the works, and all such materials as above mentioned shall thereupon become the property of the employer absolutely, and the employer shall retain and hold a lien upon all such plant until the works shall have been completed under the powers hereinafter conferred upon him. If the employer shall exercise the above power he may engage any other person to complete the works, and exclude the contractor, his agents and servants, from entry upon or access to the same, except that the contractor or any one person nominated by him may have access at all reasonable times to inspect, survey, and measure the works. And the employer shall take such steps as in the opinion of the architect may be reasonably necessary for completing the works without

as aftermentioned, and there were no grounds for asking such extension in terms of article 25. But the pursuers, in order to deal fairly with the defenders, have, in making their claim, allowed two weeks' extension, having claimed for only six weeks' delay, while, as matter of fact, there was a delay of at least eight weeks beyond the time stipulated for completion of the contract. . . ." (Cond. 4) "The said William Brown & Sons entered upon the construction of the said works and carried them on until the 20th day of August 1909, when a receiving order was granted in the Bankruptcy Court at Salford, Lancashire, against them. No further work was done by the said William Brown & Sons. In consequence of the said William Brown & Sons' failure to complete the contract it was necessary for the pursuers to obtain the services of other contractors, and on 16th September 1909 they entered into articles of agreement with Messrs Joshua Henshaw & Sons, of Liverpool, Lancaster, who duly completed the construction of the said works.* In terms of article 26 of the agreement the pursuers were entitled, on the contractors failing for fourteen days after notice to proceed with the works, to enter upon and take possession of the works and site and of the plant and materials on the ground, and to engage other persons to complete the works. The pursuers were further entitled to take such steps as were necessary, in the opinion of their architect, for completing the works without undue delay or expense, using for that purpose such plant and materials as were suitable. The pursuers exercised this right, and the works were completed without undue delay or expense other than that caused by the failure of the contractors during their period of possession to push on the work at the contract rate of speed, and their ultimate failure to complete the work in terms of the contract. . . ." (Cond. 5) "Before entering into the said agreement with the said Messrs William Brown & Sons the pursuers stipulated that the said William Brown & Sons should provide approved cautioners for the due fulfilment of the work. Instead of finding caution, Messrs Brown & Sons proposed that a bond of indemnity should be granted by the defenders in favour of the pursuers, whereby they should guarantee to the pursuers the due fulfilment by the said Messrs William Brown & Sons of the contract entered into between them and the pursuers. A contract of indemnity was accordingly granted by the defenders in favour of the pursuers, dated 21st and 22nd May 1909, whereby the defenders undertook to guarantee the due fulfilment of the contract by the said William Brown & Sons, and to pay and satisfy to the pursuers all losses and damage, costs, charges, and expenses which

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undue delay or expense, using for that purpose the plant and materials above mentioned, in so far as they are suitable and adapted to such use. Upon the completion of the works the architect shall certify the amount of the expenses properly incurred consequent on and incidental to the default of the contractor as aforesaid, and in completing the works by other persons. Should the amount so certified as the expenses properly incurred be less than the amount which would have been due to the contractor upon the completion of the works by him, the difference shall be paid to the contractor by the employer; should the amount of the former exceed the latter, the difference shall be paid by the contractor to the employer."

* The pursuers' contract with Messrs Henshaw provided that the work should be completed by 31st December 1909, but it did not contain provisions for "damages for non-completion" as in clause 24 of their contract with Messrs Brown.

Feb. 22, 1912. they might sustain, pay, or incur by or through the failure of the said William Brown & Sons to carry out the said contract.* . . .
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(Cond. 6) "In the bankruptcy of the said William Brown & Sons the pursuers lodged a claim for the sum of £3231, 18s. 9d., and the said claim of £3231, 18s. 9d. was, after negotiation, admitted on 31st December 1910 by the receivers in bankruptcy to the extent of £3031, 18s. 9d. The pursuers have sustained loss and damage at least to the amount of said sum in consequence of the said contractors' failure to fulfil their agreement with the pursuers, and the defenders are liable therefor under the contract of indemnity before referred to. The said sum of £3031, 18s. 9d. is made up of:—

(1) Amount paid by the pursuers in excess of the contract price by reason of the failure of the said William Brown & Sons to complete their contract,	£1686	0	0
(2) Architects' charges for extra services in reletting contracts and extra work through the failure of Messrs William Brown & Sons,	210	0	0
(3) Paid clerk of works, ditto, and salary during extra time, eight weeks at £3, 10s.—say,	25	0	0
(4) Liquidated damages for delay in completion of buildings as per contract:—			
Four weeks at £250,	£1000	0	0
Two " 500,	1000	0	0
	2000	0	0
	£3921	0	0

Value of work executed to September

20th, 1909,	£6072	8	0
By cash paid on account,	5383	6	9
	£689	1	3

Balance in hand,	689	1	3
Amount of claim,	£3231	18	9
Restricted to	£3031	18	9

Explained further that the pursuers' claim as now made was adjusted and agreed to by the two receivers in the said Messrs Brown's bankruptcy, assisted by a committee of inspection of practical men. Explained further that it was essential for the pursuers that the works should be finished with the least possible delay, as they required to be completed, and the manufacture commenced in this country, before

* By their contract of indemnity the defenders guaranteed "to the British Glanzstoff Manufacturing Company, Limited, the due fulfilment by the said Messrs William Brown & Sons of the said building contract so entered into by them to carry out the work above mentioned, and bind ourselves to pay and satisfy unto the said the British Glanzstoff Manufacturing Company, Limited, all losses and damage, costs, charges, and expenses as they may sustain, pay, or incur by or through the failure of the said contractors to carry out the said building contract, or by reason of the non-performance or non-observance by the contractors of the stipulations, provisions, and conditions on their part to be performed and observed and contained in the said contract."

the pursuers could obtain a patent in terms of the Patents Act, 1908, Feb. 22, 1912. Immediately the contract with Messrs Brown was completed the pursuers made contracts for delivery of machinery of a highly valuable nature, and the pursuers were put to a considerable trouble in keeping back delivery of these. Further, the pursuers suffered loss in consequence of the delay in the completion of their works through (1) loss of business during the period in question, including loss of current orders and loss of contracts covering large quantities of material in consequence of customers knowing that the works had not started, and fearing that future deliveries might be uncertain; (2) expenses incurred in wages to foreign experts whose services were contracted for on the faith that the works would be completed as specified in the contract; (3) loss of interest on deposits made on account of machinery contracts, where delivery had to be delayed in consequence of the non-completion of the works at the time stipulated by the contract; (4) loss of interest on expenditure for raw materials contracted for delivery at the contract time; and (5) general oncost expenses consequent on the delay in completion of the work. The loss incurred under these heads amounts to not less than £2000. The pursuers have therefore suffered actual loss and damage through the delay in completing the contract to the extent of at least £2000. The said sum of £1686 is made up as follows, viz.—[Then followed a detailed account for the sum of £1686, being item (1) referred to above].

The defenders pleaded, *inter alia*;—(1) The pursuers' averments in support of item (1) of their claim, and their alternative averments in support of item (4), not being relevant or sufficiently specific to be remitted to probation, the action so far as relating thereto should be dismissed. (2) The defenders should be assoilzied from item (4) of the pursuers' claim for liquidate damage in respect—(a) That liquidate damage for delay in completing the work contracted for was not in the circumstances that have occurred a competent or appropriate claim against the contractors, whose contract the defenders guaranteed; (b) That in any case, in the circumstances that have occurred, the pursuers are barred from enforcing the liquidate damage clause against the original contractors; (c) That *esto* such claim was competent against the contractors, it is not a relevant or competent claim against the defenders under their guarantee; (d) That in any case, in the circumstances that have occurred, the pursuers are barred from enforcing the liquidate damage clause against the defenders.

On 5th December 1911 the Lord Ordinary (Dewar) sustained the second plea in law for the defenders, and *quoad ultra* allowed parties a proof of their respective averments, and to the pursuers a conjunct probation.*

The pursuers reclaimed, and the case was heard before the First Division on 9th January 1912.

Argued for the reclaimers;—Section 24 of the pursuers' contract with Messrs Brown & Sons, providing for liquidate damages for delay, was to be read, not as a penalty clause, but as excluding the necessity for proof of such details as were the subject of parties' averments and had been remitted by the Lord Ordinary to probation. The defenders by their guarantee had become cautioners for the fulfilment by Messrs Brown of their contract, and were bound to meet the

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* The Lord Ordinary delivered no formal opinion.

Feb. 22, 1912. liabilities undertaken thereby. Though the works had been suspended by the contractors, and the pursuers had obtained their completion by others, delay was still provided for by the liquidate damages clause in the original contract, subject to the pursuers' obligation to minimise the damage by taking all necessary steps to expedite the completion of the works, and the pursuers undertook to prove that they had taken such steps. Messrs Brown, and therefore their guarantors, were not concerned with the terms of the pursuers' contract with those by whom the works were completed. The dictum of Bacon, V.C., in the case of *In re Newman, ex parte Capper*,¹ relied on by the defenders, was unsupported. In the case of *Yeadon Waterworks v. Binns & Wright*,² there was necessarily an election between two remedies, whereas in the present case the contract had been terminated by the contractors and not by any election by the pursuers. The defenders were called upon to meet the liabilities of the contractors in accordance with the intention of their guarantee.³ Though they might not be bound under a penalty clause,⁴ they were bound to meet a claim for liquidate damages due by the contractors for failure to fulfil their contract, and the stipulations of that contract were not fulfilled in the sense of the defenders' guarantee unless liquidate damages were paid as claimed, just as the fulfilment of a contract of charter-party might require payment of demurrage. The pursuers' averments as to the period for which liquidate damages were due would have been made more specific had this been necessary, but the case did not call for specification such as was called for in the case of *North British Railway Company v. Wilson*,⁵ relied on by the defenders.

Argued for the respondents;—The pursuers could not recover under the liquidate damages clause even in a question with Messrs Brown, as it had ceased to be applicable by reason of their abandonment of the contract.⁶ Assuming, however, that Messrs Brown had incurred liability for liquidate damages, that liability was not covered by the defenders' guarantee. The guarantee was limited to specific implement of the contract by the contractors,⁷ and the contract here had been completed by other parties. The pursuers' averments as to the loss alleged to have been suffered by them were lacking in specification,⁸ because the defenders were entitled to have liability proved against them in the same way as it would have to be proved against Messrs Brown.⁹ In exercising their right to take possession

¹ (1876) 46 L. J., Bank. 6, 4 Ch. D. 724.

² (1895) 72 L. T. 538.

³ *Ex parte Young, In re Kitchin*, (1881) 17 Ch. D. 668, James, L.J., at p. 671; *Parker v. Lewis*, (1873) L. R., 8 Ch. 1035, Mellish, L.J., at p. 1059.

⁴ *Board of Trade v. Employers' Liability Assurance Corporation*, [1910] 2 K. B. 649.

⁵ 1911 S. C. 730. In addition to the cases cited for the claimer the case of *Public Works Commissioners v. Hills*, [1906] A. C. 368, was referred to by the Court.

⁶ *Hudson, Building Contracts*, 3rd ed. i. 539; *In re Newman, ex parte Capper*, 4 Ch. D. 724, Bacon, V.C., at p. 729, 46 L. J., Bank. 6; *Yeadon Waterworks Co. v. Binns & Wright*, 72 L. T. 538, Kennedy, J., at p. 540.

⁷ *Baird v. Corbett*, (1853) 14 S. 41; *Board of Trade v. Employers' Liability Assurance Corporation*, [1910] 2 K. B. 649.

⁸ *North British Railway Co. v. Wilson*, 1911 S. C. 730.

⁹ *Ex parte Young, In re Kitchin*, 17 Ch. D. 668.

of the plant, the pursuers had elected to take a remedy which was Feb. 22, 1912.
 alternative to any claim for liquidate damages, and apart from that
 consideration the clause of the contract providing for such damages
 did not apply when delay occurred in circumstances beyond the
 control of the contractors. It was conceded that that clause could
 not be enforced unless every effort had been made by the pursuers
 to minimise the delay, but no efforts on their part could have
 created any incentive to the new contractors, Messrs Henshaw, to
 hasten the work by any such steps as Messrs Brown might have
 taken, because Messrs Henshaw were working under a contract which
 did not contain the clause of Messrs Brown's contract as to damages
 for non-completion. It was not within the intention of the latter
 contract that liquidate damages should be payable by the contractors
 for delay occurring after they had ceased to control the progress of
 the works, seeing that under the contract such damages were to be
 payable from the stipulated date until completion of the works by
 them, and there never could have been completion thereof by Messrs
 Brown. In any case, had it not been for their bankruptcy they
 might have obtained an extension of time in terms of the provisions
 of clause 25, which were essentials of the contract. If the contract
 was open to two readings, that was to be preferred which favoured
 the defenders.

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At advising on 22nd February 1912,—

LORD PRESIDENT.—This is an action brought by a manufacturing com-
 pany against an insurance corporation to recover damages under a guarantee
 bond under which the defenders guaranteed the performance of a contract
 by a certain Messrs William Brown & Sons, which contract Messrs William
 Brown & Sons had entered into with the pursuers. The pursuers wished
 certain works to be constructed, and Messrs William Brown & Sons, who
 were contractors, undertook to execute them. There is no question that
 Messrs William Brown & Sons did not complete the contract. They failed
 to do so; they threw it up and, upon that, another set of contractors
 were brought in—Messrs Henshaw—who eventually finished the work.
 There is no question also that Messrs William Brown & Sons went
 bankrupt, and that, therefore, the damages—whatever they are—cannot
 be recovered in full from them, and that something is due under the
 guarantee.

But the question before your Lordships on the reclaiming note has been
 limited to one matter alone. The contract between the pursuers and Messrs
 William Brown & Sons contained a clause entitled "Damages for non-
 completion." The 24th clause is as follows:—[His Lordship quoted the
 clause]. Now, in the bill of damages, which the pursuers put forward and
 which they seek to recover under the guarantee, there is an item (No. 4)—
 "Liquidated damages for delay in completion of buildings as per contract:
 Four weeks at £250," and "Two weeks at £500." The way they calculate
 that is this: they calculate it by taking the weeks that it actually took to
 have the buildings completed by the other contractors. The Lord Ordinary
 has sustained the second plea in law for the defenders, which is in these
 terms:—[His Lordship quoted the plea]. The question that has been
 argued before us is whether he was right or not. The Lord Ordinary has

Feb. 22, 1912. allowed a general proof as to damages, but he has held that this particular clause does not apply.

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Ld. President.

I do not think it necessary in this case to determine the question that has so often arisen in these cases—I mean the question as between liquidate damages and penalty, because I have come to the conclusion that the question whether this is liquidate damage or penalty does not arise in the circumstances which have occurred.

The 26th clause of the contract provided that if the contractor, except for certain good reasons, should suspend the works, then “the employer by the architect shall have power to give notice in writing to the contractor requiring that the works be proceeded with in a reasonable manner and with reasonable dispatch,” and then, if he does not proceed (it is a long clause and I do not read it), the employer may take possession of the plant and the materials upon the ground and finish the work himself; that means, of course, finish the work through another contractor, because the actual employer is not a person who could do the work.

Now, that is what actually happened; and it seems to me that, when you see there is a clause of this sort allowing the employer to enter upon the ground and finish the work instead of the contractor, it is obviously incompatible with the provision as to damage for delay. I will assume that it is properly liquidate damage. I will assume in favour of the person who pleads it that that is so; but it is perfectly evident that the question of the time that the thing takes then passes into other hands altogether. The contractor is gone. He has got no more power, so to speak, to stop the running of the time. He will be liable, of course, in damages, for his breach of contract, so to speak, at common law, as a contractor is in every contract if he breaks it. But this particular clause, which provides for a penalty per week for delay in completion, seems to me, upon the face of it, necessarily to apply—and to apply only—to a case where the works are finished by the original contractor.

If that is so, that is an end of the matter, because, whether it is liquidate damages or whether it is not, if the clause does not apply to the circumstances as they emerge in the case of the original contractor, of course it cannot apply in a question under the guarantee. Therefore upon the whole matter, I think that upon this preliminary point the Lord Ordinary is right, and that the case must go back to him.

The respondents did raise a point on the want of specification of damage. I consider they have not made out that, and I think the matter should go on as I have suggested.

LORD KINNEAR concurred.

LORD JOHNSTON.—I think that the Lord Ordinary's judgment should be sustained.

There is much to be said in favour of the contention that clause 24 of the contract, particularly when read in conjunction with clause 24a, stipulates for liquidate damages for delay, and not for a fine or penalty. But even admitting that this is so, the provision of section 24 is, I think, ousted, in the circumstances of the contractors' bankruptcy and failure to carry out

the contract, by those of section 26. Section 24 contemplates that the Feb. 22, 1912. work is to be completed in natural course, but not to contract time. Section 26 provides for a breach of contract of another kind, viz., failure to proceed, and empowers the employers to take the work into their own hands, and to complete it themselves or by another contractor. In that situation the clause provides for the method under which the contractors are to be charged with what it costs their employers to complete the work, but also, be it noted, are to get the benefit of any saving the employers may make. And in ascertaining the sum due *hinc inde* the architect is called in to a certain effect, on which, however, neither party appears to stand. But whether the amount of extra or under cost is fixed by him or otherwise, the ascertainment and settlement of accounts for actual cost of completion does not exhaust the situation. The contractors are *ex hypothesi* in breach, and that breach does not necessarily affect only the cost of completion. There may be other damage to the employers. And while the contract does provide for ascertainment of the balance, one way or the other, of the cost of construction, it neither provides for nor precludes a claim for other loss and damage consequent on the breach. Such other damage may result purely from the delay occasioned, or may involve other considerations. But it is evidently a matter which could not be measured by liquidate damages. Neither does the clause stipulating liquidate damages apply to it, nor could such clause very well have been framed, because the data involved are not necessarily mere loss from delay, but may be other matters neither definite nor capable of being foretold. Hence this damage must be ascertained in the ordinary way. The averments in support of the claim are, I think, relevant, and therefore the Lord Ordinary was right in allowing the proof which he has done. The terms of the bond of guarantee cover the claim.

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Ld. Johnston.

LORD MACKENZIE.—I agree with your Lordships. It is sought to make the guarantors liable for liquidate damages under clause 24 of the original contract, which provides that these are to be paid if the contractor, i.e., William Brown & Sons, fail to complete the works by the date named in clause 23, the 31st of January 1910, or within any extended time allowed by the architect. Brown & Sons became bankrupt on 20th August 1909, and no further work was done by them under the contract. The receivers carried on the work until the middle of September, when they intimated to the pursuers that they did not propose to proceed further. On 16th September the pursuers made an agreement with Henshaw & Sons to complete the work by 31st December 1909, and they, as the pursuers aver, duly completed the construction of the said works. The pursuers say there was eight weeks' delay, but allow two weeks' extension, and claim for six weeks' delay.

It appears to me, upon a sound construction of clause 24, that the pursuers' demand fails, for the clause was not intended to apply to the case when another contractor completes the work. In support of this view the provision that the architect may allow an extension of time is of importance. The contract has been so innovated upon that no application to the architect for an extension of time by the original contractor is possible. The reason is that the pursuers have exercised their rights under the 26th

Feb. 22, 1912. clause, which entitles them to enter and employ any other person to complete the works. Upon completion the architect is to certify the amount of the expenses properly incurred consequent on and incidental to the default of the original contractor, who is either to receive or pay, as the amount may be greater or less than the sum that would have been due to him if he had completed the works. This, in the circumstances, displaces the 24th clause which provides for liquidate damages.

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Lord Mac-
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I may add upon the relevancy of the pursuers' case on this head that I am unable to see how the pursuers can charge Brown & Sons under a liquidate damages clause, because they failed to complete the works by 31st January 1910, when on Messrs Brown's bankruptcy the pursuers made a contract with Henshaw & Sons to complete by 31st December 1909.

The respondents submitted an argument that the pursuers' averments of damage were wanting in specification, but I do not think there is anything in this.

I am accordingly of opinion that the reclaiming note should be refused.

THE COURT adhered.

HUME M'GREGOR & Co., S.S.C.—SIMPSON & MARWICK, W.S.—Agents.

No. 86. THE REV. WILLIAM DUNNETT AND OTHERS (Mrs Mitchell's Trustees),
First Parties.—*J. A. T. Robertson.*

Feb. 23, 1912.

MRS MARION MITCHELL OR PRIDE AND WILLIAM PRIDE, Second
Parties.—*Hon. W. Watson.*

Mitchell's
Trustees v.
Pride.

Succession—Testament—Writ—Holograph writing—Documents of debt pinned together with holograph writing importing legatum liberationis.

In the repositories of a deceased four I O U's and a letter from the borrower, acknowledging the sum for which one of them had been granted, were found pinned together and folded so that the back of the letter was outermost; and on the back of the letter there was a holograph note signed by the truster, "I don't want this money paid up."

Held that the writing constituted a valid bequest in cancellation of the debts contained in the I O U's.

1st DIVISION. ON 11th July 1911 a special case was presented to the Court with reference to certain writings found in the repositories of the late Mrs Jessie Finnie or Mitchell, to which Mrs Mitchell's trustees were the *first parties*, and Mrs Marion Mitchell or Pride and William Pride (the truster's stepdaughter and her stepdaughter's husband) were the *second parties*.

The case stated as follows:—"II. On four occasions between the years 1895 and 1898 the said Mrs Mitchell advanced sums on loan to her stepdaughter, the said Mrs Pride, and her husband William Pride, engineer, Lincoln, receiving in return on each occasion an I O U signed by the said Mr and Mrs Pride. The dates and amounts of the said I O U's are as set forth below, *videlicet* :—

1. 4th November 1895,	£100
2. 22nd October 1896	100
3. 19th March 1897,	100
4. 23rd April 1898	60

£360

Said loans have not been repaid. Repayment thereof was never asked by Mrs Mitchell, nor was any interest in respect thereof asked for or paid. III. The said Mrs Mitchell at her death left a trust-disposition and settlement dated 15th May 1902, having a codicil appended thereto dated 30th May 1906." Feb. 23. 1912.
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The provisions of the trust-disposition, so far as affecting the second parties, consisted of the gift of a liferent of the testatrix's dwelling-house to Mrs Pride and the testatrix's sister, Mrs Arbuckle, jointly, and the gift of an annuity of £150 to Mrs Pride and an annuity of £75 to Mr Pride in the event of him surviving his wife. In the trust-disposition and settlement the testatrix further reserved power to alter, innovate, or revoke the trust-disposition and settlement in whole or in part by any writing under her hand clearly expressing her wishes, however informally the same might be executed.

The case further stated:—"V. By the codicil to said trust-disposition and settlement before mentioned the testatrix increased the foresaid annuity of £150 to Mrs Pride to £300, and the annuity of £75 to Mr Pride to £150. The only provisions of the said trust-disposition and settlement and codicil in favour of the said Mrs Pride and William Pride were those above mentioned, and none of the legacies therein were in their favour. VI. After the death of the said Mrs Mitchell there were found in a cash box in the safe in her dwelling-house, among other papers relating to her investments, the I O U's above mentioned and certain other writings hereinafter described. . . . Her trust-disposition and settlement was in the custody of her law-agents at her death. The I O U's were found pinned together, with (at the back) a letter dated 19th March 1897 (being the date of the I O U third above mentioned), addressed by the said William Pride to Mr Matthew Arbuckle, the husband of the said Mrs Sarah Finnie or Arbuckle, acknowledging a letter from him with a cheque for £100 from Mrs Mitchell. The said I O U's and letter were folded so that the back of the letter was outermost, and on it was written in ink, in the handwriting of the said Mrs Mitchell, the words:—

'I don't want this
money paid up.
J. MITCHELL.'

The I O U's and letter pinned together, folded and endorsed as above mentioned, were contained in an envelope addressed by the said Mrs Pride to the said Mrs Mitchell, bearing the Lincoln postmark of 24th April 1898 (being a day later than the date of the fourth and last I O U). VII. The other papers relating to the matter found in said cash box, but unattached and unenclosed, were (1) an empty envelope bearing a Lincoln postmark of date 23rd October 1896 (being a day later than the date of the second I O U), addressed to the testatrix's brother-in-law, the said Mr Matthew Arbuckle, but with his name and part of his address scored out, and the words written thereon, partly in ink and partly in pencil, in the handwriting of the said testatrix:—

'Mrs Mitchell from Mrs and Mr Pride.'

On the back of said envelope written in pencil, in the handwriting of the testatrix, were the words:—

'I don't want this money paid up.
J. M.'

(2) jotting or memo. of the loans of 1895, 1896, and 1897, the jotting regarding each loan being initialled by the testatrix, and the whole

Feb. 23, 1912. being in her handwriting; and (3) a letter from the said Mrs Pride to the testatrix acknowledging receipt of the cheque for the fourth and last loan of 1898, and returning the I O U of that date. VIII. There is no extrinsic evidence as to the time when, or the circumstances under which, the foresaid jottings were made by the deceased Mrs Mitchell."

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The testatrix's trust-disposition and settlement contained no reference to the I O U's.

The first parties maintained "that the writings were not testamentary in their character, and that they did not, in the circumstances, constitute a valid bequest or bequests by Mrs Mitchell in favour of the second parties of any of the sums contained in the four I O U's in question; alternatively they maintained that, in any event, the writings could only be held as constituting a valid bequest (1) *quoad* the sum contained in the I O U dated 19th March 1897; or (2) *quoad* the sums contained in the I O U's dated respectively 22nd October 1896 and 19th March 1897; or (3) *quoad* the sums contained in the I O U's dated respectively 4th November 1895, 22nd October 1896, and 19th March 1897."

The second parties maintained that the holograph writings constituted a valid bequest to the second parties of the sums contained in all four I O U's, or otherwise a cancellation of the debts thereby constituted, which was binding on the first parties.

The question of law was:—"Do the said holograph writings printed in the appendix hereto constitute a valid testamentary bequest or bequests in favour of the second parties of the sums contained in, or a cancellation of the debts constituted by, the said I O U's dated (a) 4th November 1895, (b) 22nd October 1896, (c) 19th March 1897, and (d) 23rd April 1898, or any of them?"

The case was heard before the First Division on 23rd February 1912.

Argued for the second parties;—The holograph writing of the testatrix "I don't want this money paid up" was to be read as a testamentary direction operating a *legatum liberationis* affecting all the documents of debt attached to the paper which was signed.¹ The note being in effect addressed to anyone who should find the documents after the testatrix's death, its testamentary purpose was clear; and its meaning was perfectly intelligible as importing a cancellation of the debts constituted by these documents.² This bequest could not be regarded as revoked by the mere fact that the settlement of the testatrix, though of later date, did not mention the I O U's. The onus was on the first parties of proving revocation, and the fact referred to was not a sufficient discharge of that onus.³

Argued for the first parties;—It was not clear that the note by the testatrix was intended to have a testamentary effect. It imported nothing more than a present intention to cancel the debts, but nothing further having been done, and, in particular, no intimation of discharge having been given, it was ineffectual as a testamentary provision.⁴ Accordingly, the debts constituted by the I O U's still subsisted.

¹ Russell's Trustees v. Henderson, &c., (1883) 11 R. 283.

² Colvin v. Hutchison, (1885) 12 R. 947.

³ Stoddard v. Grant, (1852) 1 Macq. 163.

⁴ Pink v. Pink, W. N., Feb. 10, 1912, p. 42.

LORD PRESIDENT.—The question raised in this case is whether there was Feb. 23, 1912.
 a bequest of sums contained in certain I O U's granted by the stepdaughter of the testatrix for sums advanced to her and her husband. The testatrix left a trust-disposition and settlement in which she made certain provisions for her stepdaughter who had borrowed various sums from her; and the position is that when the testatrix died there were found in her repositories four I O U's granted by her stepdaughter lying pinned together with a letter, which had been sent in connection with one of them, serving as a wrapper, and on the back of that wrapping letter the words, "I don't want this money paid up. J. Mitchell." I have no doubt that in the circumstances disclosed that is a perfectly good bequest. It is holograph; it is signed; and therefore I think it is a good direction to the executors; "I don't want this money paid up. J. Mitchell," being equivalent to "I grant a discharge of this money."

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Pride.

Now the only other matter is, what is the identification of "this." I think the identification of "this" is provided by the way in which the four documents of debt are discovered, presumably intentionally put there by the testatrix. I have therefore no doubt that the question ought to be answered in the affirmative.

LORD KINNEAR, LORD JOHNSTON, and LORD MACKENZIE concurred.

THE COURT answered the question in the affirmative.

LAING & MOTHERWELL, W.S.—CAMPBELL & SMITH, S.S.C.—Agents.

THE INCORPORATION OF TAILORS OF EDINBURGH, Petitioners.—

No. 87.

Fleming, K.C.—A. M. Mackay.

JAMES CAMPBELL DEWAR (Trustee on the Sequestrated Estate of Feb. 23, 1912.

Robert Gillespie Muir and Judicial Factor on the Estate of the Incorporation of Tailors of Edinburgh), Respondent.—*Graham of Tailors of Edinburgh v. Stewart, K.C.—J. H. Henderson.*

THE LORD ADVOCATE, as representing His Majesty as *Ultimus Hæres*, Respondent.—*Mercer.*

JOHN HARRISON AND OTHERS, Respondents.—*Constable, K.C.—Kemp.*

THE LORD PROVOST, MAGISTRATES, AND COUNCIL OF THE CITY OF EDINBURGH, Respondents.—*Wilson, K.C.—W. J. Robertson.*

Burgh—Trade Incorporation—Alteration of bye-laws—Application by sole surviving member of incorporation—Proposed alterations for benefit only of sole member's relations—Sanction of the Court—Power of Court to make alternative scheme—Nobile Officium—Burgh Trading Act, 1846 (9 and 10 Vict. cap. 17), sec. 3.

The Incorporation of Tailors of Edinburgh, an ancient trading corporation whose membership had become reduced to that of a single member, presented a petition under the Burgh Trading Act, 1846, for the sanction of the Court to certain proposed alterations on the bye-laws of the Incorporation. The practical effect of the proposed alterations would have been to relax the conditions of entry in favour only of relations of the sole member, and to admit his widow to benefits which she would not otherwise have been entitled to enjoy. The petition was opposed, *inter alios*, by representatives of the tailoring trade in Edinburgh, who moved for a remit that a scheme might be prepared and submitted to the Court for the amendment of the existing regula-

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tions, and for the future administration of the Incorporation and its funds.

The Court *dismissed* the petition, holding that the alterations on the bye-laws proposed by the Incorporation, being in effect a scheme for the endowment of the family of one member only, were not such as the Court ought to sanction, and (*dub.* Lord Dundas) *refused* the respondents' motion for a remit to prepare a scheme, in respect that the Court was not entitled to impose a scheme upon an unwilling corporation: the Lord President *observing* that such a petition was not an appeal to the *nobile officium* of the Court, but only to the exercise of its statutory jurisdiction.

1ST DIVISION. ON 17th October 1911 a petition, under the Burgh Trading Act, 1846, section 3,* was presented by the Incorporation of Tailors of Edinburgh for the sanction of the Court to certain resolutions and proposed alterations on the bye-laws of the Incorporation.

The petition set forth that the petitioning Incorporation was an ancient craft corporation, constituted under Seal of Cause of the Town-Council of Edinburgh, and having a charter of the Town-Council, dated 26th August 1500. Prior to 1846 the Incorporation possessed, like other similar incorporations, exclusive trading privileges and rights, which were abolished by the Burgh Trading Act of that year. It also possessed accumulated funds, which were derived solely from payments by entrants and members, and were not contributed by any outside persons or bodies. These funds were applied to various purposes of the Incorporation, *inter alia*, for mutual benefit of members and their widows and children, in respect of old age, sickness, or bereavement. The Incorporation had been in use, prior to 1846, to pass on its own authority all bye-laws and regulations as to conditions of membership, application of funds, &c.

By interlocutor, dated 11th June 1853, the Court of Session, on the application of the Incorporation in terms of the Burgh Trading Act, sanctioned certain bye-laws and regulations. The effect of these bye-laws and regulations, in so far as the present petition had a bearing upon them, was as follows:—

Article I. That every person proposing to enter with the Incor-

* The Burgh Trading Act, 1846 (9 and 10 Vict. cap. 17), enacts:—
Sec. 3. "And whereas the revenues of such incorporations as aforesaid may in some instances be affected, and the number of the members of such incorporations may in some instances diminish, by reason of the abolition of the said exclusive privileges and rights, and it is expedient that provision should be made for facilitating arrangements suitable to such occurrences: Be it therefore enacted that it shall be lawful for every such incorporation from time to time to make all bye-laws, regulations, and resolutions relative to the management and application of its funds and property, and relative to the qualification and admission of members, in reference to its altered circumstances under this Act, as may be considered expedient, and to apply to the Court of Session by summary petition, for the sanction of the said Court to such bye-laws, regulations, or resolutions; and the said Court, after due intimation of such application, shall determine upon the same, and upon any objections that may be made thereto by parties having interest, and shall interpose the sanction of the said Court to such bye-laws, regulations, or resolutions, or disallow the same, in whole or in part, or make thereon such alterations or adject thereto such conditions or qualifications as the Court may think fit, and generally shall pronounce such order in the whole matter as may to the said Court seem just and expedient . . ."

poration must have been regularly bred to the craft in terms of the Feb. 23, 1912.
Seal of Cause.

Article II. That every applicant must produce satisfactory evidence of having been bred to the craft, and should be put on his essay, which he would be required to perform in the presence of the standing committee of the Incorporation. Incorporation
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Article VI. That the dues payable on entry should be calculated according to the respective ages of the applicants and of their wives, if married, and according to the amount of annuity or other provisions at the time payable to members or widows, and that upon the Carlisle Tables of Mortality, assuming interest at 4 per cent, to the net result of which calculation there should be added, (a) in the case of a son or son-in-law of a member regularly bred to the business, 10 per cent, (b) in the case of a free apprentice having served his time with a member of the Incorporation, 15 per cent, and (c) in the case of a stranger entrant, 25 per cent.

Article XVIII. That funeral money should be paid to the amount of £10 for a member and to that of £7 for his wife or widow.

In 1886 the membership of the Incorporation had been reduced to two—Mr James Dundas Grant, an advocate, and Mr Robert Gillespie Muir. On the death of the former in 1900 Mr Muir became the sole member of the Incorporation.

The petition proceeded:—"The causes of this diminution were efflux of time, the natural wastage by death of the membership, and the stringency of the conditions imposed by way of qualification upon all applicants by the said bye-laws and regulations. Of old the chief sources of new intrants were found in two favoured classes—(a) those qualified by relationship, as son or son-in-law of a member; or (b) those qualified by apprenticeship to the craft. The latter avenue has for many years been closed, apprenticeship not being now in observance. The supply of new members by way of relationship has been obstructed by reason of the requirements of the first and second of said bye-laws, and in particular by reason of the requirement that an applicant must have been regularly bred to the craft, and because in the altered circumstances of the Incorporation the entry-moneys, calculated according to the bye-laws and regulations, have become prohibitive. There are at present no annuitants or claimants for allowances (other than the aforesaid member) possessing any claim, whether present or contingent, against the Incorporation or its funds. In the present position of affairs, and unless the alterations hereinafter set out or similar alterations upon the bye-laws are effected, it is certain that upon the decease of the present member the Incorporation will cease and determine, and its said accumulated funds, subscribed as aforesaid, will be derelict. The said funds amounted, as at 30th June 1911, to about £8250."

It was then narrated that Mr Muir, who was admitted in 1870, was married in 1879, but that his wife, should she survive him, had forfeited all benefit from the funds of the Incorporation, as it had been found, as the result of certain investigations, that Mr Muir had failed to pay the marriage-tax provided for in article 8 of the regulations.¹ It was stated that, as there could be, in the event of the death of Mr Muir, no claimant or beneficiary on the funds of the Incorporation whose interests could compete with the equitable

¹ *Vide* Tait v. Muir, (1904) 6 F. 586.

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claims of his widow, the Incorporation was of opinion that such forfeiture ought in the circumstances to be relaxed in her favour. It was further stated that the scale of funeral allowance under the existing bye-laws appeared to the Incorporation to be inadequate in view of changed habits and customs in this regard.

The petition proceeded to narrate that certain resolutions had been duly proposed to and adopted by the Incorporation containing the proposed alterations of its regulations which were submitted for the sanction of the Court.

The effect of these resolutions was:—(1) To add to article 1 of the regulations the following proviso:—"That in the case of sons or sons-in-law of present or future members proposing to enter, it shall not be necessary that such entrants shall have been regularly bred to the craft." (2) To relieve sons and sons-in-law of present and future members of the necessity of performing their essay in terms of article 2 of the regulations. (3) To substitute for the provisions of article 6, with regard to the entry of sons and sons-in-law of members, the following:—"The entry-money of a son or son-in-law of a member shall be a single payment of £100, or in his option four annual payments of £25 each." (4) To increase the amount of funeral allowance, in the case of members to £25, and in the case of their wives or widows to £15. (5) The fifth resolution was in these terms:—"That the widow of any present member of this Incorporation shall be entitled to such annual sum as the state of the funds can from time to time afford in terms of the bye-laws and regulations and existing practice of the Incorporation, exempt from and notwithstanding any disability or forfeiture in respect of marriage-tax or any other dues unpaid, whether incurred under article 8 of the said bye-laws and regulations, or otherwise."

Intimation of the petition was made in the first instance to Mr James Campbell Dewar, C.A., judicial factor on the estate of the Incorporation, and subsequently, by order of the Court, intimation was also made to the Lord Advocate, as representing the public interest, to the Corporation of the City of Edinburgh, and to Mr Dewar, as trustee on the sequestrated estate of Mr Muir, and advertisement was made calling the attention of the tailoring trade in Edinburgh to the proceedings.

Answers were lodged for all these parties and for Councillor John Harrison and others, who had been appointed as a committee at a meeting of the tailoring trade convened for the purpose of considering the petition.

It appeared from the answers that a judicial factor had been appointed on the estate of the Incorporation, on the petition of an annuitant in 1900, that the estate of Mr Muir had been sequestrated in 1903, and that the respondent Mr Dewar had subsequently been appointed to be judicial factor and to be trustee in bankruptcy on these two respective estates. As the result of an action at the instance of the trustee in bankruptcy against the judicial factor it was found that the pursuer was entitled to payment, from and after August 1906, of the whole free income of the funds of the Incorporation during the lifetime of Mr Muir and so long as he remained the sole member thereof.*

* Not reported. Two previous actions arising out of Mr Muir's intrusions with the funds of the Incorporation are reported—*Tait v. Muir*, (1902) 5 F. 288, and *Tait v. Muir*, (1904) 6 F. 586.

In the answers objection was taken to the competency of the application, and the granting of the prayer of the petition was opposed on various grounds. It was averred, *inter alia* ;—

By the judicial factor :—"The alterations proposed on the 1st and 2nd bye-laws, in the opinion of the respondent, involve a fundamental change in the objects of the Incorporation inasmuch as they may ultimately confer upon the family and descendants of a particular individual, irrespective of any trade qualification, the benefits which under the constitution of the Incorporation are intended solely for those who are 'bred to the craft.' The respondent is not aware that it has become impossible for persons proposing to enter the Incorporation to acquire the trade qualification. If it is still possible, the proposed alteration would be to the manifest prejudice of such applicants. In any event, the respondent submits that such a complete diversion of the funds is incompetent.

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"The alterations proposed on the 6th bye-law will greatly increase the advantage with regard to entry-money already possessed by the sons and sons-in-law of members over strangers.

"Further, according to the previous practice of the Incorporation, the dues of entry have been calculated on the footing that each entrant should bring into the Incorporation an amount which with accumulations would be equivalent to the benefits which he would ultimately receive, so that the interest of existing members should not suffer. This principle is abandoned in the proposed alteration, under which entrants at the near hand would be favoured at the expense of others who paid dues of entry on the old scale. In particular, this would seriously prejudice the right and interest of R. G. Muir in the funds of the Incorporation, which is at present vested in his trustee for behoof of his creditors. The claim of the said Mrs Muir to participate in the benefits of the Widow's Fund has already been, as above explained, under the consideration of the Court, and has been refused."¹

By the representatives of the tailors' trade :—"These respondents further submit that the existence of the said Incorporation ought to be maintained and continued in the interests of the tailors' trade of the city of Edinburgh. A considerable number of the members of the tailors' trade in Edinburgh have indicated their desire, in the event of the bye-laws and regulations being so altered as to admit of their doing so, to become members of the Incorporation. But the respondents conceive that before the Incorporation can be properly resuscitated it is necessary, having regard to the present condition of the Incorporation, (1) that temporary machinery should be provided for the admission of new members, and (2) that certain of the bye-laws and regulations hitherto in force should be altered so as to bring the Incorporation within reach of ordinary members of the trade in Edinburgh. These respondents are prepared, if such a course is considered competent, themselves to submit for the consideration of the Court a scheme for the amendment of the existing regulations and the future administration of the Incorporation and its funds. Alternatively, they would respectfully suggest that the Court should appoint the judicial factor as an officer of Court to submit a scheme, in which case these respondents will be prepared to submit all information at their disposal and all suggestions which may occur to them

¹ Reported *sub nom.* Tait v. Muir, 6 F. 586.

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either to the judicial factor or to the Court, or to any person to whom such scheme may be remitted by the Court for report."

The Crown and the Town-Council stated, as their interest to oppose, the possibility, in the event of the Incorporation coming to an end, of the funds reverting to the former as *ultimus hæres*, or to the latter as the original granters of the charter.

Counsel for the parties were heard before the First Division (consisting of the Lord President, Lord Dundas, and Lord Cullen) on 19th December 1911.¹

At advising on 23rd February 1912,—

LORD PRESIDENT.—This is a petition for the approval of alterations in its bye-laws which are put forward by the Incorporation of Tailors. Now the Incorporation of Tailors is in a very peculiar position; it has dwindled down to one member; he is bankrupt; there is a judicial factor upon the funds of the Incorporation; and the whole of the income which the bankrupt takes out of the funds of the Incorporation has been by decree assigned to his trustee. The bankrupt has asked us to sanction a scheme which is really a scheme for the endowment of his own relatives, and answers to this application have been lodged both by the judicial factor and by the trustee in bankruptcy, as also by the town of Edinburgh and by the Crown. Appearance is also made for gentlemen who represent a meeting of the tailoring trade.

I have no doubt that we should not give our confirmation to the bye-laws as proposed, because I think it is simply a scheme for the endowment of

¹ The following authorities were referred to in argument :—

For the petitioners.—On the status of the petitioning body as a legal incorporation :—*University of Glasgow v. Faculty of Physicians and Surgeons*, (1840) 1 Rob. App. 397, at p. 406. On the competency of the application at the instance of a sole remaining member, and on the power of one man to hold a meeting :—*Anderson v. Campbell, Deacon Skinners of Ayr*, (1736) Elchies, vol. i. *sub voce* "Jurisdiction," No. 9; *Rex v. Richardson*, (1758) 1 Bur. 517, *per* Lord Mansfield, C.J., at p. 541; *United Incorporation of Masons and Wrights of Haddington*, (1881) 8 R. 1029. On the authority of the Court to impose a scheme other than that desired by the Incorporation :—*Incorporation of Cordiners of Edinburgh v. Allan*, 1907 S. C. 654, *per* Lord President Dunedin, at p. 665. On the propriety of a scheme which gave exceptional benefits to entrants "at the near hand" :—*Incorporation of Cordiners of Edinburgh v. Allan*, 1911 S. C. 1118, *per* Lord President Dunedin, at p. 1125.

For the respondents.—On the power of the Court to suggest a new scheme for what was not a charitable trust but a benefit society :—*Mitchell v. Burness*, (1878) 5 R. 954, and *Smith v. Lord Advocate*, (1899) 1 F. 741. On the power of the Court to make a fundamental alteration of the Incorporation's constitution :—*Incorporation of Wrights, &c., of Leith*, (1856) 18 D. 981, at pp. 981, 983, *et seq.* On the propriety of a proposal to apply what were in essence trust funds for the benefit of the sole trustee's relations :—*Muir v. Rodger*, (1881) 9 R. 149, *per* Lord Curriehill, at p. 152; *Saddler v. Webster and Webster v. Incorporation of Tailors of Ayr*, (1893) 21 R. 107, *per* Lord Kyllachy (Ordinary) and Lord M'Laren, at pp. 115-6.

Reference was also made for the respondents the Corporation of Edinburgh to *Gray v. Smith*, (1836) 14 S. 1062, *per* Lord Glenlee, at p. 1068, and to *University of Glasgow*, 1 Rob. App. 397, at pp. 402-3-4.

the one member's family, and incidentally, for the cutting down of the Feb. 23, 1912.
 revenue, which revenue in one sense goes to himself, but really goes to his ^{Incorporation}
 creditors. I should not myself think the latter consideration to be material ; of Tailors of
 the former seems to me to be fatal. The scheme is not one for the ^{Edinburgh v.}
 encouragement of the tailoring trade in any way. ^{Muir's}
^{Trustees.}

The Crown and the town are really here with a view to what may ultimately happen. I think it is premature to say what may ultimately happen if this Incorporation comes to extinction by the disappearance of all its members. Such an occurrence is not, at present, imminent, because the present member is not particularly old, and it is to be hoped that he will still live for a considerable time. There is obviously therefore no decree which could be pronounced which would in any way benefit those objectors at this time. ^{Ld. President.}

The only difficulty I have had is in connection with the appearance of the representatives of the tailoring trade. One cannot help having the feeling that it is a great pity that what ought really to be a fund for the benefit of the tailoring trade should be allowed to perish because the conditions of entrance are such that they do not fit the present conditions of that trade ; and if this were in any sense a petition to the *nobile officium*, I should be very glad to give effect to such considerations.

It is quite clear that the idea at the time when the Act was passed by which the exclusive trading privileges were taken away—and at that time these societies were allowed to continue for benefit purposes—it was never expected that these societies would dwindle away to nothing, and they never would have been allowed to dwindle away if it had not been for the selfishness of particular members. This particular society came to consist of only two members, the present petitioner and a gentleman who is now deceased—a gentleman who was an advocate, and who, whatever he may have been in his early years, was not really a proper person to become the only representative, along with another, of an endowment for tailors. He died, and the membership came down to one.

This application is not to the *nobile officium* of the Court, and it cannot be. The Court here is exercising merely its statutory jurisdiction. It is put in the position of considering the bye-laws put forward by the Incorporation. It is quite true that the terms of the Act which confers this jurisdiction are wide in this sense, that when alterations are proposed the Court has power to cut and carve upon them, and may make such alterations upon them as it may think just. But I cannot bring myself to think that that means that the Court is entitled to form a scheme of its own and then, so to speak, thrust it down the throat of an unwilling Incorporation. I think it is quite evident that any scheme which would benefit the class which Mr Harrison represents would really be something entirely different from that which exists at present, and I do not think it is the proper function of the Court to create such a scheme and to impose it upon an unwilling Incorporation.

Accordingly, I think the only thing to do is to dismiss the petition *de plano*. As regards the future I cannot say, but two possible solutions suggest themselves to me. Either the existing tailors may go to the sole incorporator and make terms with him, or else others may force their

Feb. 23, 1912. way into the Incorporation and, having got there, propose a more liberal scheme.

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There is no question of the possibility of the latter solution ; the test which the Incorporation requires is not an impossible test, for I suppose there are still persons in the tailoring trade who can cut out clothes and

Ld. President. make an essay.

Failing some such solution the time will come when the Incorporation will in one sense disappear, and as to what will happen then I say nothing. The result is that the petition must be dismissed.

LORD DUNDAS.—Your Lordships, I understand, are both of opinion that this matter ought to be disposed of *de plano* upon the petition and answers. On this footing I agree that the petition should be refused ; because the proposed resolutions are not, in my judgment, such as the Court ought to sanction or approve. I confess, however, that I should not have been sorry if your Lordships had seen your way, in the very peculiar circumstances of the case, to obtain some further information, by way of remit or otherwise, particularly as to the position and rights (if any) of the respondents Councillor John Harrison and others, in order to judge how far they are "parties having interest" (section 3 of 9 and 10 Vict. cap. 17), and whether we could arrive at any "order in the whole matter . . . just and expedient," which would give effect to their desires—when we knew precisely what these are—for the legitimate continuation of this old Incorporation.

I observe that in the *Cordiners'* first petition¹ the Court refused to sanction bye-laws proposed by compearing respondents because they were not "put forward by the general members of the Society," and not such as the Court should force upon the Society "against the wishes of the Society in general." But the respondents were at least allowed to submit their proposals ; and in the present case there are no "general members of the Society," and there is no "Society in general," only Mr Muir ; and it remains to be seen what attitude "the Incorporation" (such as it is) would assume towards the proposals when tabled, and whether that attitude would be justifiable. It might, for all I know, turn out that the Incorporation would be willing to agree to, and adopt, some competent alterations of the existing bye-laws, which would preserve the funds for their original uses, and yet make it possible for the Court to sanction (under widened conditions) the resolutions contained in the petition, or some of them. But while I think it right to indicate a course which I should have been very willing to see adopted, I do not desire to dissent from the judgment your Lordships are to pronounce.

The Lord President intimated that LORD CULLEN, who was absent at advising, concurred in his opinion.

THE COURT dismissed the petition.

WISHART & SANDERSON, W.S.—WM. CONSIDINE, S.S.C.—ALEXANDER RAMSAY, S.S.C.—ROBERT FLEMING, S.S.C.—SIR THOMAS HUNTER, W.S.—Agents.

¹ 1907 S. C. 654, see pp. 664, 665.

WILLIAM SMITH, Pursuer (Respondent).—*Fenton*.
THE SCOTTISH LEGAL LIFE ASSURANCE SOCIETY, Defendants
(Appellants).—*H. P. Macmillan*.

No. 88.

Feb. 27, 1912.

Process — Appeal — Sheriff — Stated case — Friendly Society — Friendly Societies Act, 1896 (59 and 60 Vict. cap. 25), sec. 68 (7) — Competency of stated case after judgment in inferior Court.

Smith v,
Scottish Legal
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ance Society.

The Friendly Societies Act, 1896, sec. 68 (7), provides that the Court or arbitrator to whom any dispute is referred under the rules of a friendly society, "may, at the request of either party, state a case for the opinion . . . of the Court of Session on any question of law."

Held that such a case must be stated during the progress of the reference, and cannot be stated after the Court or arbitrator has given judgment.

Johnston's Trustees v. Special Committee of the Corporation of Glasgow, supra, p. 300, followed.

ON 25th November 1911 William Smith brought an action in the Small-Debt Court at Edinburgh against the Scottish Legal Life Assurance Society, a friendly society registered under the Friendly Societies Acts, in which he claimed repayment of £16, 15s. 10d., the amount of premiums which he had paid upon a policy of the Society.

1ST DIVISION.
Sheriff of the
Lothians and
Peelies.

The pursuer's case was that he had applied for a policy in his own name upon the lives of his parents, but that, after paying premiums, to the amount sued for, on the policy which had been issued to him upon this application, he had discovered that the policy had been issued not in his own name but in that of his parents.

On 29th January 1912 the Sheriff-substitute (Guy) decerned against the defenders for the sum sued for, and, on 16th February, at the request of the defenders, he stated a case for the opinion of the First Division of the Court of Session on certain questions of law in terms of section 68 (7) of the Friendly Societies Act, 1896.*

In stating the case the Sheriff-substitute said:—

"Of this date, 2nd February 1912, the appellants lodged a minute requesting me to state a case for the opinion of the First Division of the Court of Session, in terms of section 68 of the Friendly Societies Act, 1896 (59 and 60 Vict. cap. 25).

"This stated case is accordingly presented at the request of the appellants, as falling under the provisions of the said Act, though I doubt the competency of it in view of the fact that the provisions of the Act relate to disputes between a member, or person claiming through a member, or under the rules of a registered society, or branch, and the society, or branch, or an officer thereof, or any person aggrieved who has, for not more than six months, ceased to be a member of a registered society or branch, or any person claiming through such person aggrieved, and the society or branch or an officer thereof.

"If my decision was right the respondent was never a member of the appellants' society, or a person claiming through a member, and the provision would not apply. If, on the other hand, my decision was wrong, the provision might be applicable, though, from the terms of the policy, the respondent's parents and not the respondent, bear

* The section is quoted in the opinion of the Lord President.

Feb. 27, 1912. to be the members. Further, the stated case would appear to be too late. The stated case provided for is for the opinion of the Court of Session, presumably to aid or direct me in coming to my judgment. I was not asked to state a case until after my judgment was given.

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ance Society.

"The question of the competency of the appeal is properly left for the decision of the Court."

On the case appearing, on 27th February 1912, in the Single Bills of the First Division (consisting of the Lord President, Lord Johnston, and Lord Hunter), the pursuer objected to the competency of the appeal, and argued;—If the finding of the Sheriff-substitute that the pursuer was not a member of the Society was justified, then this special case was not competent. The dispute was not between the Society and one of its members; the provisions of section 68 of the Friendly Societies Act, 1896, did not apply, and the decree in question was only open to review according to the ordinary rule applicable in small-debt actions. But even if the Court were to hold that appeal by stated case in terms of the Act might have been competently taken in these proceedings at an earlier stage, it was not open to the parties to take this course after decree had been pronounced by the Sheriff-substitute.¹ The object of the statutory provision was not to provide a method of review of the decision of the inferior Judge, but to enable him to obtain the opinion of the Court upon a question of law in order to guide him in coming to his decision.

Argued for the appellants;—(After submitting an argument that the statutory provisions were applicable in respect that this was in fact a dispute between the Society and one of its members)—Appeal by stated case, after decree had been pronounced in the Small-Debt Court, had been allowed in the case of *Linton v. City of Glasgow Friendly Society*,² under the provisions of the Friendly Societies Act, 1875, which were practically the same in this respect as those of the Act of 1896. *Johnston's case*³ was not an authority against the appellants, as that case was decided on the interpretation of quite different phraseology used in a different statute; and the case of *Steele v. M'Intosh Brothers*⁴ was in the same position. The question was whether this statute intended to provide a method of review of the decision of the inferior Judge or whether it intended only to provide him with a method of obtaining an opinion on a matter of law from the superior Court in order to help him to arrive at his decision. *Prima facie* the statute appeared to give a right of appeal. It was not stated in the Act, and could not be assumed, that it was intended to limit the litigant's right to the benefit of an opinion of the higher Court to the period prior to the decision of the inferior Judge.

LORD PRESIDENT.—There has been an interesting question raised upon the competency on the first point, but I do not think it is necessary to give any opinion upon it, and we must leave it to lie till it occurs again, because I am clearly of opinion that this stated case, even assuming that a stated case might have been competent at an earlier stage, is not competent

¹ *Steele v. M'Intosh Brothers*, (1879) 7 R. 192; *Johnston's Trustees v. Special Committee of Glasgow Corporation*, *supra*, p. 300; Fuller on Friendly Societies Act, 1896, 3rd ed., p. 136.

² (1895) 25 R. 51.

³ *Supra*, p. 300.

⁴ 7 R. 192.

now, because it has been stated too late. The defender only asked the Feb. 27, 1912.
 Sheriff-substitute to state a case after the judgment in the Small-Debt Court was given. Subsection 7 of section 68 of the Act says :—"Notwith-
 standing anything contained in the Arbitration Act, 1889, or in any other Act, the Court and the chief or other registrar or other arbitrator or umpire to whom a dispute is referred under the rules of a registered society or branch, shall not be compelled to state a special case on any question of law arising in the case, but the Court or chief or other registrar may, at the request of either party, state a case for the opinion in England or Ireland of the Supreme Court, and in Scotland of either Division of the Inner House of the Court of Session, on any question of law." But the Act does not go on to say anything more which would give the Court before whom the case is stated what I may call executive powers to deal with the matters in the appeal. I am therefore of opinion that this case falls within the rule of the case of *Johnston's Trustees v. The Special Committee of Glasgow Corporation*.¹ I need not repeat what I then said, and only remind your Lordships that we were there only carrying out the rule which was stated in the earlier case of *Steele v. M'Intosh Brothers*.²

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 Life Assur-
 ance Society.

Ld. President.

I am therefore of opinion that this case as presented is incompetent.

LORD JOHNSTON and LORD HUNTER concurred.

THE COURT sustained the objection to the competency, and dismissed the special case.

FRANCIS C. COWNIE, S.S.C.—J. & J. ROSS, W.S.—Agents.

JOHN MACDONALD KIRKWOOD AND OTHERS, First Parties.—*Ballingall*. No. 89.
 THE REV. THOMAS NICOL AND OTHERS (James Kirkwood's Trustees),
 Second Parties.—*Wilton*.

Feb. 27, 1912.

Trust—Administration—Charges against estate—Annual payment to trustees. Kirkwood v. Kirkwood's Trustees.

By his trust-disposition and settlement a testator directed his trustees to set aside £16,000 and hold it for the alimentary liferent use of certain liferenters and for certain other beneficiaries in fee, and to divide the residue of his estate among his residuary legatees. He also directed his trustees to pay to themselves annually the sum of twenty-five guineas.

Held that the trustees were not entitled, before distributing the residue, to retain a capital sum to meet the annual payment to themselves, but were entitled to charge that payment against the revenue of the £16,000 which they continued to hold for the liferenters.

JAMES KIRKWOOD, printer, Edinburgh, died in 1901 leaving a trust-^{2D DIVISION.}
 disposition and settlement, by which, after providing for payment of mournings for his children and household debts, deathbed and funeral expenses, the expenses of executing the trust, and certain legacies, he provided :—"In the sixth place, with the view of securing to my children an alimentary provision, I direct my trustees, on my decease, to set aside out of the first available funds of my estate the sum of Sixteen thousand pounds sterling, to be held by them in trust for my

¹ *Supra*, p. 300.

² 7 R. 192.

Feb. 27, 1912. children equally for the following purposes, *videlicet*,—(First) For payment to my children, and the survivors or survivor of them, equally among them, of the free annual income of said sum,
 Kirkwood v. (Second) On the death of the last survivor of my children, I direct
 Kirkwood's my trustees to pay to the issue of such of my children as may have
 Trustees. died leaving issue, and without disposing of their respective shares of said capital by testamentary deed as hereinafter provided, their respective parents' shares of said capital, and to pay such issue, equally among them *per stirpes*, the balance of said capital, in so far as the same shall not have been disposed of by testamentary writing, in virtue of the powers hereinafter conferred; whom all failing, then said alimentary fund shall be paid to the Royal Infirmary of Edinburgh and the Royal Edinburgh Hospital for Sick Children, equally between them And in the seventh place, I direct my trustees to hold and retain the whole residue and remainder of my means and estate for behoof of my children equally and to make payment to my sons of their shares at the first term of Whitsunday or Martinmas which shall happen after my death, and after they shall respectively attain twenty-five years of age; and in regard to the shares of my daughters, I direct my trustees at the first term of Whitsunday or Martinmas which shall happen after my death, and after my daughters respectively attain twenty-five years of age or be married with the approbation of my trustees, whichever of these events shall first happen, to pay or to settle on my daughters, exclusive of the *jus mariti* and right of administration of their husbands, their respective shares; And I hereby direct my trustees to pay to themselves annually the sum of Twenty-six pounds five shillings sterling, to be divided equally among them, but I declare that the acceptance by them of said sum shall not deprive them of the powers, privileges, and immunities of gratuitous trustees as conferred by statute. . . ."

Questions having arisen regarding the administration of the estate, a special case was presented to the Court on 21st July 1911, to which the *first parties* were the children of the testator, all of whom, at the date of the case, were above twenty-five years of age, and the *second parties* were the trustees under the settlement.

The case stated:—

"(5) The second parties, in terms of the testator's directions, set aside the alimentary trust fund of £16,000 provided for by the sixth purpose of the trust-disposition and settlement, and have paid the revenue thereof to the first parties regularly. They have also divided among the first parties the residue of the estate, but have retained the sum of £900 or thereby to meet the legacy of £26, 5s. per annum payable to the trustees. . . ."

"(6) Questions have arisen as to the appropriate funds of the trust against which the said yearly legacy of £26, 5s. to the trustees of the testator falls to be charged. The first parties maintain that the said legacy forms a proper charge against the said alimentary fund of £16,000, upon the ground that the trust administration only now subsists for the purposes of this particular fund, and that the said sum of £900 retained out of the general residue to meet the said legacy falls to be divided among the first parties, as residuary legatees of the testator.

"(7) In the event of the Court being of opinion that the said legacy of £26, 5s. cannot be charged against the alimentary fund,

the second parties hereby express their willingness to discharge the said legacy. Upon this further ground, the first parties also maintain that they are entitled to an immediate division among them of the said sum of £900.

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"(8) The second parties maintain that the said legacy is a charge upon the general estate of the testator, and that the said alimentary fund of £16,000 is not liable to be charged with the said legacy or any part thereof. Further, the second parties have been advised that it is doubtful whether, in the event of a discharge by them of their annual legacy, they would be in safety to divide the said sum of £900 or thereby among the first parties as residuary legatees of the testator, as he directed the said legacy to be paid yearly to his trustees for the time being, whether original or assumed, and that, although they should discharge their said legacy, their discharge would not bind future trustees who may hereafter be assumed."

The following questions were submitted for the opinion and judgment of the Court:—"1. Are the second parties, in the circumstances set forth in the case, entitled to charge their annual legacy against the alimentary fund of £16,000? 2. In the event of the first question being answered in the affirmative, or otherwise, in the event of the second parties discharging their annual legacy, are the second parties entitled to divide among the first parties the residue of £900 retained by them?"

The case was heard before the Second Division (without Lord Dundas) on 27th February 1912.

LORD JUSTICE-CLERK.—This is a somewhat novel question, but I have no doubt in my mind what is the proper answer to be made. The testator here ordered his trustees to set aside a capital sum of £16,000 out of his estate for certain alimentary liferents, and for other purposes which it is unnecessary to enumerate. He also directed that the residue should be divided in a certain way, and the trustees have carried out that direction, and have distributed the whole remainder of the estate with the exception of a sum of £900 which they have retained in their hands to meet the gift that was given to them by the testator in his will for their trouble, namely, twenty-five guineas to be divided annually among the trustees.

Now, the beneficiaries who are entitled to the residue maintain that this £900 ought not to be reserved, but ought to be paid to them as being part of the residue, the practical result of which will be that, if the gift to the trustees is to continue to be paid, it must be paid out of the annual proceeds of the £16,000. The present trustees state their willingness to give it up altogether, and that would remove any difficulty as regards them personally, but then it is said that these trustees may gradually disappear, and that the heir of the last survivor is to be the trustee in the event of their all dying without assuming other trustees, and that he then accepting the trusteeship must assume certain other trustees. Therefore the present trustees point out that a renunciation by them might not bind their successors.

I am decidedly of opinion that the trustees are not entitled to retain this sum of £900 in their hands for the purpose stated. It is part of the residue, and, in my opinion, must be divided among the beneficiaries. The purpose of the trust being to pay liferents out of the proceeds of the £16,000,

Feb. 27, 1912. I think the income derived from this sum must suffer deduction of all the expenses which the trustees have to meet, including the payment to themselves, before distribution of the balance among the persons entitled to it.

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LORD SALVESEN.—I entirely agree. I think the key to the problem that is presented to us for solution is what is meant by "residue." Mr Wilton contended that you can only ascertain residue after you have made provision for the expenses of executing the trust by setting aside a capital sum for this purpose, and that, accordingly, it was the trustees' duty to retain the sum of £900, the income of which would suffice to pay the annual sum of twenty-five guineas which the testator said they should receive for the performance of their trust-duties. I asked Mr Wilton whether he could refer us to any case in which it had been held that in ascertaining residue you had first to make an estimate of the annual expenses of the trust, and capitalise that and deduct it from whatever the trustees had in their hands, but he was unable to refer us to such a case. The truth is that the expenses of a trust are a continuing charge which will vary according to the amount of the estate which the trustees hold, and which are properly a charge upon whatever estate the trustees happen to be in possession of at the time. Now here, according to the scheme of the testator, the whole of his estate was to be divided amongst his children after £16,000 had been set aside as an alimentary provision for them. He contemplated that that trust would continue for an indefinite period—and it may be a very long period—and it is admitted that the expense of collecting the revenue and of having the accounts audited forms a deduction from the revenue payable to the alimentary liferenters. I see no distinction between that and the sum which is to be paid to the trustees in accordance with the testator's expressed direction. I think, in this particular trust, it just forms part of the expense of administration of the trust-estate which remains. Of course the testator might have directed that the sum payable to the trustees should be reduced after so many of the trust purposes had been fulfilled, but he gave no such direction, and we must therefore interpret his will as meaning that during the subsistence of the trust the trustees are entitled to charge this sum for their trouble in connection with the trust management. So reading the settlement, I have no difficulty in arriving at the same conclusion as your Lordship in the chair.

LORD GUTHRIE.—I agree. This trust has lasted for some years, but the question before us has only arisen since the beneficiaries attained the age of twenty-five, and became entitled to a division of the residue. Up to the present no part of the annual fund of twenty-five guineas payable to the trustees has been charged against the fund which was set aside by the trustees on the testator's death as an alimentary provision for his children, and it is not necessary to decide whether that was right or not—whether a proportion of that sum ought in accounting to have been charged against that provision. The question arises now because the trustees have paid away all the residue except a sum of £900 which they have set aside to meet that payment, and, as stated in the case, to meet that payment only—not, that is to say, in addition to meeting the expenses of the trust.

I agree that the view presented by Lord Salvesen as to the meaning of

the word "residue" is sound. Further, if one considers the clause which Feb. 27, 1912. is not printed, but which is summed up in the second article of the special ^{Kirkwood v. Trustees.} case, namely, the clause providing for payment of the expenses of executing Kirkwood's the trust, I am not at all clear that, on a true construction of the settlement, that was intended to include anything except the ordinary expenses of Lord Guthrie. executing every trust in every case. I do not think that the subsequent purpose at the end of the will, by which the truster makes this unusual but extremely appropriate and proper provision for his trustees, was in his contemplation when he made the provision about expenses in the earlier part of the settlement.

THE COURT pronounced this interlocutor:—"Answer the first question of law therein stated in the affirmative, and answer the second question of law therein stated by declaring that the second parties are entitled to divide among the first parties the residue of £900 retained by the said second parties."

W. & W. SAUNDERS, S.S.C.—CAIRNS, M'INTOSH, & MORTON, W.S.—Agents.

THE UNITED CREAMERIES COMPANY, LIMITED, Pursuers (Respondents). No. 90.

—Sandeman, K.C.—Hon. W. Watson.

DAVID T. BOYD & COMPANY, Defenders (Appellants).—Horne, K.C.—Feb. 27, 1912.

Paton.

Arbitration—Arbiters not named—Reference to "arbitration in Glasgow"—United Creameries Co., Limited, v. Boyd & Co.
Application to appoint arbiter—Averment of custom of trade as to appointment—Arbitration (Scotland) Act, 1894 (57 and 58 Vict. cap. 13), secs. 1, 2, and 3.

Sheriff—Process—Arbitration—Summary application to appoint arbiter—Preliminary question involving a proof—Competency of summary procedure—Arbitration (Scotland) Act, 1894 (57 and 58 Vict. cap. 13)—Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. cap. 51), sec. 3 (p).

One of the parties to a contract for the sale of oil, under which disputes were referred to "arbitration in Glasgow," presented a petition in the Sheriff Court, under the Arbitration (Scotland) Act, 1894, for the appointment of an arbiter, and averred that the expression quoted imported into the reference clause a custom of the oil trade in Glasgow by which each party nominated an arbiter, and the arbiters an overman. The proceedings were conducted in the Sheriff Court under the rules prescribed by the Sheriff Courts (Scotland) Act, 1907, for summary applications, and the Sheriff, having allowed a proof of the custom averred, granted leave to appeal against his interlocutor. The other party to the contract maintained that the reference to arbitration was not sufficiently specific to come within the scope of the Arbitration Act, 1894; that the action was incompetently presented, in respect that it proceeded upon summary application and not in the form of an ordinary action in which appeal would have been open as matter of right; and that the action should be dismissed, or should at least be sisted until it was decided in some competent process whether the parties were properly bound by a reference clause.

Held that there was a relevant averment of a custom which would, if proved, make the reference clause sufficiently specific to fall within the scope of the Arbitration Act, and that proof of the custom had been properly allowed; but that, in view of the questions which had arisen, the case was inappropriate for summary procedure; and cause remitted to the Sheriff to be transferred to the ordinary Court.

Feb. 27, 1912. ON 10th August 1911 the United Creameries, Limited, Dunragit, presented a petition in the Sheriff Court in Glasgow, in which they complained that David T. Boyd & Company, oil merchants and brokers there, had refused to nominate an arbiter to act along with an arbiter nominated by them in settling a dispute which had arisen under a contract between the parties. They craved the Court to order the defenders to appoint an arbiter, and failing their doing so to appoint an arbiter.

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Sheriff of
Lanarkshire.

The warrant of citation was in form "B" of the First Schedule to the Sheriff Courts (Scotland) Act, 1907, the form prescribed by Rule 4 of that Schedule as applicable to "summary applications."*

On 18th August the acting Sheriff-substitute (Smith Clark) appointed a condescendence and defences to be lodged, and on 24th August he allowed the pursuers to amend their petition to the effect that they craved to the Court now was simply "to appoint an arbiter under the Arbitration (Scotland) Act, 1894."†

The contract in question was for the sale by the defenders to the pursuers of four hundred barrels of American Prime Summer Seed Oil, and contained this clause:—"Arbitration.—Disputes to be settled by arbitration in Glasgow."

The pursuers averred:—(Cond. 10) "By the custom of the oil trade in Glasgow, where the contract provides that disputes are to be settled 'by arbitration in Glasgow,' each party nominates one arbiter and the arbiters name an oversman, and said disputes are settled by the decision of said arbiters or oversman. Said custom was impliedly incorporated in the contract of sale between the pursuers and the defenders."

The pursuers further averred that certain questions had arisen

* The Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. cap. 51), enacts:—Sec. 3 (p). "'Summary application' means and includes . . . all applications, whether by appeal or otherwise, brought under any Act of Parliament which provides or, according to any practice in the Sheriff Court, which allows that the same shall be disposed of in a summary manner, but which does not more particularly define in what form the same shall be heard, tried, and determined."

† The Arbitration (Scotland) Act, 1894 (57 and 58 Vict. cap. 13), enacts:—

Sec. 1. "From and after the passing of this Act, an agreement to refer to arbitration shall not be invalid or ineffectual by reason of the reference being to a person not named, or to a person to be named by another person, or to a person merely described as the holder for the time being of any office or appointment."

Sec. 2. "Should one of the parties to an agreement to refer to a single arbiter refuse to concur in the nomination of such arbiter, and should no provision have been made for carrying out the reference in that event, or should such provision have failed, an arbiter may be appointed by the Court, on the application of any party to the agreement, and the arbiter so appointed shall have the same powers as if he had been duly nominated by all the parties."

"Sec. 3. "Should one of the parties to an agreement to refer to two arbiters refuse to name an arbiter, in terms of the agreement, and should no provision have been made for carrying out the reference in that event, or should such provision have failed, an arbiter may be appointed by the Court, on the application of the other party, and the arbiter so appointed shall have the same powers as if he had been duly nominated by the party so refusing."

which fell to be determined by arbitration under the contract, that Feb. 27, 1912. they had appointed an arbiter, but that the defenders had refused to do so.

The defenders pleaded, *inter alia*;—(1) The application is incompetent. . . . (2) The pursuers' averments being irrelevant, the application should be dismissed.

On 8th September 1911 the Sheriff-substitute (Fyfe) pronounced this interlocutor:—"Having heard parties' procurators, repels defenders' first and second pleas, allows a proof *primo loco* upon pursuers' averment in condescendence 10 . . . Grants leave to appeal."*

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* "NOTE.—The defenders, in the first place, plead that this application is incompetent; but it appears that they do not mean all they say. What they do mean by this plea is that they take exception to the form in which the application is presented, because it is presented as a summary application in which there is no appeal except by leave of the Court. They contend that it should have been in the form of an ordinary action, where they have an appeal of right. I have no hesitation whatever in repelling this plea. The application is brought under an Act of Parliament, and according to the practice of this Court it is to be disposed of in a summary manner, and that the Act of Parliament does not forbid. It is accordingly quite clearly a summary application within the meaning of section 3 (p) of the Sheriff Courts Act, 1907.

"The defenders' next plea is that the action is irrelevant. Under that plea they contend that the arbitration clause in the contract founded on is not in itself sufficiently specific to bring it within the scope of the Arbitration Act of 1894, and that the weakness of the arbitration clause is not cured by the averment in condescendence 10, because that averment does not allege that the custom of trade founded on was known to the defenders when they signed the contract in question.

"I think this is a very technical and somewhat fanciful plea. It means that the expression in the contract, 'arbitration in Glasgow,' is merely geographical, and that the clause does no more than locate the arbitration if an arbitration is otherwise competent. I think this a far too narrow construction of the contract. It is a contract for the sale of oil, and I think that the arbitration clause—which reads, 'Disputes to be settled by arbitration in Glasgow'—means that the dispute is to be settled according to practice in that particular trade in that particular city. It is accordingly, in my opinion, quite relevant to make the averment which pursuers do in article 10 of their condescendence; and if that is established, it is, I think, sufficient to get over the difficulty illustrated in the case of *M'Millan v. Rowan* (1903, 5 F. 317), and to bring the present case within *Douglas v. Siren* (1900, 2 F. 575), which recognises that custom may be brought in to explain an ambiguity in the arbitration clause itself. The defenders urge that the case of *Douglas* is quite different from the present, in respect that the contract there expressly referred the dispute to arbitration in the customary manner of the timber trade, whilst here custom is not in the contract itself, but only in the condescendence. I do not think there is any material distinction between the cases. In my opinion, 'arbitration in Glasgow' is merely a short way of expressing the intention of the parties to settle their dispute according to the custom of the oil trade at Glasgow. In my opinion, pursuers' averment in article 10 of the condescendence is quite sufficient to warrant an order for proof; but the proof, of course, will meantime be restricted to that one matter.

"I have, at defenders' request, granted leave to appeal.

"I am not in favour of appeals in summary applications, for to carry a case from Court to Court might often defeat the whole object of the applica-

Feb. 27, 1912. The defenders appealed to the Sheriff (Millar), who, on 3rd January 1912, adhered to the interlocutor of the Sheriff-substitute, and granted leave to appeal.

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The defenders appealed to the Court of Session, and the case was heard before the First Division (consisting of the Lord President, Lord Johnston, and Lord Hunter) on 27th February 1912.

Argued for the appellants;—The contract left the nature of the reference undetermined, seeing that it did not provide for reference either to one or to two arbiters. Therefore neither section 2 nor section 3 of the Arbitration Act applied, and it was only under these sections that the Court was given power to appoint an arbiter.¹ The pursuers' averments in cond. 10 were not relevant to instruct a reference to one or to two arbiters. The expression "arbitration in Glasgow" was merely geographical and did no more than fix the locus of the arbitration. The use of this expression was not sufficient to import into this contract the alleged custom of the oil trade there. But assuming this point against the appellants, the averments in cond. 10 still remained irrelevant as it was not averred that such a custom was known to the parties, only one of whom was a member of that trade.² The application therefore involved questions which could not be disposed of in a "summary application," to which the rule of section 3 (p) of the Sheriff Courts Act, 1907, applied; and, accordingly, the proceedings were incompetent as they had admittedly been conducted under the procedure prescribed by that section and by the relative rules of the Schedule.³ The procedure should have been that of an ordinary Sheriff Court action, in which appeal would have been open to the parties as matter of right. The action should therefore be dismissed, or, at any rate, the proceedings should be sisted until the question of the existence of an effective arbitration clause under the Act was determined in a competent process.⁴ In any case, procedure by way of summary petition was not an appropriate method for the disposal of the questions between the parties.⁵

Argued for the respondents;—It was clear that if the pursuers relevantly averred a reference to one or to two arbiters, the case was one which fell to be disposed of by summary application in terms of the Arbitration and Sheriff Courts Acts. Such an averment was contained in cond. 10. The words "arbitration in Glasgow" had not the limited meaning ascribed to them by the appellants. On a fair reading they imported a reference to the custom of the oil trade in Glasgow, which the pursuers were entitled to prove.⁶ The present

tion, but there are exceptional cases where, as here, an important legal question may be raised, and nobody will be prejudiced by delay; and in that kind of case, I think, it is quite proper that an appeal should be sanctioned."

¹ M'Millan & Sons, Limited, v. Rowan & Co., (1903) 5 F. 317.

² Holman v. Peruvian Nitrate Co., (1878) 5 R. 657; Mollet v. Robinson, (1870) L. R., 5 C. P. 647, (1872) L. R., 7 C. P. 84, (1874-5) L. R., 7 H. L. 802.

³ First Schedule, Rules 4 and 41.

⁴ Cooper & Co. v. Jessop Brothers, (1906) 8 F. 714.

⁵ Sleigh v. Glasgow and Transvaal Options, Limited, (1904) 6 F. 420; Macnabs v. Macnab, *supra*, p. 421.

⁶ Dickson on Evidence, (1887 ed.) ii., sec. 1061; Taylor on Evidence, (10th ed.) ii., sec. 1161 *et seq.*

case was distinguished from *M'Millan's* case.¹ The contract there dealt with only contained the indefinite provision that disputes should be "referred to arbitration," whereas the terms of the contract here were, in effect, similar to those considered in the case of *Douglas & Company v. Stiven*,² "arbitration in the customary manner of the timber trade," which were held to be equivalent to a reference to unnamed arbiters and to import a valid reference under the Arbitration Act. The only question raised upon this part of the case was one of the construction of what was an admittedly existing agreement. In *Cooper & Company v. Jessop*³ the existence of an agreement was in question, and it was because of this question, as well as of other questions there raised, that the Court held that the matter could not competently be decided in the petition under the Arbitration Act. The appellants could not show that they had suffered any prejudice from the manner in which the proceedings had been conducted. The Sheriff had not in fact followed the ordinary procedure of summary applications; pleadings had been allowed, and the parties had been granted leave to appeal.

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LORD PRESIDENT.—In this case matters began in the Sheriff Court by the presentation of an initial writ which set forth that the complaint of the pursuers was that the defenders refused to nominate an arbiter, and the pursuers originally craved the Court "to order the defenders to appoint an arbiter, and failing their doing so, to appoint an arbiter." That crave was afterwards amended by minute to this effect, that the words, "to order the defenders to appoint an arbiter, and failing their doing so," were struck out, and after the words "to appoint an arbiter" were put in the words "under the Arbitration (Scotland) Act, 1894"; and accordingly it became a simple crave for the appointment of an arbiter under that Act. That crave was opposed in respect that the dispute which had emerged was not within the arbitration clause. The contract containing the clause in question was drawn up by the defenders, a firm of oil merchants in Glasgow, and accepted by the pursuers, a company called the United Creameries Company, Limited, and carrying on business at Dunragit. It was a contract for the sale of 400 barrels American Prime Summer Yellow cotton-seed oil, and among other clauses there was one which provided that disputes were to be settled "by arbitration in Glasgow."

What happened in the cause was this: When the initial writ was presented, the first step taken was that a warrant of citation was pronounced upon the 10th August 1911, and the warrant was in the form "B" of the First Schedule to the Sheriff Courts (Scotland) Act, 1907. Rule 4 of that schedule provides that a warrant of citation form "B" shall be used in summary causes, summary removings, and also in summary applications where citation is necessary, and that in all other causes a warrant in form C shall be used. Accordingly it is undoubted that the warrant for citation used was such a warrant as would be pronounced upon a summary application.

After that the Sheriff-substitute appointed a condescendence to be lodged, and allowed the amendment that I spoke of. He then repelled the defenders' first and second pleas, which were pleas that the application was

¹ 5 F. 317.² (1900) 2 F. 575.

• 3 F. 714.

Feb. 27, 1912. incompetent and that the averments were irrelevant, and he granted the pursuers a proof of their averments in condescendence 10. Condescendence 10 contains an averment that by the custom of the oil trade in Glasgow—where the contract provides that disputes are to be settled by arbitration—each party nominates one arbiter and the arbiters name an oversman, and that this custom was impliedly incorporated in the contract in question. The Sheriff-substitute granted leave to appeal against the interlocutor, and he subjoined a note in which he put forward very clearly the contentions of the defenders. These contentions were (a) that the application was incompetent in respect that it was presented as a summary application and not in the form of an ordinary action in which there would be an appeal as of right, and (b) that the action was irrelevant, inasmuch as the arbitration clause was invalid or not sufficiently specific, there being no averment that the custom of trade founded on was known to the defenders when they signed the contract. The Sheriff-substitute called attention to certain decisions in this Court, in the cases of *M'Mullan v. Rowan*,¹ and *Douglas v. Stiven*.² The learned Sheriff adhered, but he again granted leave to appeal. The defenders are here in an appeal against that interlocutor; they urged very strongly that these proceedings are bad *ab initio*; that the case is not appropriate for summary proceedings at all; and that, following what was done by the Second Division in the case of *Cooper & Company v. Jessop Brothers*,³ we ought to dismiss the action altogether, or at least to sist it until the question of whether the parties are properly bound under an arbitration clause is settled by some competent process.

In the case of *Cooper v. Jessop*³ a petition to appoint an arbiter under the 1894 Act was presented to a Lord Ordinary, and there, as here, there had to be an averment of custom in order to make the arbitration clause exactly square with section 3 of the Act of 1894; and the averment there was this, that the usual way of arbitration in that particular trade was for each party to nominate an arbiter, and for these arbiters to appoint an oversman. Lord Dundas allowed the parties a proof of their averments, and granted leave to reclaim. The Second Division recalled that interlocutor and remitted the cause to the Lord Ordinary to sist process in order that the questions between the parties might be determined by a Court of competent jurisdiction and in the appropriate form. Lord Kyllachy, who delivered the leading judgment, pointed out that there were other matters in controversy between the parties; in particular, that the jurisdiction of the Lord Ordinary to entertain the petition depended upon its being proved, first, that there was a concluded agreement between the parties, which was denied; second, that such concluded agreement included a clause of reference, which one party maintained and the other denied to be part of the agreement; third, that this clause of reference, which admittedly did not *prima facie* satisfy the conditions of the Arbitration Act, might yet be made to do so by proof of an alleged but disputed custom of trade in Glasgow; and finally, fourth, that the clause of reference *ex hypothesi* thus set up by proof amounted on its just construction to a prorogation by both parties of the jurisdiction of the Scottish tribunals. There being all this

¹ 5 F. 317. •² 2 R. 575.³ 8 F. 714.

amount of debatable matter between the parties, the Second Division considered—I think I am not putting too great a stress on what they said—that it was quite improper, at least in such a case, to take all this matter incidentally in the course of a petition which craved the Court to perform a ministerial act. Now, I do not think that that decision necessarily binds us, in every case, to say, “you shall not go on with a petition of this sort unless you have a pure and simple case where you find, by the mention of either one or two arbiters as the case may be, that the case exactly fits either section 2 or section 3 of the Arbitration Act of 1894.” And there are certain passages which have been cited to us from the opinions both of Lord Kyllachy and of Lord Low which point the same way.

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But what I think the matter comes to is this, the Arbitration Act of 1894 had twofold scope. First comes section 1, which contains a general amendment of the law. Prior to that Act a reference to arbitration was invalid in Scotland if there was not a named arbiter. Section 1 altered the law generally upon that matter. Then come sections 2 and 3, in which a remedy is provided for a state of matters where parties were not really in dispute as to construction or any such thing, but where the difficulty was that one party was supine and, simply by *vis inertiae*, made it impossible for the other party to go on by refusing to appoint an arbiter; and accordingly sections 2 and 3 provided a remedy which I think is certainly meant to be a summary remedy to meet that state of affairs. Section 2 deals with a case where the agreement refers to a single arbiter, section 3 to one where the agreement refers to two arbiters; and each provides the appropriate remedy.

Prima facie, summary procedure is only appropriate to a case which falls naturally and obviously under the provisions of section 2 or of section 3. But there are cases which in truth may fall within these provisions and yet do not obviously do so, that is, cases of this sort where, if you look at the arbitration clause and read it, you do not find in so many words a reference either to a single arbiter or to two arbiters, but where you find a reference to a custom, which custom being interpreted and writ large will give you a reference to one arbiter or to two arbiters. But in any case where such a question emerges, whether it be upon the original statement of the case or upon the defences that are put in to the original case, I think it is obvious that summary procedure is inappropriate, if for no other reason than this, that by making the procedure summary and so dispensing with a record of the evidence you would practically exclude review upon what might be the crucial point of the dispute between the parties. I think that is really what the learned Sheriffs felt in this case, because, although they treated the matter as a summary cause, they granted, what they would not ordinarily grant in a summary cause, leave to appeal from what was purely an interlocutory judgment; and I cannot doubt that, actuated by the same spirit, they would probably, even if nothing had been said to them, have kept a record of the evidence so that appeal would have been possible upon the whole merits of the cause. But as the matter has been raised here, what I feel constrained to say is that I think technically they did make a mistake in treating this cause all through as a summary cause. I think as soon as they found out, as they did, what was the true contention between

Feb. 27, 1912. the parties, they ought to have sent this cause to the ordinary Sheriff Court roll. It does not follow, however, that we can do nothing except sist, because I see no incompetency whatsoever in a person presenting a writ in the Sheriff Court in which he first asks for judgment in what I may call a declaratory form, and thereafter, such judgment having been pronounced, craves an appointment under the Act of 1894. I see no incompetency in that. Accordingly, I do not think there was any necessity, so to speak, to turn the case out of Court or sist it, and to say, Go and try the case in another action. But I think it ought to have been tried in the ordinary Court so as to allow an appeal, and, having that put before them, I have no doubt that the learned Sheriffs will do so in the future.

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The only question is what is to be done in this case. I think it would be a great pity not to utilise the procedure which has already taken place, because although Mr Horne was entitled to argue, as he did, that there was no relevant averment of custom here, I do not think your Lordships were impressed with his argument; in other words, we thought that the decision of the Sheriffs in this matter was clearly right. If it can be shown that there was a custom in the oil trade in Glasgow to have arbitration in the way proposed, then the other party would be bound to go to arbitration.

I would therefore move your Lordships to remit the case to the Sheriffs with instructions to them to proceed with the proof which they have allowed,—but to proceed with that proof sitting in the ordinary Court and keeping a record of the evidence that it may be used in an appeal if necessary.

LORD JOHNSTON.—I quite agree. As soon as it became apparent that something more than the performance of a ministerial duty was involved, it was obvious that this case could not either conveniently or properly be tried in a summary form. That, however, did not prevent the Sheriff as soon as this was made apparent, and it was so at a very early stage of the case, from transferring it at once to his ordinary Court; and I agree that that may now be done, with advantage to the parties and with a saving of expense.

LORD HUNTER.—I entirely agree.

THE COURT pronounced this interlocutor:—"Recall the interlocutor of the Sheriff and Sheriff-substitute dated 3rd January 1912 and 8th September 1911 respectively: Remit the cause to the Sheriff-substitute to transfer it to the ordinary Court, to close the record, to allow a proof *primo loco* upon pursuers' averments in condescendence 10, and to proceed as accords."

J. & J. ROSS, W.S.—J. W. & J. MACKENZIE, W.S.—Agents.

JOHN HENRY MARLOW, Petitioner.—*W. T. Watson.*

No. 91.

Company—Winding-up—Voluntary winding-up—Petition for the appointment of committee of inspection—Consent of liquidator—Procedure—Companies (Consolidation) Act, 1908 (8 Edw. VII. cap. 69), sec. 188. Feb. 28, 1912.
Marlow.

A petition having been presented in terms of section 188 of the Companies (Consolidation) Act, 1908, for the appointment of a committee of inspection in the voluntary winding-up of a limited company, the Court, on the production of a letter from the liquidator consenting to the application, *granted* the prayer of the petition *de plano* without ordering intimation or service.

ON 23rd February 1912 John Henry Marlow, the representative of certain creditors of Cherry & Company, Limited, tile-layers, Glasgow, presented a petition under section 188 of the Companies (Consolidation) Act, 1908,* for the appointment of a committee of inspection in the voluntary winding-up of that Company.

The petition set forth that at an extraordinary meeting of the shareholders of the Company held on 22nd January 1912, a resolution was passed for the voluntary winding-up of the Company, that a liquidator had been appointed, and that, at a meeting of creditors, convened by the liquidator, held on 9th February 1912, it had been resolved that application should be made to the Court, in the name of the petitioner, for the appointment of a committee of inspection in the liquidation, and that the names of the petitioner and of Mr Robert Watson, a tile-layer in Glasgow, should be suggested as members of the committee.

The prayer of the petition was "after such intimation and service, if any, as your Lordships shall think fit, to appoint the petitioner John Henry Marlow and the said Robert Watson, or such other per-

* The Companies (Consolidation) Act, 1908, enacts :—Sec. 188. "(1) Every liquidator appointed by a company in a voluntary winding-up shall, within seven days from his appointment, send notice by post to all persons who appear to him to be creditors of the company that a meeting of the creditors of the company will be held on a date, not being less than fourteen nor more than twenty-one days after his appointment, and at a place and hour to be specified in the notice, and shall also advertise notice of the meeting once in the *Gazette* and once at least in two local newspapers circulating in the district where the registered office or principal place of business of the company was situate; (2) at the meeting to be held in pursuance of the foregoing provisions of this section, the creditors shall determine whether an application should be made to the Court for the appointment of any person as liquidator in the place of or jointly with the liquidator appointed by the company, or for the appointment of a committee of inspection, and if the creditors so resolve, an application may be made accordingly to the Court at any time, not later than fourteen days after the date of the meeting, by any creditor appointed for the purpose at the meeting; (3) on any such application the Court may make an order either for the removal of the liquidator appointed by the company and for the appointment of some other person as liquidator, or for the appointment of some other person to act as liquidator jointly with the liquidator appointed by the company, or for the appointment of a committee of inspection either together with or without any such appointment of a liquidator, or such other order as, having regard to the interests of the creditors and contributors of the company, may seem just. . . ."

Feb. 28, 1912. sons as to your Lordships may seem fit, as a committee of inspection in the voluntary winding-up of Cherry & Company, Limited, as authorised by the said statute. . . ."
Marlow.

On the petition appearing on 27th February 1912 in Single Bills of the First Division (without Lord Kinnear), counsel for the petitioner moved the Court to grant the prayer of the petition.

The application was continued until the following day in order that evidence of the liquidator's consent thereto might be obtained. On 28th February a letter of consent by the liquidator was produced.

THE COURT, without ordering intimation and service, granted the prayer of the petition.

PEARSON, ROBERTSON, & FINLAY, W.S., Agents.

No. 92. JAMES PATTISON GRANT AND OTHERS (Edward Griffiths' Trustees),
First Parties.—*Sandeman, K.C.—Hon. W. Watson.*
Feb. 28, 1912. MRS MARY JACK OR GRIFFITHS, Second Party.—
Griffiths' *Graham Stewart, K.C.—Cowan.*
Trustees v. Griffiths. *Succession—Husband and Wife—Widow's allowance for mournings—Discharge of legal rights.*

A widow's allowance for mournings is a privileged debt due by her husband's estate, and is not discharged by her acceptance of provisions under her husband's will which are therein declared to be "in full satisfaction of all terce of lands, *jus relictæ*, or legal share of moveables, and any other right or claim competent to her" through his decease.

2D DIVISION. EDWARD GRIFFITHS, Troon, died in 1910 leaving a trust-disposition and settlement by which, *inter alia*, he made certain provisions for his wife, with regard to which he declared "that the foresaid provisions in favour of my said wife shall be deemed and taken to be in full satisfaction of all terce of lands, *jus relictæ*, or legal share of moveables, and any other right or claim competent to her through my decease."

The testator was survived by his wife, Mrs Mary Jack or Griffiths, who accepted the provisions in her favour under the will, and in addition claimed an allowance for mournings out of the trust-estate, which claim the trustees maintained was excluded by the terms of the settlement.

Questions having arisen with regard to the construction of the settlement, a special case was presented to the Court, the *first parties* being the testator's trustees, and the *second party* his widow.

The following question was, among others, submitted for the opinion and judgment of the Court:—"6. Is the second party entitled to an allowance for mournings out of the trust-estate, in addition to her provisions under the said trust-disposition and settlement?"

The case was heard before the Second Division (without Lord Dundas) on 28th February 1912.

The undernoted authorities were referred to.¹

¹ Buchanan v. Ferrier, (1822) 1 S. 323; Fraser on Husband and Wife, 2nd ed., vol. ii. pp. 967-8.

LORD SALVESEN.—(In the course of his opinion)— . . . The sixth Feb. 28, 1912. question seems to be concluded by authority, the law of Scotland holding Griffiths' that an allowance for mournings is a debt of a privileged nature, just as Trustees v. Griffiths. funeral expenses are, and that a widow's claim to that allowance is not excluded by such a clause in a settlement as the one to which we were referred in this case. Accordingly I am of opinion that the sixth question should be answered in the affirmative.

LORD GUTHRIE.—(In the course of his opinion)— . . . The sixth question is the only one which raises a question of general application, and I agree that it is conclusively settled by authority in favour of the view maintained by the second party.

The LORD JUSTICE-CLERK concurred.

THE COURT answered the sixth question of law in the affirmative.

MACPHERSON & MACKAY, S.S.C.—R. R. SIMPSON & LAWSON, W.S.—Agents.

SAMUEL REID AND ANOTHER, Pursuers (Appellants).—*Munro, K.C.*— No. 93.
J. A. T. Robertson.

THE NORTH ISLES DISTRICT COMMITTEE OF THE COUNTY COUNCIL OF Mar. 1, 1912.
ORKNEY, Defenders (Respondents).—*Cooper, K.C.*—*R. S. Brown.*

Reid v. North Isles District Committee of County Council of Orkney.
Expenses—Sheriff—Taxation—Application to Court to sanction employment of counsel, to allow a higher debate fee, and to certify charges for skilled witnesses—Time for making application—Act of Sederunt, 10th April 1908, General Regulation VI., and Table of Fees, cap. I. 16, and cap. X. 5 (b).

The Act of Sederunt of 10th April 1908, regulating fees in the Sheriff Court, enacts, General Regulation VI., that the Sheriff may allow a higher debate fee, "either by a direction in the interlocutor disposing of the case, or by a special interlocutor following on a motion by the party found entitled to expenses," and the Table of Fees, cap. I. 16, provides that "where the employment of counsel is sanctioned" certain fees shall be allowed. The Table of Fees further provides, cap. X. 5 (b), that certain charges may be made for the services of skilled witnesses, "provided that the Judge who tries the cause shall, on a motion made either at the proof or trial . . . or within eight days of any interlocutor disposing of the case, certify such skilled persons for such charges."

In an action of damages brought in the Sheriff Court counsel were employed to revise and adjust pleadings and to conduct a proof on commission, without the previous sanction of the Sheriff-substitute having been obtained. The Sheriff, on appeal, assoilzied the defenders and found the pursuers liable to them in expenses. The defenders thereafter applied to the Sheriff to allow a higher debate fee, to sanction the employment of counsel, and to certify the charges of certain skilled witnesses; but the Sheriff did not dispose of this application, as in the meantime his interlocutor had been appealed against and the process had been transmitted to the Court of Session. The First Division affirmed the Sheriff's interlocutor and found the pursuer liable in expenses as between agent and client. The defenders objected to the Auditor's report in respect that he had allowed only the ordinary fee for debate, and had disallowed the items in connection with the

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employment of counsel and the services of skilled witnesses, and craved that these various items should be allowed.

The Court *repelled* the objection with regard to the charges for skilled witnesses on the ground that the motion for certification, not having been made to the Judge who tried the case or within the time allowed by the Act of Sederunt, could not now be entertained; but *quoad ultra* remitted the cause to the Sheriff in order that the defenders might have an opportunity of applying to him to allow the higher debate fee and to sanction the employment of counsel.

Observed, per the Lord President, with regard to the latter application, that such a motion should properly be made to the Judge who tried the cause; and that, although it was not incompetent to delay the motion until the case was before the Sheriff on appeal or before the Court of Session, in such circumstances it should only be granted if it were shown, not only that the application was well founded, but also that there was very good reason why the motion had not been made before.

Expenses—Sheriff—Taxation—Debate fee—Attendance fee—Act of Sederunt, 10th April 1908, General Regulations VI., and Table of Fees, cap. I. 12 (1), and 15 (2).

The Table of Fees contained in the Act of Sederunt of 10th April 1908, regulating fees in the Sheriff Court, allows the following fees:—Cap I. 12 (1), an attendance fee of ten shillings per hour; and cap. I. 15 (2), a debate fee of four guineas. By General Regulation VI. the Act of Sederunt provides that, in certain cases, the Sheriff may allow a higher debate fee than that allowed in the Table, not exceeding seven guineas.

Expenses were awarded as between agent and client in an action which had been debated before the Sheriff-substitute and Sheriff for eleven and twenty-three hours respectively. The successful party in moving for the allowance of higher debate fees asked, as an alternative, that he should be found entitled to an attendance fee at ten shillings per hour, which would have amounted to more than the higher debate fees asked for. *Held* that this alternative proposal could not be entertained.

Expenses—Sheriff—Taxation as between agent and client—Application of provisions of Act of Sederunt, 10th April 1908—Public Authorities Protection Act, 1893 (56 and 57 Vict. cap. 61), sec. 1 (b).

In a Sheriff Court action against a public authority the defenders were successful, and, in terms of sec. 1 (b) of the Public Authorities Protection Act, were awarded expenses to be taxed as between agent and client.

Held that, as the provisions of the Act of Sederunt, 10th April 1908, regulating fees in the Sheriff Court, applied to taxation as between agent and client as well as to taxation as between party and party, the defenders could not recover charges for the employment of skilled witnesses which had not been certified by the Sheriff as required by the Act of Sederunt.

1st DIVISION.
Sheriff of
Caithness,
Orkney, and
Shetland.

ON 10th December 1908 Samuel Reid and another, joint owners of the smack "Howard," of Kirkwall, brought an action in the Sheriff Court at Kirkwall against the North Isles District Committee of the County Council of Orkney, as proprietors of the Harbour Works in the island of Ronaldshay. The pursuers' claim was for damages sustained by them in consequence of the "Howard" having gone ashore in Ronaldshay harbour owing, as they alleged, to a defect in moorings for which the defenders were responsible.

In the procedure which followed a proof was led, and evidence was also taken on commission at Edinburgh; expert witnesses were examined before the Sheriff-substitute and before the Commissioner. Counsel were employed to conduct the proof on commission, and to adjust and revise the pleadings in the action, but the previous sanction of the Sheriff-substitute to their employment was not obtained.

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On 5th January 1910 the Sheriff-substitute (Harvey) granted decree for the sums sued for.

On 2nd April 1910 the Sheriff (M'Lennan), on appeal, reversed that decision, assolizied the defenders, and found the pursuers liable to them in the expenses of the action.

On 9th April 1910 the defenders' agent made the following motion to the Sheriff:—"In respect that your Lordship by interlocutor, dated 2nd April 1910, assolizied the defenders from the conclusions of the action, and found them entitled to expenses as therein stated, moved the Court as asked for at the debate before your Lordship, and previously at the debate before your Lordship's substitute—(1) for a direction to the Auditor of Court that the expenses in the cause should be taxed as between agent and client under and in virtue of section 1 (b) of the Public Authorities Protection Act, 1893¹; (2) to sanction the employment of counsel for defenders in the cause; (3) to certify certain persons "as skilled witnesses in the cause; and (4) to find under the Table of Fees in the Sheriff Court (Act of Sederunt 10th April 1908) that under Regulation VI. the defenders are entitled to a debate fee both before the Sheriff and Sheriff-substitute of at least £7, 7s."*

¹ Reference was made to *Aird v. The School Board of Tarbert*, 1907 S. C. 305; *Christie*, (1899) 7 S. L. T. 27, 36 S. L. R. 694.

* The Act of Sederunt, 19th April 1908, regulating fees in the Sheriff Court, enacts, General Regulation VI.—"In cases of great importance, or requiring much special preparation, it shall be in the discretion of the Sheriff to allow for debate a higher fee than is allowed in the Table, but not exceeding £7, 7s., and that either by a direction in the interlocutor disposing of the case, or by a special interlocutor following on a motion by the party found entitled to expenses. . . ."

VIII. "This Table of Fees shall regulate the taxation of accounts as well between agent and client as between party and party. . . ."

The Table of Fees annexed to the Act of Sederunt contains the following entries:—

"Cap. I. General Business in Sheriff Courts."

"12. Attendances.

"(1) Exceeding half an hour but not exceeding one hour, 10s.

For every half hour thereafter, 5s."

"15. Debates."

"(2) Debating case on merits, £2, 2s. to £4, 4s."

"16. Where counsel employed.

"(a) The following fees to be allowed as judicial costs where the employment of counsel is sanctioned."

[Fees detailed].

"Cap. X. Witnesses fees."

"(5) (b) Where it is necessary to employ skilled persons to make investigations prior to a proof or trial in order to qualify them to give evidence thereat, charges shall be allowed for the trouble and expense of such persons, of such amount as shall appear to be fair and reasonable, provided that the Judge who tries the cause shall, on a motion made either at the proof or trial, or when leave is

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On 16th April the pursuers appealed to the Court of Session, and on the same day the Sheriff issued the note, quoted *infra*.*

On 16th March 1911 the First Division affirmed, with certain variations, the interlocutor of the Sheriff dated 2nd April 1910, found the pursuers and appellants liable to the defenders and respondents in the expenses incurred in both Courts, and remitted to the Auditor to tax the account thereof as between agent and client.

It appeared from the items of the account submitted to the Auditor that eleven hours had been occupied in the debate before the Sheriff-substitute, and twenty-three hours in that before the Sheriff. The Auditor disallowed the expenses of counsel in the Sheriff Court, and the charges of skilled witnesses, and added a note to his report in which he stated as his reason for so doing that the former were not

asked to abandon the case, or within eight days after the date of any interlocutor disposing of the case, certify such skilled persons for such charges."

The Public Authorities Protection Act, 1893 (56 and 57 Vict. cap. 61), enacts:—Sec. 1. "Where after the commencement of this Act any action . . . is commenced in the United Kingdom against any person for any act done in pursuance or execution, or intended execution, of any Act of Parliament, or of any public duty or authority, or in respect of any neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect:— . . . (b) Wherever in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client."

* "NOTE.—The case having been appealed to the Court of Session, and the interlocutor sheet not having been transmitted to the Sheriff along with the motion, it is now impossible for the Sheriff to deal with the motion at this stage. For the convenience of parties he desires to communicate his views regarding the points dealt with in the motion.

"(1) The failure to insert the words 'as between agent and client' in the award of expenses was a clerical or incidental error, which the Sheriff would have been prepared to correct under rule 84. The defenders argued for such expenses under the Public Authorities Protection Act, 1893, and it was admitted by the pursuers' agent that a similar argument had been submitted to the Sheriff-substitute. In the Sheriff's opinion the statute applies to the present case.

"(2) and (4) It is competent for the Sheriff to deal with these branches of the motion after final judgment on the merits. Act of Sederunt, 10th April 1908, General Regulations VI., Table of Fees, chap. I. 16. Consequently care should be taken when the appeal is disposed of in the Court of Session to have the process remitted back to the Sheriff. He understands this course has been taken under similar circumstances in other litigations. It seems therefore proper that he should not at present express any view on the merits on these branches of the motion.

"(3) According to the Sheriff's understanding of the Table of Fees, chap. X. note (5) (b), the certifying of skilled witnesses could only be done by the Sheriff-substitute, he being, in the sense of the note, 'the Judge who tries the cause.' If application was made to him within eight days of his interlocutor of 5th January 1910, a fresh application to the Sheriff is unnecessary. If application was not so made, an application to the Sheriff now is too late. The Sheriff observes that the present motion was lodged within eight days after the date of his interlocutor of 2nd April disposing of the case, so that, if the Sheriff's understanding of the Table be wrong, he could deal with this branch of the motion on the case being remitted back. The judgment of the Court of Session should, if possible, be obtained on the construction of the note in the Table of Fees."

sanctioned nor were the latter certified. He also disallowed certain charges for the debates in the Sheriff Court. Mar. 1, 1912.

The defenders and respondents lodged a note of objections to the Auditor's report, in which they stated:—"The defenders and respondents object to the Auditor's report in so far as he has disallowed:—

- (1) The items in connection with the employment of counsel in the Sheriff Court for the revisal and adjustment of the pleadings in the said Court, and at the commission in Edinburgh prior to the proof in said Court. . . .
- (2) The items in connection with the employment of skilled witnesses who gave evidence at the commission in Edinburgh in connection with the Sheriff Court proof. . . .
- (3) The special fees for debates before the Sheriff-substitute and the Sheriff. . . ."

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Counsel were heard on the note of objections on 1st March 1912 in Single Bills of the First Division (without Lord Kinneir).

Argued for the objectors;—The test to be applied in the taxation of an account of expenses awarded as between agent and client was whether the proposed charges were such as a prudent law-agent, without special instructions from his client, would incur, and this was the appropriate test in a case where the expenses fell to be paid by a third party, although a greater latitude might be allowed where they fell to be paid by the client.¹ There was nothing in the terms of the Act of Sederunt which withdrew cases of taxation as between agent and client from the scope of this general rule, and, judged by this test, the charges in question were proper charges and should be allowed. *As to the employment of counsel.*—In cases of taxation between agent and client it was unnecessary to obtain sanction for such employment where the above test was satisfied. But if sanction were necessary it was not too late to obtain it now. The Act of Sederunt set no limit to the time within which such an application might be made, and it had been held under the earlier Act of Sederunt of 4th December 1878, the terms of which were substantially the same as those of the later Act, that it might be granted by the Supreme Court after appeal,² and it should be so granted here. In any case, the application had already been made timeously to the Sheriff, and he should be allowed to have an opportunity of dealing with it. *As to the charges for skilled witnesses.*—Certification was only necessary in taxation as between party and party. In taxation between agent and client it was the function of the Auditor, subject to the Court, to decide whether the proposed charges satisfied the test above referred to. In the present case the charges should have been allowed. *As to the debate fee.*—The argument already advanced with regard to counsel's fees applied equally to this item. Alternatively, the defenders should be found entitled to charge for the debate an attendance fee of ten shillings per hour as provided for in the Table of Fees.³ This alternative charge was authorised by the latter part of section 8 of the General Regulations, which provided that, in taxation as between agent and client, a detailed charge might be substituted for the general charge stated in the Table of Fees.

Argued for the appellants;—The Act of Sederunt was expressly applied to the taxation of accounts as between agent and client

¹ Hood v. Gordon, (1896) 23 R. 675, per Lord M'Laren, at p. 676.

² M'Kercher v. M'Quarrie, (1887) 14 R. 1038.

³ Cap. I. 12 (1).

Mar. 1, 1912. by the terms of section 8 of the General Regulations, and these objections must therefore be dealt with severally in accordance with its rules. *As to the charges for skilled witnesses.*—This application was clearly too late, as it had been made neither to the Judge who conducted the proof nor within the time prescribed by the rule of cap. 10, sec. 5 (b) of the Table of Fees. *As regards the employment of counsel.*—Employment could not now be sanctioned.¹ The decision in the case of *M Kercher*² was no authority on this point. That case was decided on the terms of the Act of Sederunt of 4th December 1878, which provided that sanction might be “subsequently obtained.” There was no provision for subsequent sanction in the Act of Sederunt of 10th April 1908. *As regards the debate fee.*—Application here also came too late. In any case, the objectors’ alternative proposal should not be entertained. There was no precedent for such a charge, and to allow it would be to create a dangerous incentive to the prolongation of debates. The latter part of section 8 of the General Regulations, which was relied on as authority for the proposal, did not apply to a case where, as here, the expenses fell to be paid by a third party; its application was expressly limited to the quite distinct case in which the expenses fell to be paid by the client.

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Isles District
Committee of
County
Council of
Orkney.

LORD PRESIDENT.—This is a case in which certain shipowners raised an action against the North Isles District Committee of the County Council of Orkney for damage done to a ship owing to the breaking away of the buoy at which the ship was moored, such breaking away being due, as they alleged, to the negligence of the defenders in not providing a suitable chain. The Sheriff-substitute gave decree in favour of the pursuers. That judgment was reversed by the Sheriff upon appeal.

An appeal was then taken to your Lordships, and your Lordships upheld the judgment of the Sheriff. This judgment involved a finding of expenses in favour of the defenders and respondents, and your Lordships awarded those expenses as between agent and client, as you were bound to do by the terms of the Public Authorities Protection Act. The account has been taxed, and the note of objections raises three points in respect of the taxation.

The first point is in connection with the employment of counsel in the Sheriff Court. Counsel were not employed for the conduct of the debate, but they were employed for the adjustment of pleadings, and they were employed for the examination of certain witnesses who had to be examined on commission. No motion to sanction the employment of counsel was made before the Sheriff-substitute, but a motion was made before the Sheriff. Unfortunately that motion only came before him on the same day as the opposite party noted the appeal. The result was that, the process having been removed, the Sheriff had no interlocutor sheet to write upon, and accordingly he gave out a separate note for the parties, in which he said that, as he had not an interlocutor sheet to write upon, it would be necessary, if he was to deal with the motion, that the case should go back to him; he did not *hoc statu* deliver any opinion upon

¹ *Mackenzie v. Blakeney*, (1879) 7 R. 51; *Wood's Trustees v. Wood*, (1900) 2 F. 870.

² 14 R. 1038.

the merits of the question as to whether counsel were properly employed Mar. 1, 1912. or not.

Now, the whole matter is regulated by the Act of Sederunt of 10th April 1908, dealing with the fees in Sheriff Courts, and the passage which deals with the employment of counsel is section 16 of cap. 1 of the table of fees annexed, which says this:—"The following fees to be allowed as judicial costs where the employment of counsel is sanctioned." Previous Ld. President. to the Act of Sederunt of 1908 the matter was regulated by the earlier Act of Sederunt, 4th December 1878, which used these rather different words as to counsel's fees, "when the employment is authorised, or subsequently sanctioned." It had been decided under that earlier Act, in the case of *M'Kercher v. M'Quarrie*,¹ that the motion for sanction might be made at any time, and as a matter of fact, in the case which settled the point the motion was made after the account had been taxed, and after the case had been taken away from the Sheriff Court to the Court of Session, the judgment had been adhered to on appeal, and the case had come back again.

The respondents, who ask that these expenses should be allowed, submitted a twofold argument. They argued first of all, that the sanction might be given at any time, and therefore might be given by your Lordships, and that your Lordships should now give it. I am not prepared to hold that that argument is wrong, because the words in the Act are perfectly general. But at the same time I wish it to be understood for the instruction of the profession that I do not think we should look with any favour upon the idea of putting off this motion until the case comes before the Supreme Court, or even, as was done here, putting off the motion until the case comes before the Sheriff on appeal. I think such a motion should properly be made to the Judge who tries the cause—that is to say, the Judge who conducts the case. I say this for the instruction of the profession, because I am thinking of the ordinary case where counsel are employed in the conduct of the proof. This case is somewhat peculiar, because it is comparatively rarely that there is an examination of witnesses on commission, and that the examination is of such a nature that counsel ought to be employed. But in the ordinary case I wish it to be understood that the proper person before whom to make the motion is the Judge of first instance. Although I do not think it is incompetent for the employment of counsel to be sanctioned afterwards, I think it should only be so sanctioned if the party show, not only that the employment was right, but also that there were very good reasons why the motion was not made before.

However, in this case, I think, in view of the standing decisions, one cannot wonder that the motion was not made until the case came before the Sheriff and, inasmuch as the Sheriff never applied his mind to it, I think it would be going too far to hold that the time had now gone by when the matter could be taken up. Therefore I think we should practically remit this matter to the Sheriff. Counsel for the respondents submitted another argument of a more general character which I shall take up with the next point, because it covers both that point and the point with which I have just been dealing.

Reid v. North
Isles District
Committee of
County
Council of
Orkney.

¹ 14 R. 1038.

Mar. 1, 1912.

Reid v. North
Isles District
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Council of
Orkney.

Ld. President.

The next point is as to the allowance for skilled witnesses. Now, the allowance for skilled witnesses is dealt with in cap. 10 of the Table of Fees, in subsection (5) (b) where it is said :—"Where it is necessary to employ skilled persons to make investigations prior to a proof or trial in order to qualify them to give evidence thereat, charges shall be allowed for the trouble and expenses of such persons, of such amount as shall appear to be fair and reasonable, provided that the Judge who tries the cause shall, on a motion made either at the proof or trial, or when leave is asked to abandon the case, or within eight days after the date of any interlocutor disposing of the case, certify such skilled persons for such charges." Now, it is admitted that no certification was got from the Judge who tried the case, namely, the Sheriff-substitute, either at the time or within the eight days, and therefore it is too late, unless, as was argued, it is a provision that does not apply to the taxation of accounts as between agent and client, but only applies as between party and party. I am of opinion that this is a provision which applies whether the taxation is between agent and client or between party and party, and I think that that is really made perfectly clear by section 8 of the General Regulations which are at the beginning of the Act of Sederunt. It says that "This table of fees shall regulate the taxation of accounts, as well between agent and client as between party and party." I am of opinion that that disposes of that argument.

The only other matter is that of a special debate fee. The maximum debate fee is four guineas before the Sheriff-substitute and four guineas before the Sheriff, and that fee was allowed here. But there is in Article 6 of the General Regulations a provision to the effect that "In causes of great importance, or requiring much special preparation, it shall be in the discretion of the Sheriff to allow for debate a higher fee than is allowed in the Table, but not exceeding seven guineas; and that either by a direction in the interlocutor disposing of the case, or by a special interlocutor following on a motion by the party found entitled to expenses." That special motion was made at the same time as that for a certificate for sanction of the employment of counsel, and it was not disposed of for the reason that I have already mentioned. I think the same view applies, and it is necessary therefore that the cause should go back to the Sheriff in order that he may record this allowance in a special interlocutor if so advised.

The respondents made a counter proposition that instead of having a debate fee they should be allowed to have an attendance fee, because the duration of this debate was so long that they would get more by an attendance fee of ten shillings per hour than by a debate fee of seven guineas. That is a perfectly inadmissible proposition. To allow a person to get round the debate fee, by simply protracting the debate and charging for attendance, would obviously be to drive a coach and four through the Act of Sederunt, and therefore I do not think that proposition can be entertained.

LORD JOHNSTON.—I agree. This case is of importance simply because of its bearing upon the Public Authorities Protection Act, and raises the question whether a public authority is to be dealt with in the audit of its account of judicial expenses, as between agent and client, where so awarded

by virtue of the provision of that Act, without regard to the rules and scale Mar. 1, 1912. of fees of the Court in which it has been engaged in litigation. I agree with your Lordship that while the defenders are to get their expenses as between agent and client, these expenses should be taxed with reference to the rules of the Courts in which these expenses have been incurred.

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LORD MACKENZIE.—I am of the same opinion.

THE COURT pronounced this interlocutor:—"Repel the second of said objections, and with regard to the first and third of said objections remit the cause to the Sheriff in order that the defenders may, with regard to the first objection, have an opportunity to apply to the Sheriff for his sanction under the Table of Fees in the Sheriff Court, chapter I. head 16, and with regard to the third objection may under the Act of Sederunt of 10th April 1908, section 6, move the Sheriff for an allowance of a higher debate fee than the Table of Fees allows; *quoad ultra* continue the cause: Find no expenses due to or by either party in connection with this discussion."

HOSSACK & HAMILTON, W.S.—JAMES GIBSON, S.S.C.—Agents.

ROBERT ANDERSON MILNE, Appellant.—*Johnston, K.C.*—*M. P. Fraser.*

No. 94.

THOMAS DOUGLAS, Respondent.—*Gillon.*

Dec. 11, 1911.

Election Law—Lodger Franchise—Occupation "separately and as sole tenant"—Room occasionally shared with a guest—Representation of the People (Scotland) Act, 1868 (31 and 32 Vict. cap. 48), sec. 4, subsec. 2.

Milne v.
Douglas.

A son paid for and had the sole right to occupy a bedroom in his father's house. Held that the fact that during the period of qualification for the lodger franchise he had occasionally *ex gratia* allowed a young brother (who could have had a bed of his own) to sleep in the room with him, did not prevent him from having occupied the room "separately and as sole tenant" within the meaning of sec. 4 (2) of the Representation of the People Act, 1868.

At a Registration Court for the county of Peebles, held at Peebles on 27th September 1911, which was adjourned to 6th October 1911, Thomas Douglas junior, draper, March Street, Peebles, claimed to have his name inserted in the List of Voters for the combined counties of Peebles and Selkirk, as a voter under the lodger franchise. Robert Anderson Milne, a voter on that list, objected on the ground that the claimant had not the sole occupation of his lodgings.

Registration
Appeal Court.
Lord Dundas.
Lord Mac-
kenzie.
Lord
Skerrington.

The Sheriff-substitute (Orphoot) repelled the objection, and admitted the claim. Milne, the objector, obtained a special case for appeal in which the following facts were stated to have been proved or admitted:—

"The dwelling-house in March Street, Peebles, in which claimant resides, is tenanted by his father at a rent of £13, 10s., and consists of kitchen, parlour, back bedroom, small front bedroom, and large front bedroom and bathroom. It is occupied by respondent's father and mother, two daughters, the respondent, and his brother (a schoolboy). The claimant paid for the use of the room claimed upon, and had the sole right to occupy that room. From September 1910,

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Douglas.

and for a considerable but indefinite period of the winter, the boy slept with the claimant at his request, as he preferred the boy to be with him. The boy could have had a bed of his own. During the first two weeks in July 1911 he slept in the claimant's room, with the claimant's consent. To the extent above stated the claimant *ex gratia* allowed his brother to use his bedroom."

The question of law was:—"Is the claimant entitled in terms of the Representation of the People (Scotland) Act, 1868, section 4, to be entered as a voter in the Register of Voters for the combined counties of Peebles and Selkirk in respect of his having, for the qualifying period, separately and as sole tenant occupied the lodgings claimed upon?"*

The case was heard on 11th December 1911.

Argued for the appellant;—The claimant had not occupied the room "separately and as sole tenant." He had occupied it along with his brother, and the case was one of joint occupation in the sense of the Registration Amendment (Scotland) Act, 1885,¹ section 13. The room, if jointly occupied, was not of sufficient value to entitle the occupiers to the franchise.²

Counsel for the respondent was not called on.

LORD DUNDAS.—I think this is a very clear case, and the Sheriff is plainly right.

The only objection to the voter's qualification is that, during some part or parts of the qualifying period his young brother, a schoolboy, slept in his bedroom. The case states that "the boy slept with the claimant at his request, as he preferred the boy to be with him. The boy could have had a bed of his own." I am at a loss to conceive how this occasional introduction of his young brother as a sleeping guest can affect the claimant's right to the franchise. The statute requires that a lodger must occupy lodgings of the necessary value for the qualifying period "separately and as sole tenant." This man was "sole tenant" of his lodgings; and I cannot doubt that, according to the reasonable use of language, he occupied them "separately." Upon the facts of this case, with which alone we are concerned—if and when other and different conditions of fact are brought before us, they will be dealt with—I am clear that the Sheriff's decision is right, and that we should answer the question put to us in the affirmative.

LORD MACKENZIE.—I am of the same opinion. It is said that because the claimant has sometimes *ex gratia* allowed his brother to sleep in the bedroom which he occupies as a lodger during the qualifying period, he

* The Representation of the People Act, 1868 (31 and 32 Vict. cap. 48), enacts:—Sec. 4. "Every man shall . . . be entitled to be registered as a voter . . . who is qualified as follows: (that is to say) . . . 2. As a lodger has occupied in the same burgh separately and as sole tenant for the twelve months preceding the last day of July in any year lodgings of a clear yearly value, if let unfurnished, of ten pounds or upwards . . ."

The above Act was applied to counties by the Representation of the People Act, 1884 (48 and 49 Vict. cap. 3), sec. 2.

¹ 48 and 49 Vict. cap. 16.

² The following case was cited:—Campbell v. Rankin, (1894) 2 S. L. T. 326. Reference was also made to Nicholson on Elections (2nd ed.), pp. 97 and 98.

cannot be held to occupy the room separately and as sole tenant in the Dec. 11, 1911. sense of the statute, and cannot therefore be registered as a voter in respect Milne v. Douglas. of it. It appears to me that such an objection to the claimant's qualification is quite untenable.

LORD SKERRINGTON.—I concur.

THE COURT answered the question in the affirmative.

RUSSELL & DUNLOP, W.S.—P. GARDINER GILLESPIE & GILLESPIE, S.S.C.—Agents.

JAMES GREGORY, Appellant.—*Mercer*.
WILLIAM TRAQUAIR, Respondent.—*Macquisten*.

No. 95.

Dec. 11, 1911.

Election Law—Household occupation franchise—“Part of a house occupied as a separate dwelling”—Inhabitant occupier of unfurnished apartments in a dwelling-house—Control—Representation of the People Act, 1884 (48 and 49 Vict. cap. 3), secs. 2, 7 (4). Gregory v. Traquair.

A widower was enrolled as a county voter as tenant of a house which consisted of three rooms and a kitchen. He, however, only occupied one of the rooms, the rest of the house being occupied by his daughter and her husband and family. The daughter cooked her father's meals in the kitchen, but he partook of them in his own room. His son-in-law paid him half the total rent and taxes, and owned the furniture in the portion of the house occupied by himself and his family. All the apartments and the street door were fitted with locks and keys, the key of the street door being left in the lock, and the last person coming in at night locking the door.

Held that the inference from these facts was that the father-in-law retained the control of the house, and, accordingly, that the son-in-law was not entitled to the franchise as an inhabitant occupier of a separate dwelling.

At a Registration Court for the county of Midlothian, held at Edinburgh on 2nd October 1911, William Traquair, W.S., Edinburgh, a voter on the List of Voters for the county, objected to the retention on the List of Voters of the name of James Gregory, Kirknewton, on the ground that Gregory was not possessed of a household qualification in terms of the Representation of the People Act, 1884, sections 2 and 7 (4). Registration
Appeal Court.
Lord Dundas.
Lord Mac-
kenzie.
Lord
Skerrington.

The Sheriff (Maconochie) having sustained the objection and ordered the name to be deleted from the list, Gregory obtained a special case for appeal in which the following facts were stated to be admitted or proved:—

“The tenant of the house (whose name appears in the Valuation-roll as such) is Francis Nicol, Gregory's father-in-law. Nicol is enrolled as a voter as tenant of said house. The house is entered by a door from the street. The outer door enters upon an inner passage. There are four apartments in the house, viz., a kitchen and room on the ground floor, entered by separate doors on the opposite sides of the passage, and two rooms on the upper floor, the access to which is by a stair at the end of the passage. Gregory occupies the kitchen and the two rooms upstairs exclusively, with his wife and children, while Nicol, who is a widower, occupies exclusively the room on the ground floor opposite the kitchen. The room occupied by Nicol is furnished exclusively with furniture belonging to him, while all the

Dec. 11, 1911. furniture in the rooms occupied by Gregory belongs to him. There is no written agreement between Nicol and Gregory as to the terms on which the latter occupies the rooms above specified. The door of each of the apartments is fitted with a lock and key; the street door has also a lock and key, the key being left continuously in the lock; the last person to come in at night locks the door. The rent of the house is £5, 10s., and Gregory pays to Nicol £2, 15s. of the rent due to the landlord, and one-half of the rates and taxes, as the claims come in to Nicol. Mrs Gregory cooks Nicol's food, Nicol taking his meals in his own room. Gregory has occupied the same apartments since 1904, and has made the payments above set forth to his father-in-law since that year. The introduction of Gregory and his household into Nicol's house was a family arrangement arrived at on the death of Mrs Nicol in December 1904. The tenant of the house has no power to sublet.* Gregory has been on the Register of Voters in respect of the rooms he occupies since 1905."

Gregory v.
Traquair.

The question of law for the decision of the Court was:—"Whether, in the circumstances, the said James Gregory is entitled to remain on the Roll of Voters in respect of his occupancy of the said rooms in the said house?"†

The case was heard on 11th December 1911.

Argued for the appellant—The appellant here was tenant of a dwelling-house occupied as a separate dwelling, consisting of the kitchen on the ground floor and the two rooms on the upper storey. His father-in-law, the principal tenant, although he resided on the premises, exercised no control whatever over the portion of the house rented by the appellant. Control was admittedly the criterion.¹

* At the hearing of the appeal it was admitted that this statement was erroneous, and that the tenant could sublet.

† The Representation of the People (Scotland) Act, 1868 (31 and 32 Vict. cap. 48), enacts:—Sec. 3. "Every man shall . . . be entitled to be registered as a voter at elections for a member . . . for a burgh . . . who . . . (2) Is, and has been for a period of not less than twelve calendar months next preceding the last day of July, an inhabitant occupier, as owner or tenant, of any dwelling-house within the burgh . . . Provided also that no man shall under this section be entitled to be registered as a voter by reason of his being a joint occupier of any dwelling-house."

The Representation of the People Act, 1884 (48 and 49 Vict. cap. 3), enacts:—

Sec. 2. "A uniform household franchise and a uniform lodger franchise at elections shall be established in all counties and boroughs throughout the United Kingdom, and every man possessed of a household qualification . . . shall . . . be entitled to be registered as a voter . . ."

Sec. 7 (4). "The expression 'a household qualification' means, as respects Scotland, the qualification enacted by the third section of the Representation of the People (Scotland) Act, 1868, and the enactments amending or affecting the same, and the said section and enactments shall, so far as they are consistent with this Act, extend to counties in Scotland, and for the purpose of the said section and enactments the expression 'dwelling-house' in Scotland means any house or part of a house occupied as a separate dwelling, and this definition of a dwelling-house shall be substituted for the definition contained in section fifty-nine of the Representation of the People (Scotland) Act, 1868."

¹ Bishop v. Duffy, (1894) 22 R. 192; Bradley v. Baylis, (1881) 8 Q. B. D. 195.

Argued for the respondent ;—In the present case admittedly a joint occupation of the house would not avail the appellant. He required to establish that he occupied the portion he rented as a separate dwelling. He clearly did not. In the first place, his occupation of the kitchen was not separate but joint, his father-in-law constructively occupying it through his daughter, who cooked his meals there. In the second place, it was clear that the father-in-law, who lived on the premises, exercised the ultimate control.¹

Dec. 11, 1911.
Gregory v.
Traquair.

LORD MACKENZIE.—I think that the result of the authorities quoted in argument is to show that the decision in such a case as this depends on the facts of the particular case. While the question is not strictly one of fact, it comes to be very nearly so in this case. I think that the determination of the Sheriff should be sustained, to the effect that the claimant does not possess the necessary qualification under section 2 and section 7 (4) of the Act of 1884. Section 2 of that Act deals with household qualification, and section 7 (4) provides that “the expression ‘dwelling-house’ in Scotland means any house or part of a house occupied as a separate dwelling.”

The question in the case is whether on the facts we are satisfied that James Gregory occupied part of this house as a separate dwelling-house. Nicol, his father-in-law, is enrolled as a voter as tenant of the house. On the death of Nicol's wife his daughter and her husband, the claimant, came to live in his house. It is set out in the case that Gregory “occupies the kitchen and the two rooms upstairs exclusively, with his wife and children, while Nicol, who is a widower, occupies exclusively the room on the ground floor opposite the kitchen.” But it is a plain inference from the facts that the kitchen must be occupied jointly; because the case states that “Mrs Gregory cooks Nicol's food, Nicol taking his meals in his own room.” In that state of matters there is certainly an onus on the claimant to show that he has an exclusive use and control of the kitchen, which he has failed to discharge. Further, there is a finding that the key of the street door is used indifferently by the tenant and his son-in-law, but it is impossible to resist the inference that, in the event of a dispute, the father-in-law would have the control of the front door. Though it is stated that the rooms upstairs have locks and keys, it is apparent that this means no more than the ordinary locks with which dwelling-rooms are commonly provided.

When we turn to the result of the English cases which were considered in *Bishop's case*² in this Court, it has to be observed that in the case before us Nicol does reside in the house, and in addition he has in the person of his daughter one who discharges the duties of a servant. The inference seems therefore to be that Nicol has the control. Whether the correct view is that the Gregorys are lodgers, for which there is much to be said, or whether they are joint occupiers, it is not necessary for us to determine. At least the facts fall short of what is necessary to entitle the Court to say that the claimant is occupier of part of the house as a separate dwelling.

LORD SKERRINGTON.—I concur.

¹ *Bradley v. Baylis*, (1881) 8 Q. B. D. 195; *Ancketill v. Baylis*, (1882) 10 Q. B. D. 577; *Milne v. Brunton*, 1909 S. C. 912.

² 22 R. 192.

Dec. 11, 1911. **LORD DUNDAS.**—I agree. I would only add that the argument proceeded on the footing that the statement in the case that "the tenant of the house has no power to sublet" is not correct; and that element accordingly falls out of the matter. The decision of the case comes to depend on the view to be taken of its own facts, which are very peculiar. I should be slow to differ from the conclusion of an experienced Sheriff upon a matter of that sort, unless I thought it was plainly wrong; but in the present case I think the Sheriff's decision is right. The question will be answered in the negative.

Gregory v.
Traquair.

THE COURT answered the question of law in the negative, and dismissed the appeal.

A. THOMSON CLAY, W.S.—W. TRAQUAIR, W.S.—Agents.

No. 96.

Mar. 4, 1912.

O'Connell v.
Blacklock.

JOHN O'CONNELL, Appellant.—*A. R. Brown.*
JONATHAN EDWARDS BLACKLOCK, Respondent.—*Johnston, K.C.*—*Cochran-Patrick.*

Election Law—Lodger Franchise—Member of brotherhood occupying room in college.

A member of a voluntary association or brotherhood, which devoted itself to teaching, occupied a bedroom in a college belonging to the brotherhood. He was not paid for his services, but was provided with board, lodging, clothing, and everything necessary for his maintenance. Held that he was not a "lodger" for the purposes of the franchise, in respect that there was no contract of location, either express or implied, between him and the brotherhood, under which he had a right to occupy the room.

Doyle v. Craig, 1911 S. C. 493, distinguished.

Registration
Appeal Court.
Lord Dundas.
Lord Mac-
kenzie.
Lord
Skerrington.

AT a Registration Court for the burgh of Dumfries, held at Dumfries on 6th October 1911, John O'Connell, B.A., teacher, St Joseph's College, Craig's Road, Dumfries, claimed to be enrolled in the Register of Voters for the burgh of Dumfries as occupier and sole tenant of lodgings described as a "bedroom" situated in the college.

Jonathan Edwards Blacklock, solicitor, Dumfries, a voter on the roll, objected to the claim. The Sheriff (Fleming) sustained the objection, and at the request of the claimant stated a case for appeal.

The case set forth:—"The facts are as follows:—

"The claimant is a member of the Order or Association known as the Marist Brothers. The Marist Brothers are a voluntary association of men who devote themselves to the education of boys and young men.

"Members of the Association on their admission submit themselves to the rules of the Order and the directions of their superiors in the Order, and out of the common funds of the Order are provided with board, lodging, clothing, and everything necessary for their suitable maintenance. They receive no other remuneration. Great Britain and Ireland form a Province of the Order, and the governance of the Order within that Province is in the hands of a General Council, of which the claimant may be a member, and, subject to that Council, of the Provincial Superior, who is at present the Reverend Thomas Peter McCann. The Provincial Superior determines the work to be per-

formed by each member and his place of residence, and may at any time in his own discretion, subject to appeal to the General Council, vary such work or place of residence. The claimant about three years ago was directed by the said Provincial Superior to act as one of the assistant masters of St Joseph's College, Dumfries, a secondary school for boys, most of whom reside in the college. Robert Devine is the superior or headmaster of the college, and the claimant is subject to his orders and directions in all matters, including the selection of a bedroom for his occupation. Robert Devine has no power to transfer the claimant from St Joseph's College to any other school or college, or to dismiss him from the Order.

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"The claimant has, during the whole period of his work at St Joseph's College, occupied the bedroom in respect of which he claims to be registered as a voter. That bedroom is of the required annual value. The claimant has never paid to anyone any rent for the bedroom, and no deduction has been made in respect of his occupancy thereof from any emolument or consideration drawn from the funds of the Order.

"St Joseph's College is vested in trustees for behoof of the Order.

"On the facts stated I held that there is no contract of location between the claimant and the Order of which he is a member, that there is no room for implying any such contract, there being no consideration paid to the claimant in respect of the services he renders to St Joseph's College, and consequently no deduction from such consideration in respect of his occupancy of the said room, and that such occupancy is defeasible at the will of the Superiors of the Order. I therefore held that the claimant is not a lodger in the sense of the Act, and rejected the claim."

The case also set forth the names of a number of other claimants who were similarly situated, and whose claims had also been rejected by the Sheriff.

The questions of law for the opinion of the Court were:—"(1) Whether on the facts stated I was entitled to reject the claim? (2) Whether on the facts stated the claimant is a lodger in the sense of the Representation of the People (Scotland) Act, 1868, and the Representation of the People Act, 1884, and as such entitled to be registered as a voter?"

The case was heard on 11th December 1911. On that date the Court remitted to the Sheriff "to amplify the facts on which he bases his finding in law that there is no room for implying a contract of location, and generally to state fully all the facts bearing upon the relations and mutual arrangements between the Order mentioned in the case on the one hand and the respective claimants on the other, and to report *quam primum*."

The Sheriff reported as follows:—

"As regards the first part of your Lordships' remit, I beg to report that the only points on which I can amplify my statement of the facts I found proved are:—1. That the Marist Brothers are joint owners of all the property belonging to the Brotherhood, at all events in the province of the United Kingdom, although for convenience the title to the heritable subjects is taken in the name of trustees. 2. That Robert Devine, the Superior of St Joseph's College, had power not only to select bedrooms for the use of the claimants when they first entered the college, but also to change these bedrooms from time to time at his pleasure.

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Blacklock.

"As regards the second part of your Lordships' remit, I beg to report as additional facts proved:—1. That the claimants took vows upon entering the Brotherhood to obey the orders of those in authority over them, that for disobedience to those orders they might be expelled from the Brotherhood, that if dissatisfied with any such orders they might appeal to the Provincial Superior and from him to the General Council, and that if still dissatisfied they might leave the Order, though the more correct course would be to appeal to the Superiors, stating their wish to be dispensed from their vows. 2. That there was no evidence of any obligation upon the Order or the claimants enforceable in a Court of law. 3. That by the rules of the Order all the brothers lived within buildings the property of the Brotherhood, even where, as in Glasgow, their work was performed outwith these buildings.

"The view in law upon which I proceeded was that location is a contract by which 'one party in consideration of a certain hire, which the other engages to pay, agrees to give during a certain time, or to a certain effect, the temporary use of a certain subject' (Bell's Prin. sec. 133), and that to justify a lodger claim there must be a valid contract of location either express or that can be implied in existence at the beginning of the qualifying period, and continued either itself or by successive contracts of location during the remainder of the period.

"I found on the facts proved:—That the claimants were joint owners of the house in which they claimed to be lodgers. That there was no certain hire, nor any remuneration, deduction from which in respect of lodgings provided might be looked on as a certain hire. That there was no certain time stipulated for the endurance of the contract. That there was no certain subject the use of which was stipulated for. That the fact that during the whole qualifying period the claimants had occupied the same subjects did not cure the two immediately foregoing defects."

The case was again heard on 4th March 1912.

Argued for the appellant;—The case was indistinguishable from, and was ruled by, *Doyle v. Craig*.¹ The appellant was bound to give his services, and the Brotherhood were bound to give him remuneration in return, the remuneration taking the form of board and lodging. The fact that the remuneration was wholly in kind and not in money was quite immaterial.² The case was distinguishable from *Macdonald v. Dickson*,³ which was a case of a father gratuitously allowing his son to lodge in his house. It was also immaterial that at any moment the superior might turn the claimant out of his room and make him occupy another. That was approximately the position of every lodger,⁴ and did not at anyrate affect the fact that he had for the necessary period occupied a room of the requisite value, not *ex gratia*, but as remuneration for services rendered.

Argued for the respondent;—The appellant was not entitled to be put upon the roll, for he was not a "lodger" in the sense of the Representation of the People Acts. It was true that he occupied a room,

¹ 1911 S. C. 493.

² *Brown v. Martins*, (1885) 13 R. 159; *Daly v. Brown*, (1885) 23 S. L. R. 111.

³ (1888) 16 R. 143.

⁴ *Vide Urquhart v. Adam*, (1904) 7 F. 157.

but mere occupation was not enough. What was required was occupation under an onerous contract of location. There was no such contract here, the appellant being just in the position of a son allowed to live in his father's house.¹ The whole arrangement between the parties was a voluntary one.² It was the absence of a contract which distinguished the present case from *Doyle v. Craig*.³ The undernoted cases, although they dealt with the service franchise, were instructive.⁴

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LORD DUNDAS.—This case concerns a claim for the lodger franchise and is of some importance, as we are told that its decision will affect a considerable number of other votes. When the case was last before the Court the appellant's counsel expressed himself as dissatisfied with the way in which it had been stated by the learned Sheriff; and we accordingly made a remit to him asking for additional information. We now have that report before us, and I have now no doubt that the appellant's case fails. The Sheriff reports to us, as one of the "additional facts proved," "that there was no evidence of any obligation upon the Order, or the claimant, enforceable in a Court of law." That appears to me to be merely another way of saying that there was no evidence of any binding contract of location as regards the particular lodging upon which this claim is made. The absence of such evidence clearly distinguishes this case from that of *Doyle v. Craig*,⁵ on which the appellant founded, and which at first sight has a considerable resemblance to the present. The distinction is clearly brought out in the opinions of the learned Judges. Lord Skerrington put the matter expressly upon legal obligation. Lord Mackenzie was satisfied that an implied contract of location was proved; and went on to point out that, in a case of this sort, labour may be an effective equivalent to money. With that observation, of course, I quite agree. I may remind your Lordships that, as long ago as the case of *Brown v. Ferguson*,⁶ Lord Mure having concluded his brief opinion by saying that "it makes no difference in principle that it is money's value and not money that passes," Lord Craighill followed with an even briefer and very pertinent opinion in these words: "No. Once you have the contract, I think it makes no difference at all." In the present case we have no express contract, and no materials for the implication of a contract; and that appears to me to be *per se* a sufficient ground for disposing of the case, though there are probably other difficulties in the way of the appellant. I am for affirming the decision of the Sheriff, and answering the first question in the affirmative and the second in the negative.

LORD MACKENZIE.—I concur with your Lordship. The present case is clearly distinguishable from *Doyle v. Craig*.⁷ In that case there was an implied contract of location upon the facts stated. Here there is no express contract of location, and no sufficient facts from which such a contract can be implied.

¹ Macdonald v. Dickson, 16 R. 143.

² Ladd v. O'Toole, [1904] 2 I. R. 389.

³ 1911 S. C. 493.

⁴ Cruise v. Annan, (1892) 20 R. 79; Monyhan, (1894) 22 R. 195; Topping v. Keogh, [1910] 2 I. R. 1.

⁵ (1885) 13 R. 159, 163.

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LORD SKERRINGTON.—I concur. The only title of occupation to a bedroom which this claimant possesses arises from the fact that he is a member of a voluntary Association or Brotherhood. When a person claims a civil right in respect of his membership of such an Association he must, in the first instance, show that, on a fair reading of the rules of the Association, he was intended to possess a domestic right which can be founded on as the basis of a similar civil right. It does not of course follow that a Court of law will enforce every right which the members of a voluntary association intend to confer on each other, but it is plain that a Court will not recognise any right arising out of membership unless it is made clear that according to the rules such a right was intended to be conferred.

In the present case all that we are told is that the members are under an obligation of obedience to their superiors, and that the claimant occupied a particular room in the college. It is nowhere stated that the rules of the Association conferred upon its several members a right to the exclusive possession of the rooms allotted to them, similar to the right of a lodger in a question with his landlord. If it had been stated that, notwithstanding the obligation of obedience, the claimant was entitled to exclusive possession of his room in a question with his superiors, we should then have had to consider whether he was or was not possessed of a civil right equivalent to the right of a lodger. In the absence of any relevant statement as to the rights conferred upon the claimant by the rules of the Association to which he belongs, I decline to consider whether he has or has not the rights of a lodger, according to the law of Scotland. Though the claimant's right of possession is defeasible at the pleasure of his superiors, he might, notwithstanding, have had such an exclusive right as entitled him to be regarded as a lodger—*Doyle v. Craig*.¹

THE COURT answered the first question in the affirmative and the second question in the negative, and dismissed the appeal.

ALEX. RAMSAY, S.S.C.—RUSSELL & DUNLOP, W.S.—Agents.

No. 97.

MRS ELIZABETH POTTS OR YOUNG, Pursuer (Respondent).—

J. R. Christie—Young.

Mar. 6, 1912.

Young v.
Niddrie and
Benhar Coal
Co., Limited.THE NIDDRIE AND BENHAR COAL COMPANY, LIMITED, Defenders
(Appellants).—*Munro, K.C.—Pringle.*

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), sec. 13—
“*Dependants*”—*Children deserted by their father and maintained chiefly*
by their brothers.

A workman deserted his wife and his four children in March 1907. Up to 1909, besides a few shillings given directly to the children, occasional small payments, amounting in all to £2, were made to the wife by her husband for the children's support. In September 1909 she obtained a decree against him for aliment of the two younger children who were in pupillarity, and recovered 17s. from his employers by arrestment used on the decree. The workman then disappeared and was not traced until his death in April 1911. From the date of his desertion his wife and family were supported partly from small

¹ 1911 S. C. 493.

sums earned by the wife but mainly from the earnings of the two elder sons. After the workman's death the wages then due to him were paid to his wife.

The wife having, on behalf of her two pupil children, claimed compensation under the Workmen's Compensation Act, 1906, in respect of their father's death—

Held that the children were neither wholly nor partially dependent on their father's earnings at the time of his death, and were, therefore, not entitled to compensation.

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Is an arbitration in the Sheriff Court at Edinburgh, under the Workmen's Compensation Act, 1906,* in which Mrs Elizabeth Potts or Young claimed compensation on behalf of her two pupil children in respect of the death of her husband from an accident sustained by him while in the employment of the Niddrie and Benhar Coal Company, Limited, the Sheriff-substitute (Guy), awarded compensation, and, at the request of the employers, stated a case for appeal.

2D DIVISION.
Sheriff of the
Lothians and
Peebles.

The case set forth:—"The facts admitted or proved were as follows:—

"The claimant was married to the deceased Robert Young on 10th June 1891. There are four children of the marriage, Arthur, Robert, Gretta, and Richard, aged at the death of their father twenty-one, eighteen, eleven, and eight years respectively. In March 1907 the said Robert Young deserted the claimant and his family, removed certain furniture from the family home at Waverley Place, High Bonnybridge, and took a house for himself at Broomhill. At that time he was engaged as a carter at the paper mills there. The claimant continued to reside at Waverley Place aforesaid along with the four children. She and her family were maintained out of the earnings of the two elder children, her own earnings from charring, and other kinds of occasional employment, and occasional sums of 2s. 6d. or 3s., which Robert Young gave to his two younger children when he met them on the road, and sums amounting in all to about £2 during the period of two years immediately following on his said desertion, which the claimant got from him when she met him on the road as aliment for the children. The said Robert Young afterwards was employed as a miner by Messrs Stein & Company, at Castlecary. After he got employment there, nothing was being got from him for the children, and the claimant in June 1909 consulted a solicitor in Falkirk who, on her instructions, wrote to Robert Young requesting payment of aliment for the two younger children. Notwithstanding his promise to pay aliment, he did not pay, and the claimant raised an action in the Sheriff Court of Stirling, Dumbarton, and Clackmannan, at Falkirk, against him in which she was found entitled to the custody of Richard and Gretta Young, the pupil children of the marriage, during their respective pupillarities, and in which decerniture was granted against the said Robert Young for payment of the sum of £15, 12s. per annum for each of said children

* The Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), enacts:—Sec. 13. "In this Act, unless the context otherwise requires, . . . 'Dependants' means such of the members of the workman's family as were wholly or in part dependent upon the earnings of the workman at the time of his death. . . ."

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payable quarterly and in advance with the legal interest on each quarterly instalment from the date of its becoming due till payment. The decree was granted on 6th September 1909, the first instalment being made payable on that date. The claimant extracted the decree, and by virtue of the warrant contained therein used arrestment in the hands of the said Robert Young's employers, Messrs Stein & Company, on 23rd September 1909. The arrestment attached 17s., which was thereafter paid to the claimant. To avoid further diligence being used on said decree, the said Robert Young left his said employment, and also left the district where he had been employed. Notwithstanding that the claimant and her two sons, with the assistance of others, made all reasonable inquiries, they did not learn where the said Robert Young had gone to until the eldest son received a post card from a doctor in the Royal Infirmary, Edinburgh, on the day of the deceased's death, namely, 22nd April 1911. On that day the said Robert Young, who had for some time previous been in the appellants' employment as a miner in their Woolmet Pit, met with an accident in that pit arising out of and in the course of his employment. He was crushed by a portion of the roof falling upon him, and sustained severe personal injury. He was removed to the Royal Infirmary, Edinburgh, where he himself gave direction for a post card to be sent to his eldest son requesting to see him. The son went to the infirmary in response to the post card, but his father had died before his arrival. The average weekly earnings of the deceased were 27s. 9d., and the sum of £216, 9s. is one hundred and fifty-six times his average weekly earnings. A sum of £2, 18s., was due to the said Robert Young at the date of his death in name of wages, and that sum was paid to the claimant by the head of the squad in which he was employed.

"From the date of said decree down till the said Robert Young's death, the claimant and her four children resided together. The claimant earned a sum of 3s. a week during that period, and no more. This sum was insufficient for her own maintenance. The pupil children earned nothing. The household was maintained out of the earnings of the two eldest sons, whose wages at the time of their father's death were about 25s. and 20s. per week respectively. The two pupil children of the deceased were thus during that period maintained by their two brothers, who were under no obligation to maintain them. They were not doing so *ex pietate*, and the sum contributed by them would have been recoverable by them from their father under said decree. I found that the deceased Robert Young was liable under said decree to repay the disbursements of the aliment due under said decree, and that his estates (if any), after his death, were also liable to be made available in the same manner. In these circumstances, I found that the deceased's said pupil children were wholly dependent upon the earnings of the deceased within the meaning of the Workmen's Compensation Act, 1906, and that, therefore, the employers were liable in compensation to the extent of the said sum of £216, 9s.

"In any event, I should hold that the said pupil children were, in respect of the occasional payments made by the deceased prior to the decree, the sum arrested, and the sum of wages made available after their father's death, partially dependent upon the earnings of the deceased, within the meaning of said Act."

The questions of law were:—(1) Whether the said pupil children

of the said deceased Robert Young were wholly dependent upon the earnings of the said deceased at the time of his death within the meaning of the Workmen's Compensation Act, 1906? (2) In the event of the foregoing question being answered in the negative, whether the said pupil children were partially dependent, as aforesaid, within the meaning of the Act." Mar. 6, 1912.
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The case was heard before the Second Division on 2nd and 6th March 1912.

Argued for the appellants;—Dependency was in each case a question of fact,¹ and, on the facts of this case, the pupil children were not in any way dependent on the deceased. The arbitrator had found that for nineteen months before their father's death these children had been entirely supported by the earnings of their brothers; and this finding was conclusive against the claim for compensation. It was true that the deceased had made occasional payments to his wife and to the children; but these were all made before 1909, and were so trivial as to be insufficient to support a finding of dependency.² The decree and the arrestment following on it in 1909 might have been vital if they had been acquiesced in by the deceased, as in *Bowhill Coal Company, Limited, v. Smith*,³ or if they had been actually enforced against him from time to time up to the date of his death. But without acquiescence or enforcement, the decree was nothing more than the expression of the wife's legal right; and legal rights did not enter into the question of dependency. In the *Bowhill* case³ Lord McLaren observed that if money had not been actually applied by the injured person to the maintenance of a dependant, it must be shown that it was "at the disposal of the dependant"; and this had not been shown here. The payment of the £2, 18s. after the deceased's death could not be taken into consideration, as the definition of "dependants" in the Act referred to dependency at the time of the workman's death.⁴ The case of *Sneddon v. Addie & Sons' Collieries, Limited*,⁵ was overruled by the case of *Keeling*.⁶

Argued for the respondent;—Dependency being a question of fact, the arbitrator's finding on the point was a finding in fact which could not be disturbed unless it was wholly inconsistent with the evidence in the case. It could not, however, be said here that the arbitrator's finding was contrary to the evidence, and the finding must, therefore, stand. The facts on which the respondent relied were that the origin of the separation between the deceased and his wife and family was his desertion; that for two years after his desertion he had recognised his obligation towards his children by paying certain sums; that the respondent had not acquiesced in the separation or waived (assuming that she could do so) the children's claim on their father; that she looked to him for her support, and obtained decree against him and arrested his wages; and that the further enforcement of the decree was prevented only by the deceased's disappearance. These circum-

¹ *New Monckton Collieries, Limited, v. Keeling*, [1911] A. C. 648; *Lee v. Owner of Ship "Bessie,"* [1912] 1 K. B. 83; *Briggs v. Mitchell*, 1911 S. C. 705; *Baird & Co., Limited, v. Birsztan*, (1906) 8 F. 438.

² *Briggs v. Mitchell*, 1911 S. C. 705, *per* Lord Dundas, at p. 710.

³ 1909 S. C. 252.

⁴ *Pryce v. The Penrikyber Navigation Colliery Co.*, [1902] 1 K. B. 221.

⁵ (1904) 6 F. 992.

⁶ [1911] A. C. 648, *per* Lord Shaw, at p. 660.

Mar. 6, 1912. stances were in marked contrast to those in *Keeling's* case.¹ In that case the wife had acquiesced in the separation from her husband, had for twenty years earned her own livelihood,² and had deliberately abstained from seeking support from the deceased.³ In *Lee v. Owner of Ship "Bessie,"*⁴ Fletcher Moulton, L.J., took the correct view of the effect of the decision in *Keeling's* case.¹ All that *Keeling*¹ decided was that, while the claimant's legal right of support from the deceased was a fact to be taken into consideration, it was not *per se* sufficient to entitle the Court to hold that the claimant was a dependant in the sense of the Act. But, on the other hand, persons who had a legal right to maintenance by the deceased were not excluded merely because they were not at the time of his death participating in his earnings.⁵ This was established in *Sneddon v. Addie & Sons' Collieries, Limited*,⁶ *Coulthard v. Consett Iron Company*,⁷ *Williams v. Ocean Coal Company, Limited*,⁸ *Stanland v. North-Eastern Steel Company, Limited*⁹—which were referred to but not disapproved in *Keeling's* case¹⁰—and by the observations in *Turners Limited v. Whitefield*,¹¹ *Lindsay v. Stewart McGlashen & Son, Limited*¹²—cases which were expressly approved in *Keeling*¹⁰—and in *Addie & Sons' Collieries, Limited, v. Trainer*.¹³ It was enough if the claimant was looking to the deceased for support,¹⁴ and might reasonably count upon assistance from his earnings¹⁵; and the fact that the deceased had refused or failed to perform his obligation of maintenance would not deprive the claimant of compensation.¹⁶ The children were in that position here, although they were being supported, in the absence of their father, by their brothers. They were dependent, therefore, on their father; and must be held to be totally dependent, as they had no "permanent and substantial" means of support.¹⁷ If, however, they were held to be only partially dependent, the maximum amount of compensation might still be competently awarded.¹⁸

LORD JUSTICE-CLERK.—It is evident, I think, from the numerous cases to which we have been referred, that a great deal of confusion has crept into the decisions owing to the ambiguity of the word "dependant." That word may be used in one or other of two senses. It may signify a depen-

¹ [1911] A. C. 648.

² [1911] A. C. 648, *per* Lord Shaw, at p. 659.

³ [1911] 1 K. B. 250, at p. 251. ⁴ [1912] 1 K. B. 83, at p. 88.

⁵ *Keeling v. New Monckton Collieries, Limited*, [1911] 1 K. B. 250, *per* Fletcher Moulton, L.J., at p. 256.

⁶ 6 F. 992. ⁷ [1905] 2 K. B. 869, *per* Romer, L.J., at p. 876.

⁸ [1907] 2 K. B. 422. ⁹ [1907] 2 K. B. 425, note.

¹⁰ [1911] A. C. 648, *per* Lord Shaw, at pp. 657-660, and Lord Robson, at pp. 663, 664.

¹¹ (1904) 6 F. 822, *per* Lord Kinnear, at p. 825.

¹² 1908 S. C. 762, *per* Lord Low, at p. 766.

¹³ (1904) 7 F. 115, *per* Lord Moncreiff, at p. 118.

¹⁴ *New Monckton Collieries, Limited, v. Keeling*, [1911] A. C. 648, *per* Lord Atkinson, at p. 653.

¹⁵ *Orrell Colliery Co. v. Schofield*, [1909] A. C. 433.

¹⁶ *New Monckton Collieries Co. v. Keeling*, [1911] A. C. 648, *per* Lord Robson, at p. 662.

¹⁷ *Cunningham v. M'Gregor & Co.*, (1901) 3 F. 775, *per* Lord Moncreiff, at p. 778.

¹⁸ *Hodgson v. West Stanley Colliery*, [1910] A. C. 229.

dant in right—which is one thing—or a dependant in actual fact at a particular date—which is a totally different thing. The true question appears to me to be, not, Had the applicant a legal right to maintenance by the deceased? but, Was the applicant actually receiving support from one who was under an obligation to give support, and who was also the servant of the master whom it is proposed to make liable in compensation? Dependants are to get compensation for what they were receiving from the workman who has been killed and what they lose by his death, not for something they would have got if the deceased had done his duty while he was alive. In so stating the question, I think I am expressing what is really the effect of the recent decisions in this matter. In *Keeling's case*,¹ in which the decision of this Court in *Briggs v. Mitchell*² was approved, Lord Atkinson says, "It may be that her husband"—i.e., the husband of the applicant—"was in law bound to maintain her, but it is by the discharge of this obligation, not by its mere existence in law, that a husband supports and maintains his wife."

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Now, if this is the law, I think it enables us to decide this case without any difficulty. Was the deceased, in any sense, discharging his obligation to the children who now claim compensation from the employer? Would the compensation, if it were awarded, take the place of something which the children were receiving before the claim for compensation arose? I think it is very evident that it would not. It would be a payment to them in respect of their father's death,—a payment not corresponding to anything he was giving them or expending for their support during life. I do not think the point can be expressed better than in the words of Lord Dundas in the case of *Briggs*,² in which the other Judges, including myself, concurred, when he observed that it had been decided "that dependency is, in each case, to be decided upon a broad view of the facts—Was the applicant, in fact, supported by the earnings of the deceased at the date of his death or from other sources?—and that, if the facts disclose the latter state of matters, the existence of a legal obligation of support by the deceased is irrelevant and does not establish the applicant's claim, there being no legal presumption (to be displaced in each case) arising from such obligation." His Lordship then added: "The Scots cases are binding upon this Court, and must continue to be our guides until they are pronounced by the House of Lords to be erroneous; and I must therefore, with all respect, decline to follow *Keeling's case*³ so far as it differs from the Scots decisions." Now, the course which the Court took in differing from the English Court has been approved in the House of Lords; for the case of *Keeling*¹ was appealed to the House of Lords, where the decision of the Court of Appeal was held to be erroneous, and the decision in *Briggs's case*² was approved. The Court of Appeal in England, with that loyalty which all Courts show to a decision of the House of Lords, have, in a subsequent case, held quite distinctly that the law stands as was settled in the case of *Briggs*.²

The question comes to be whether the facts in this case will permit of the decision at which the Sheriff-substitute has arrived. Here, again, there has been some confusion, in my opinion, between two things, viz., What is

¹ [1911] A. C. 648.² 1911 S. C. 705.³ [1911] 1 K. B. 250.

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a question of fact? and What is the effect to be given to a decision on a question of fact? Undoubtedly the facts which are proved are to be stated by the Sheriff as matters of fact. But when upon these facts the Sheriff comes to decide as to the right of the party to compensation, he is then—although dealing with a matter which is fact—really and necessarily giving a decision in law. You may find certain facts in a case—in this Court or in the ordinary Sheriff Court—and, in respect of these facts, you may arrive at something which is a legal deduction from these facts, which must be held to be a fact and upon which decree will proceed. Now, here the case is exactly in that position, and I should like to call attention to a passage from Lord Atkinson's judgment in the case of *Keeling*¹ which shows plainly that a finding upon the facts that a certain thing is so-and-so is not a finding of fact in itself but a finding in law, and that the Court is entitled, having certain facts before it, to consider whether these facts would or would not justify another finding. Lord Atkinson says: "Isaac Keeling, the respondent's husband, had never, during a period of over twenty years immediately preceding his death, contributed one farthing out of his earnings, or at all, to the support and maintenance of his wife, and I cannot conceive how any reasonable man could, upon the evidence, come to the conclusion that he had, in fact, maintained her wholly or in part, or that there was any reasonable probability that he would ever do so, either voluntarily or under compulsion." Now, of course, Keeling was under a legal obligation to support his wife; and the decision makes it plain that the essential question was whether he had, in point of fact, been supporting her. Lord Atkinson further said: "Assuming, then, that the finding of the County Court Judge was what the Master of the Rolls states it to have been, I think that there was no evidence before him which could lead reasonable men to the conclusion at which he arrived, that his award was therefore bad, and, with all respect to the Court of Appeal, that their decision was based upon an assumption decided by your Lordships' House, on more than one occasion, to be erroneous." I think every word in that sentence applies to the present case.

There are two questions here. The one question is as to total dependence, the other is as to partial dependence. Upon the first question I think that what has been said effectually disposes of it. As regards the second question, anything that goes to support the case of partial dependence is so vague and, may I say, trifling, and, in point of fact—if it exists at all—refers to a period so remote from the date of the workman's death as not to be worthy of consideration. For over certainly eighteen months before his death these children were not in fact receiving anything of value from him for their support.

Accordingly, I am of opinion that we should give answers to the two questions different from the answers given by the Sheriff-substitute.

LORD DUNDAS.—I agree. I think both of the questions ought to be answered in the negative, and I need add but little. The respondent's argument, as regards the first question, seemed to me to be a very difficult

¹ [1911] A. C. 648.

one to maintain, looking to the facts found in this case by the learned Mar. 6, 1912. arbitrator, and the decisions of *Briggs*¹ in this Court, and of *Keeling*² in the House of Lords. I had occasion to express my own views on this matter in the former case pretty fully, and I do not think it necessary to say more now.

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The second question may suggest more doubt, but I think it also must be answered in the negative. The learned arbitrator has given us the facts upon which, if total dependence were to be negatived, he would be prepared to hold dependence "in part" proved, and these were the occasional payments made by the deceased prior to the decree, the sum arrested, and the sum of wages made available after the father's death. Now, one must remember that the question on this point is whether or not these children were, in part, dependent upon the earnings of the workman at the time of his death, and I cannot think that the facts referred to enable us to answer that question in the affirmative. The payments by the deceased prior to the decree consisted of occasional half-crowns to the children, I think, and of certain small sums—no doubt contributions of aliment—amounting in all to £2. But they are not only small in amount, they are too far back in date, to my mind, to have much importance, the last of them being sometime (early, I think) in 1909. The same remarks apply to the sum of 17s. which was arrested and recovered sometime in September 1909. And then, as regards the small sum of wages which had been due to the deceased man and was paid to his widow after his death, I do not think it comes in. The English case of *Pryce*,³ to which we were referred, is instructive upon that point. It was money coming after the death, and not money derived from him during his life. On these grounds, I think the second question must be answered also in the negative.

LORD SALVESEN.—I am of the same opinion. Each case of this kind must be decided on its own special facts as these have been ascertained by the proper tribunal. The broad facts in this case are that for eighteen months or so this workman, who had two years previously deserted his wife and family, did not contribute one penny to their support. He had disappeared in order to evade his obligation to support them, and they had been unable to trace him. Now, in these circumstances, I find it impossible to affirm that the children, who are the claimants here, "were wholly or in part dependent upon the earnings of the workman at the time of his death," which is the language of the Act. I think that they were dependent on their mother, with whom they resided, and who, in turn, received assistance—which she might naturally expect, and, indeed, to which, after the desertion of her husband, she was probably legally entitled—from the two sons who were residing with her, and who were earning substantial sums weekly.

These being the facts of this particular case, we need not anticipate other or narrower cases such as were figured by Mr Christie in his very able argument. Taking the facts here as they have been found by the Sheriff-substitute, I think we should answer the questions of law in the negative.

¹ 1911 S. C. 705.

² [1911] A. C. 648.

³ [1902] 1 K. B. 221.

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LORD GUTHRIE.—I agree. The respondent admits that the mere fact of legal obligation upon the part of the deceased man would not be enough to support the Sheriff-substitute's judgment. That follows, manifestly, from the occurrence of the words in the Act "at the time of his death," that view being confirmed in terms by the case of *Keeling*.¹ But the respondent differentiates this case from *Keeling*,¹ in respect of the admitted facts that, in this case, the desertion was of the wife and not by the wife, that the wife looked throughout to the husband for support, and that she made every effort to make him liable for the support of herself and the children, including obtaining decree for aliment and following it up by arrestment. It is said that that second element is sufficient for the respondent. It appears to me that, on the cases, that will not do, and that the respondent would at the very least require to point us to facts which would bring this question within the case figured by Lord-Justice Fletcher Moulton in the case of *Lee*,² when he said,—“If on the evidence there is any fair probability that the legal rights would at any future time have been actually and effectually asserted by the wife, then there is evidence of dependency.” It is not necessary to decide whether that view is sound or not, because, it appears to me, that there is no such evidence here. The respondent, I think, admitted that no case has occurred of children being held dependent on a father who, at the time of his death and for a lengthened period before it, had been concealing his whereabouts from his family. I would like to add that, while “dependent” seems to me to be “actually dependent,” I do not think it necessarily involves actual payment, up to the time of his death, by the father. If a case occurred where the children were being supported on the father's credit by shopkeepers or banks, that, I think, might quite well come within the words of the statute.

I would only add, if it be the fact (as it appears to me to be) that a decision in the respondent's favour would be going further than any previous case had gone, that I see no reason, in principle, for extending the rule. The object of the Act evidently was that, when accident takes away the children's support, in whole or in part, the employer should pay. It seems to me that the case here does not come within the rule of any of the decided cases or within the principle of the statute.

THE COURT answered both questions of law in the negative.

R. & R. DENHOLM & KERR, Solicitors—W. & J. BURNES, W.S.—Agents.

¹ [1911] A. C. 648.

² [1912] 1 K. B. 83.

LACHLAN MACKINNON AND ANOTHER (M'Conochie's Trustees),
Pursuers and Real Raisers.—*Dunbar.*

ALEXANDER GRANT M'CONOCHIE, Claimant (Reclaimers).—
Sandeman, K.C.—J. G. Jameson.

DONALD JAMES ROBERT M'CONOCHIE AND OTHERS, Claimants
(Respondents).—*Murray, K.C.—W. T. Watson.*

No. 98.

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*Succession—Heritable and Moveable—Conversion—Implied conversion—
Partial intestacy—Partial conversion.*

A testator by his trust-disposition and settlement provided for the payment of debts, Government duty, legacies, and annuities, and also for the retention by his trustee of a sum for each of his brother's children in liferent, with fee to their issue. He directed that all these purposes should be satisfied out of his "estate, heritable and moveable," and that the residue should be divided amongst such educational, charitable, and religious purposes within the city of A. as his trustee should select. He gave the trustee a power of sale, but did not direct him to sell.

The trustee paid the debts, duty, and legacies out of the moveable estate, sold a portion of the heritable estate, and expended the price and the surplus moveable estate on improving the remaining heritable estate, which he retained. The annuities were paid and the liferents were satisfied out of the rents. As a result of this system of management, the estate, while largely increased in value, came to consist entirely of heritage or the accumulated rents of heritage.

The testator died in 1879. His brother, who was his sole heir in heritage and in moveables, died intestate in 1893. In 1909, in a special case, the residuary purpose of the trust was held void from uncertainty.

In a competition between the heir in heritage and the heirs *in mobilibus* of the testator's brother for the undisposed-of residue held (1) that the operative trust purposes fell to be implemented in rateable proportions out of the heritable and the moveable estate; (2) that accordingly the heritable estate was converted to the extent necessary for the execution of the operative purposes of the trust, but no further; (3) that the undisposed-of residue to which the testator's brother acquired right as his heir was heritable and moveable in the proportion which heritage bore to moveables at the testator's death; and (4) that on the death of the brother intestate the residue passed to, and now fell to be divided in that proportion between, his heir in heritage and his heirs *in mobilibus*.

Opinions reserved as to the effect on the succession to the truster's heir if there had been a direction to convert the whole estate.

GEORGE CHARLES M'CONOCHIE, teacher, Aberdeen, died on 13th 2D DIVISION.
January 1879, leaving a trust-disposition and settlement by which Lord Cullen.
he conveyed his whole means and estate to a trustee for the following purposes:—"First, I direct my said trustee to pay from the readiest of my said means and estate, heritable and moveable, all my just and lawful debts, deathbed and funeral expenses, and the expenses of giving effect to these presents and administering the trust hereby created: Second, I direct my said trustee to pay from my said estate, heritable and moveable, to my brother, James Robert M'Conochie, an alimentary annuity of fifty pounds sterling per annum, and likewise to his wife . . . an alimentary annuity of fifty pounds sterling per annum . . . Farther, I hereby direct my said trustee

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to set aside from my said heritable and moveable estate, and to retain under his own control for each of the children of my said brother, a sum of five hundred pounds sterling, as at the first term of Whitsunday or Martinmas happening six months after my death, and to pay to said children respectively, for their alimentary liferent allanarly, the interest accruing on the said provisions in their favour . . . And declaring farther that the said capital sums of five hundred pounds sterling each shall be payable to the issue respectively of the said respective children of my said brother, on the lapse of said respective liferents, and on said issue respectively attaining majority: Farther, declaring that in case of the failure of such issue before receiving payment of said capital sums respectively, said capital sums shall respectively fall into the residue of my estate: And I farther direct that the Government duty on said annuities and on said provisions shall be paid by my said trustee from the residue of my estate, heritable and moveable: . . . Third, I hereby make the following bequests, which I direct my said trustee to pay out of my estate, heritable and moveable, free of legacy-duty, at the first term of Whitsunday or Martinmas happening six months after my death, namely:—[then follow bequests amounting in all to £1544, 18s.]; and whatever reversion of my said estate, heritable and moveable, there may be over and above meeting the foresaid annuities, provisions, and bequests, I hereby direct my said trustee, failing my making further bequests or leaving further provisions from the same, to divide the same, as he shall think fit, amongst such educational, charitable, and religious purposes within the city of Aberdeen, as he shall select to be the recipients thereof: And I confer on my said trustee the power of making up titles to my heritable and moveable estate, and of selling and disposing of the same, either by public roup or private bargain . . .”

The truster was unmarried, and was survived by his brother, James Robert M'Conochie, who was his sole heir in heritage and in moveables. James Robert M'Conochie died intestate on 10th August 1893, and his widow died, also intestate, on 17th July 1895. He had three children—(1) Marion M'Conochie or Welsh, who married David Welsh, and who died intestate on 22nd April 1908, survived by her husband and by a daughter, Marion Welsh, who was born on 21st March 1892; (2) Alexander Grant M'Conochie, who was born on 12th March 1859; and (3) Donald James Robert M'Conochie, who was born on 18th September 1864.

The heritable properties belonging to the truster at his death consisted of three properties in Aberdeen and one property in Keith, Banffshire, which were valued for legacy-duty purposes at £3350 in all, and the moveable estate belonging to the truster at his death consisted of various assets, valued for inventory-duty purposes at £2816, 14s. 4d.

The debts, Government duties, and legacies were paid out of the moveable estate. The heritable property in Keith was sold in 1880 for £258, 4s. 4d. This sum, along with the surplus of the moveable estate, was expended between 1879 and 1892 on improving the heritable properties in Aberdeen, which increased largely in value owing to that and other causes. The annuities and the liferents were met, after the moveable estate was expended, out of the rents of the heritable properties.

The heritable estate, as at 24th February 1910, was approximately

valued at £14,994, and the moveable estate, being accumulated rents and interest thereon, at £3521, the whole estate being subject to repayment of a loan of £1750, payment of the trust expenses, and payment of the interest and capital of the three sums of £500 provided by the second purpose of the trust.

Doubts having arisen as to the validity of the truster's bequest of the residue of the estate, a special case was presented to the Court, who, on 18th May 1909, found the bequest void from uncertainty.¹

On 24th February 1910 Lachlan Mackinnon and William Mackinnon, as sole surviving and acting trustees of George Charles M'Conochie, brought an action of multiplepounding for determination of the question to whom the residue of the trust-estate fell to be paid. Condescendences and claims were lodged by (1) Alexander Grant M'Conochie, the eldest son and heir-at-law of James Robert M'Conochie, who claimed the whole of the residue as heritable succession of his father; or, alternatively, one-third thereof, being the share of moveable estate to which he was entitled as one of the next of kin of his father and his mother; and (2) Donald James Robert M'Conochie, David Welsh, and Marion Welsh, who maintained that the residue was moveable, and claimed two-thirds thereof as next of kin, or as representing next of kin of James Robert M'Conochie and his wife. Alternatively, they maintained that the residue was heritable and moveable in the proportion which heritage bore to moveables at the date of the truster's death, and claimed accordingly.

On 14th March 1911 the Lord Ordinary (Cullen) pronounced an interlocutor in the following terms:—"Ranks and prefers the claimant Alexander Grant M'Conochie to one-third of the fund *in medio*, in terms of the last branch of his claim . . . and ranks and prefers the claimants Donald James Robert M'Conochie and others to two-thirds of the fund *in medio*, in terms of the first branch of their claim . . . *Quoad ultra* repels the claims stated for the said claimants, and decerns: Grants leave to reclaim."*

¹ M'Conochie's Trustees v. M'Conochie, 1909 S. C. 1046.

* "OPINION.—This case raises a question of conversion arising out of the succession of the deceased George Charles M'Conochie, who resided in Aberdeen. [His Lordship then narrated the facts and summarised the provisions of the trust-disposition and settlement, and proceeded]—

"These directions represent, in my opinion, a massing of the whole estate, heritable and moveable, for the purpose of effectuating the trust directions, so that, had the lapsed portion of the estate fallen to different persons as respectively heirs in heritage and in moveables of the testator *ab intestato*, the effective trust purposes would have fallen to be treated as burdening both the heritage and the moveables conveyed by the settlement according to their respective values—*Cowan*, 14 R. 670.

"On this footing it is maintained by the heirs in moveables of James Robert M'Conochie that there was under the settlement an implied direction for the sale of the heritage. I am of opinion that this contention is sound. Looking to the value of the heritage, and the total amount of the burdens thrown on it jointly with the moveable estate, I think that the testator must have intended that the heritage should be sold. The settlement contains power to sell, but no power to borrow on the security of the heritage.

"If this be so, and if the trustees had followed the scheme of the settlement according to its terms, they would have had now in hand (1) the three sums of £500 directed to be set aside and retained for the children of James

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The claimant Alexander Grant M'Conochie reclaimed, and was heard before the Second Division (without Lord G. 11th and 12th January 1912.

Argued for the reclaimer;—(1) The quality of the succession of the testator's heir depended on the nature of the estate to which he had right when he died. As the residuary bequest was of the trustor's radical right in the residue remained and descended to the brother as his sole heir in heritage and in moveables.¹ In that right the testator's heir might have demanded the residue of the trust as it stood in their hands, under burden of the annuities.² At the date of the heir's death the residue was *facto* heritable estate, and accordingly the right to demand the residue of it passed as heritage in the heir's succession. The case of *Cowan v. Cowan*³ was inapplicable, because there the conflict was between the heir-at-law and the heirs *in mobilibus* of the testator, and their respective rights fell to be determined by the nature

of the estate. Robert M'Conochie in liferent and their issue in fee; and (2) the invested money forming residue derived partly from the heritable estate and partly from the moveable estate of the testator, and representing what Robert M'Conochie succeeded to *ab intestato* as heir of the testator in heritage and in moveables, in consequence of the failure of the residuary bequest in the settlement. In these supposed circumstances I take it that as what James Robert M'Conochie died in right of was a moveable estate, his right thereto would have passed on his death to his heirs *in mobilibus*.

"The trustees under the settlement followed a different administration, which at least reflects credit on their business as it has resulted in a very remarkable enhancement of the value of the estate. What they did was to pay the debts and legacies which were due out of the moveable estate, to sell the property in Keith, and *quoad ultra* the properties in Aberdeen, applying thereto the surplus moveables and the price of the Keith property. They did not set aside the sum of £500, but from the retained heritage satisfied both the liferent of the testator and the three grandchildren and the two annuities to James Robert M'Conochie and his wife while they endured. Owing to their sagacious treatment of the Aberdeen properties, and to a great rise in market value, they succeeded in producing, by their course of administration, a trust fund now valued at about £17,000, which, subject to satisfaction of the bequests of £500 each, represents the lapsed residue of the trust. The trustees hold (1) heritage estimated at £14,994, subject to a bond of £500, and (2) invested money amounting to £3521, derived from the accumulation of the surplus rents of the heritage.

"The result has been that when James Robert M'Conochie died in August 1893 the trust-estate, to the lapsed residue of which he succeeded *ab intestato*, consisted *de facto* mainly of heritage, although the administration followed the scheme of the settlement, according to which I have expressed, it would have consisted of invested money in the hands of the trustees. In these circumstances, the claimant Alexander Grant Maconochie, who is the heir in heritage of James Robert M'Conochie, maintains that, in the succession of James Robert M'Conochie, the rights of his representatives depend solely on the character of the trust-estate as it was in the hands of the trustees when he died; and that he is entitled

¹ *Gilmour v. Gilmours*, (1873) 11 Macph. 853; *Neilson v. Stewart*, 22 D. 646, *per* Lord Neaves, at p. 653.

² *Advocate-General v. Smith*, (1854) 1 Macq. 760, *per* Lord Cranworth, at p. 763.

³ (1887) 14 R. 670.

estate as at the testator's death. (2) In any event, the trust-disposition Mar. 7, 1912. and settlement did not operate conversion of the whole estate into money. The residue had fallen into intestacy, and the character of M'Conochie's Trustees v. M'Conochie. intestate estate could not be affected by expressions of the truster's intention regarding property effectually disposed of by the deed.¹ It appeared to be a rule of English law that, if heritage disposed in trust for conversion subsequently fell into intestacy owing to the partial failure of the trust, although it passed to the truster's heir-at-law, it was moveable estate in his person,² but that rule had never been applied in Scotland, and there was no logical reason for its adoption.³ Even in England the rule was only applied in cases where there was an express trust for sale. Moreover, on a sound construction of the trust-disposition and settlement there was no implied direction to convert the whole estate into money. The terms of the deed provided for the retention of heritage by the trustees. A power

the heritage held by the trustees, and all the rents of such heritage accumulated since 10th August 1893.

"Now, what James Robert M'Conochie succeeded to on the truster's death was the undisposed-of residue of his estate, subject to the fulfilment, in a due course of administration in terms of the settlement, of the prior and effective purposes of the trust. He succeeded to this residue partly in his character of heir-at-law, because the implied trust for conversion did not oust his right as such heir *quoad* any part of the value of the heritage not effectually disposed of. But while he had right to claim in this character, the thing to which his claim applied was, if I am right in the views I have expressed, a money residue; and if the trustees had followed the scheme of the settlement, it would have been money alone that would have been receivable by James Robert M'Conochie, or his representatives claiming in his right, from the trustees, under the resulting trust. It is only because the trustees have not followed the scheme of the settlement, but have acted otherwise at their own hand, that they happen to hold heritage in place of money. This course of administration never had the approval or authorisation of James Robert M'Conochie, so as to admit of the application of the principle of reconversion.

"The claimants, who are the next of kin of James Robert M'Conochie, accordingly contend that, as the effect of the trust-settlement was to give him, in his character of heir in heritage and in moveables of the truster, a right to money in the hands of the trustees, that right, on his death, passed to his heirs *in mobilibus* as the persons entitled to succeed to any money to which he had right, and that this result cannot be varied by the action of the trustees, not contemplated by the truster, in proceeding at their own hand, to put the said money in land. The claim of James Robert M'Conochie's representatives, they say, is for a money residue, and it cannot make a difference in their rights that the existing assets of the trust answerable for that claim, in consequence of the trustees' course of administration, happen to be heritable property instead of being money as the testator directed. This appears to me to be a sound proposition. It is supported by the English authorities which were cited at the discussion. The opposite view would mean that the rights of succession in question

¹ Thomas v. Tennent's Trustees, (1868) 7 Macph. 114; Logan's Trustees v. Logan, (1896) 23 R. 848, *per* Lord M'Laren, at p. 853; Smith v. Wighton's Trustees, (1874) 1 R. 358; Neilson v. Stewart, 22 D. 646, *per* Lord Neaves, at p. 653.

² *In re Richerson*, [1892] 1 Ch. 379.

³ M'Laren, Wills and Succession, (3rd ed.) p. 234, note; Gardner v. Ogilvie, (1857) 20 D. 105, *per* Lord Curriehill, at pp. 110-111.

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of sale was given, but conversion only took place under a sale if it were necessary in the execution of the trust to exercise the power.¹ In the present case no necessity to sell more than a small portion of the heritage had arisen, and the power had not been exercised except to that extent. Mere excess of legacies on a moveable estate operated conversion only to the extent required to satisfy the legacies.²

Argued for the respondents;—(1) The terms and the scheme of the settlement necessarily implied a direction to convert the moveable estate.³ Where this was the case, the rule that conversion did not take place when necessary did not apply. That rule was only applicable where a power of sale was given without further indication or direction to convert, as in *Fotheringham's Trustees*.⁴ Even if the necessity applied, there was here necessity for a partial sale, and a partial sale operated conversion of the whole estate. The authority for partial conversion was *Advocate-General v. Smith*.⁵ There the question was not as to succession, but merely as to the duty for legacy-duty. If conversion was impliedly directed, or was necessary, the fact that the trustees did not sell the heritage did not affect the rights of the heirs *in mobilibus*.⁶ (2) Where there was a disposition of heritage to trustees under direction, express or implied, to sell, and resulting intestacy as to part of the fee, the heir was entitled to succeed to that part, but in his person and in his succession it was moveable estate, having been converted by the truster, whether it had actually been sold or not.⁷ After the heir emerged, the heir could reconvert,⁸ but reconversion was in

were liable to be changed by a course of administration on the part of the trustees not contemplated by the testator, and that the quality of the succession is to be that impressed on it by the trustees instead of that impressed on it by the testator himself.

"I am accordingly of opinion that the fund *in medio*, which is the lapsed residue of the truster's estate, falls to be regarded as moveable estate in the succession of James Robert M'Conochie, and as such to be divided among his heirs *in mobilibus*—that is to say, as falling to one-third to the claimant Alexander Grant M'Conochie, and as to the extent of two-thirds to the other claimants in terms of their claims."

¹ *Buchanan v. Angus*, (1862) 4 Macq. 374; *Playfair's Trustees v. Playfair*, (1894) 21 R. 836; *Sheppard's Trustees v. Sheppard*, (1881) 11 R. 1193; *Anderson's Executrix v. Anderson's Trustees*, (1895) 22 R. 1193; *Advocate-General v. Blackburn's Trustees*, (1847) 10 D. 166; *Trustee v. Seton*, (1886) 13 R. 1047; *Steel's Trustees v. Steedman*, (1885) 5 F. 239; *Duncan's Trustees v. Thomas*, (1882) 9 R. 731.

² *Gardner v. Ogilvie*, 20 D. 105; *Advocate-General v. Smith*, (1880) 7 D. 760.

³ *Cf. Baird v. Watson*, (1880) 8 R. 233.

⁴ (1873) 11 Macph. 848.

⁵ 1 Macq. 760.

⁶ *Brown's Trustees v. Brown*, (1890) 18 R. 185; *Advocate-General v. Williamson*, (1850) 13 D. 436, *per* Lord Jeffrey, at p. 446; *Cowan*, 14 R. 670.

⁷ *Hewitt v. Wright*, (1780) 1 Bro. C. C. 85; *Wright v. Wright*, (1780) 16 Ves. jun. 188; *Curteis v. Wormald*, (1878) 10 Ch. D. 172; *Advocate-General v. Lomas*, (1873) L. R., 9 Ex. 29; *In re Richardson*, [1880] 13 Ch. D. 379; *Jarman on Wills*, (6th ed.) pp. 774-6; 1 *White and Tudor's Cases*, (8th ed.) p. 404; *Theobald on Wills*, (7th ed.) p. 259; *Beesly*, sec. 1482.

⁸ *Cf. Spens v. Monypenny's Trustees*, (1875) 3 R. 50.

in the present case, the heir being ignorant of his right. (3) Even if there were no conversion, the enhanced value of the estate was due to the trustees' action in using moveable and heritable estate without distinction. The profit due to each estate could not be apportioned, and the whole should be divided in equal portions without distinction of heritable and moveable.¹ (4) Alternatively, the principle adopted in *Cowan v. Cowan*,² should be followed, and the division should be in the proportion which the heritable estate bore to the moveable estate as at the testator's death.

At advising on 7th March 1912,—

LORD DUNDAS.—I have found this case to be attended with considerable doubt and difficulty; none the less because I have ultimately reached a different conclusion from that to which Lord Cullen gave effect in the Outer House. I shall state, as succinctly as I can, the reasons which have led me to this result.

Mr George Charles M'Conochie, whom I shall throughout call "the testator," died in 1879, leaving a trust-settlement, the purposes of which are summarised by the Lord Ordinary. His estate was more than sufficient to fulfil the purposes of the trust, so far as operative. But it was recently decided by this Court³ that the testator's directions for the disposal of the residue of his estate were void from uncertainty. He therefore died intestate *quoad* the residue, and the right to it passed on his death to his brother James, who was his heir-at-law and sole next of kin. James died in 1893, intestate. The question in this multiplepointing arises between James's heir-at-law and his next of kin; and depends upon the legal character, as heritable or moveable, of the residue of the testator's estate still in the hands of his trustees, which forms the fund *in medio*.

The Lord Ordinary has upheld the claim of the next of kin. He considers that there was, under the testator's settlement, "an implied direction for the sale of the heritage." He says: "Looking to the value of the heritage, and the total amount of the burden thrown on it jointly with the moveable estate, I think the testator must have intended that the heritage should be sold. The settlement contains power to sell, but no power to borrow on the security of the heritage"; and he concludes that "as what James Robert M'Conochie died in right of was a money residue, his right thereto would have passed on his death to his heirs *in mobilibus*." I cannot agree with the Lord Ordinary that there was here any implied direction for the sale and conversion of the whole estate into money; and I must part company with him at this vital point in the case. It may very well be that the testator contemplated the total conversion of his estate into money with a view to distribution in terms of his residuary purpose. But that purpose has failed; and we have to deal with the resulting intestacy. Now, I apprehend that in intestacy there is no room for inference of a testamentary purpose; and the Court assumes that even an express direction to convert is made only with the object of facilitating the realisation of the estate effectively disposed of by the settlement. We are not, therefore,

¹ *Lynch's Judicial Factor v. Griffin*, (1900) 2 F. 653.

² 14 R. 670.

³ *M'Conochie's Trustees*, 1909 S. C. 1046.

Mar. 7, 1912. here to infer a direction to convert, except so far as conversion
 M'Conochie's indispensable to the execution of the operative purposes of the
 Trustees v. think the Lord Ordinary has overlooked a well-settled principle
 M'Conochie. which was succinctly stated by Lord Cranworth, L.C.,¹ when he
 Lord Dundas. result of the authorities is that where there is a direction to sell real
 and that the proceeds shall form part of the personal estate, the
 instruction is that the conversion takes effect so far as is necessary
 out the objects and intentions of the testator; but where the object
 the direction does not take effect. In case of lapse, the personal estate
 to the next of kin, not because the testator intended it, but because
 carries it to them. So, as to the real estate, the law gives it to the
 and the law would do the same if the testator said that his real estate
 not go to his heir, but omitted to make a valid devise of it." This
 principle has often been expressed in our own Courts—e.g., in
Neilson,² *Thomas*.³ In *Cowan*⁴ there was an express direction
 the whole estate. In the present case there is no express direction
 none can be implied in regard to what has turned out to be intestate
 cession of the trust.

One must consider, then, what was the nature and character of the
 residue of the testator's trust-estate as it stood—or as, in accordance
 the well-known maxim of trust law, *quod fieri debet infectum valere*—
 be held to have stood—in the hands of the trustees (1) after due
 of the prior operative trust purposes as at Martinmas 1879, being the
 term of Whitsunday or Martinmas occurring six months after the
 death; (2) at James's death in 1893, or at the death in 1895 of the
 when the annuities after mentioned came to an end; and (3) at the
 time. If I use, as I propose to do, some figures in reference to the
 I shall only use them as exegetical or illustrative of the views I am
 ing, and not as being necessarily accurate or agreed-on figures.

The operative purposes of the settlement were for payment of
 Government duties (which I understood from the bar might be
 put at £500), and legacies amounting to £1544, for the setting
 retaining of three sums of £500 for the benefit of persons named
 and fee respectively—these sums making in all about £3544 for
 payment of annuities of £50 each to James M'Conochie and his
 the survivor. All these purposes were directed to be satisfied out of
 estate, heritable and moveable"; and I agree with the Lord Ordinary
 they must all be treated as burdening both heritage and moveable
 ing to their respective values. The estate left by the testator in
 having been worth about £6166—£3350 of heritable, and £2816
 moveable estate. It seems clear, therefore, that in order to satisfy
 above purposes, other than the annuities, it would have been necessary
 a strict course of administration to realise heritage to a considerable
 extent than was actually done (with the corresponding result that
 the moveable estate would have been required than was in fact

¹ *Taylor v. Taylor*, (1853) 22 L. J. Chan. 742, at p. 744.

² 20 D. 105, per Lord Curriehill.

³ 7 Macph. 114, per Lord Barcaple.

⁴ 22 D. 646, per Lord Curriehill.

⁵ 14 R. 670.

these purposes); and to this extent, but no further, I think the express power to sell and the direction to pay "from my estate, heritable and moveable," did unquestionably amount in law to a direction to sell. We must assume heritage and moveables to have been respectively realised and applied to the satisfaction of the said prior purposes—requiring roughly a sum of £3544 or thereby—in the due proportions. On this assumption, the trust-estate remaining in the trustee's hands as at Martinmas 1879 would be represented by a mixed estate to the value of some £2622 (the balance of the gross value of £6166), consisting of heritage and moveables in the relative proportions of £3350 to £2816. The revenue arising from this estate would, I suppose, be sufficient, but not more than sufficient, to provide the two annuities of £50 each; and it would, I apprehend, be the duty of the trustees to hold it primarily for that purpose, and (subject thereto) for the person legally entitled to it, viz., the testator's heir *ab intestato*, in heritage and moveables respectively. There was neither necessity nor duty, so far as I can see, to realise the heritable estate to any further extent than I have indicated. The proper way to provide the annuities was from the revenue of the estate, not by recurring sales.

If such was generally the value and character of the trust-estate, after due execution of and provision for the operative trust purposes, one must next consider how matters stood, or must be held to have stood, as at the death of James M'Conochie in 1893, or as in 1895, when his wife died and the annuities ceased to be payable. If one keeps in view that the actual course of administration pursued by the trustees, though its results were highly beneficial to the interests of all concerned, was unauthorised by the terms of their trust, and that the maxim *quod fieri debet* falls, as already pointed out, to be applied, we must, I think, assume that at the later date the property would have been practically the same as it was at the earlier one. The whole available revenue would, *ex hypothesi*, have been spent in payment of the annuities. No doubt the heritable or the moveable estate might have to some extent increased or fallen in value during the period between 1879 and 1895; but we cannot speculate about this: and I do not see how we can allow either the heir or the next of kin in James's intestate succession to claim, to the exclusion of the other, more than a proportional share of the advantage which has resulted from the beneficial, but unauthorised, administration of the trustees.

One must now consider the present position of matters. The fund *in medio* represents a trust-estate very greatly enhanced in value. It in fact consists mainly of heritage, but the question is as to its just distribution in a competition between the heir and the next of kin of James in his intestacy. These claimants, according to their main contentions, each claim the whole estate. The heir maintains that the fund *in medio* represents heritage or the rents of heritage accumulated after 1893; and that as James (if he had ever been aware of his rights) might have insisted on the trustees handing over the whole estate to him, subject to the real burden of the annuities, his heir is now in the same position except that the annuities have ceased to be exigible. A sufficient answer to the latter contention seems to me to be that James did not in fact make such a demand, and that it is not now open to his heir to do so for the purpose and with the

Mar. 7, 1912. result of frustrating the rights of the next of kin. On this observations by Lord Cranworth in *Buchanan v. Angus*¹ are apposite and instructive. The next of kin, on the other hand, that James's succession being (as the Lord Ordinary has held it to be) to a money residue, though part of the money may have come to him in his capacity as his brother's heir-at-law, the whole fund *in medio* as moveable estate, to them. As already stated, I disagree with the Lord Ordinary's conclusion that this was truly a money residue. I do not wish to sustain either of these extreme contentions. The true solution of the matter is to be found in a middle course upon the lines already indicated. The matter is not solved by asserting, as counsel for the next of kin, that James's right was merely a *jus crediti*; for, assuming that it was, *jus crediti*, I apprehend, partakes of the nature and quality, being moveable, of the subject itself in regard to which the *jus crediti* is governed by the same rules of law as to its transmissibility by which the same rules are applicable to that subject (see *per* Lord Westbury, L.C., in *4 Macq.*, at p. 378). James succeeded his brother *ab intestato* in the residue of the mixed trust-estate in his double capacity as heir and next of kin. I think James's right of succession must be held to have passed on his intestacy to his heir-at-law, so far as it was truly a right to a heritable subject, and *quoad ultra* to his next of kin. I therefore conclude that the whole estate now in the hands of the trustees *fund in medio*—must be regarded in the present competition as heritable and moveable in the proportions which the value of the heritable and moveables respectively bore to the whole value of the testator's estate at the time of his decease: *i.e.*, using the figures as merely illustrative, in the proportions of £3350 and £2816 to the total of £6166.

If the views I have expressed are sound, there is no necessity, and indeed no room, to consider or decide an aspect of the case which the Lord Ordinary had to, and did, deal with, and which bulked largely in the discussion at our bar. The Lord Ordinary held, erroneously, as I think, that James's succession was to a money residue, though the money he succeeded to came to him partly in his character as heir in heritage of his brother. On this footing, he decided that the whole of this money must be treated as James's intestacy as moveable estate. On the assumption posed, I should, as at present advised, be disposed to agree with the Lord Ordinary's conclusion. It seems to be quite in accordance with the opinion *obiter* by Lord Curriehill in *Gardner's* case,² and to be supported by what the Lord Ordinary considered it to be, by English decisions. But if, as I think, there is, and can be, here no implied direction to convert the requirements in that respect of the operative trust purposes, the Lord Ordinary have pointed out, no room in this case for the application of the principle referred to; and I prefer to reserve my opinion until the matter comes before us in a case where it has to be decided.

In my opinion, for the reasons now stated, the Lord Ordinary's *locutor* must be recalled; and we should find—[His Lordship then recited the findings embodied in the interlocutor of 7th March 1912]. V

¹ 4 Macq. 374, at p. 385.

² 20 D. 105, at pp. 110 and 111.

findings, the normal course would be to remit the case to the Lord Ordinary Mar. 7, 1912. for further procedure as may be just.

M'Conochie's
Trustees v.
M'Conochie.

LORD SALVESEN.—The late Mr Charles George M'Conochie died on 13th January 1879, leaving a trust-disposition and settlement whereby he bequeathed certain annuities and legacies and directed the residue of his estate to be divided in terms of a direction which has now been held void from uncertainty. To the extent, therefore, that his estate was not required to meet the said annuities and legacies, it falls to be dealt with as intestate. There was no express direction to sell his heritable estate, but a power was conferred upon the trustees to do so either by public roup or private bargain. As the trust could not come to an end until the death of the annuitants, it is plain that the testator contemplated at all events a portion of his estate being invested, and power was given to his trustees to invest the trust funds in accordance with the various Trust Acts.

Had there been nothing from which a contrary intention might be inferred, the debts and legacies would have been primarily chargeable against the moveable estate and the annuities against the heritage. I agree, however, with the Lord Ordinary that, as the testator expressly directed that the trustees were to pay the debts, &c., from his estate "heritable and moveable," and made a similar provision with regard to the legacies and annuities, the effective trust purposes fall to be treated as burdening both the heritage and moveables conveyed by the settlement according to their respective values. The legacies amounted to £3044, 18s., and in addition the trustees were to pay Government duty on the annuities and provisions "from the residue of my estate, heritable and moveable." These purposes, however, did not exhaust much more than one-half of the total estate, leaving the remainder intestate succession.

The first question in the case is whether there was under the settlement an implied direction for the sale of the heritage so as to have the effect of converting the whole estate into moveables. It so happened that the truster possessed three properties in Aberdeen and one property in Keith; and in the course of their administration the trustees have not, in fact, sold any of these properties with the exception of that in Keith, which realised a net price of £258, 4s. 4d. They did not, however, set aside the sum of £500 as they were directed to do for each of the three children of James Robert M'Conochie (whom I shall afterwards call James), who was the testator's sole heir and next of kin; but they have paid corresponding sums out of the rents of the heritage which remained undisposed of, and have similarly dealt with the annuities to James and his wife. Owing to a rise in the value of property in Aberdeen, and also to the trustees' capable administration, they now hold heritage to an estimated value of nearly £15,000, subject to a bond of £1750, and invested money amounting to £3521 derived from accumulated surplus rents.

James appears to have assumed throughout that his brother's will validly disposed of his whole estate, and this was the view upon which the trustees acted until 1909, when it was decided that the residue clause was void from uncertainty. The contest in this case is accordingly between the heir and the next of kin of James, the former claiming the whole property now

the hands of the trustees as being *de facto* heritable, subject to the trustees paying over to the trustees the £1500 which they were directed to pay for the behoof of James's three children.

The claimant Alexander M'Conochie (who is the heir of James) contends that the rights of parties fall to be determined as at the date of James's death in 1893. At that date all the property which the trustees held was heritable or the accumulated rents of heritable; and as James was entitled to the whole estate as the sole heir and next of kin of his brother, it was maintained that that estate passed to James's heir. The trustees doubtless would have done so if the estate had been made over to James during his lifetime; but the fallacy underlying this argument lies in the fact that the heritable property which forms the fund *in medio* is not the whole of James's estate, for it remained vested in the trustees, and James had only a *jus crediti* against them. If, therefore, the whole or part of the estate was moveable succession in the person of James, or if the estate had been impressed by the testator with that character, the moveable *jus crediti* would have passed to James's executors. I am accordingly of opinion that this solution of the question, the chief merit of which is its simplicity, cannot be entertained.

The Lord Ordinary has sustained the claim for James's next of kin on the ground that the will contains an implied direction to realise the heritable estate and to mass it along with the moveables, and that this implied direction operated conversion of the heritable, although, in fact, part of the estate was never disposed of. On this assumption, what James died leaving was a money residue which passed on his death to his heirs in fee. If the settlement been operative in all its parts, it may be said that the Lord Ordinary's view would have been most in accordance with the presumed intention of the testator; although even in that case I am of opinion that the trustees would have required to sell the whole heritable estate and to distribute the estate amongst the residuary legatees. If they had only two heritable properties when the trust came to be operative, it is not at present seen why they should not have sold them and added them to two selected charities. But as the residue clause has not yet become operative, it is difficult to determine what the testator's intention would have been in an event which he obviously could not contemplate. Accordingly, the will must be construed now exactly as if it had made no reference to the residue; and no direction to sell is to be implied beyond what is necessary to carry out the operative purposes.

The Lord Ordinary speaks of James's right as being to a money residue. This is not an accurate statement. His right as next of kin and as the brother of the deceased was to succeed to the whole estate so far as undistributed property was. It was not until it vested in James in 1879 when the succession opened, that he became entitled to it. He remained ignorant of it throughout his own lifetime. In 1879 he was called upon to call upon the trustees to denude in his favour of such part of the moveable and heritable estate, as, on the footing that they had been carrying out the trust purposes, strictly they did not require to retain in their hands. As regards the intestate succession, the trustees had no right to administer the estate. It fell to him not by virtue of the deed, but because of his relationship to the deceased.

titled by a series of authorities that an implied direction to sell has M.
 the same potency in altering the quality of the succession as an M.
 direction. A direction to sell, however, will not be implied unless Tr
 indispensable to the execution of the trust. Perhaps the most authori- M.
 sum on this subject is to be found in the case of *Buchanan v. Lo*
 where the Lord Chancellor (Westbury) said: "If, instead of an
 and unqualified trust or direction for sale, the right to sell is made
 on the discretion or will of the trustees; or is to arise only in
 necessity; or is limited to particular purposes, as, for example, to
 or is not, in the appropriate language of Lord Fullerton in the
Blackburn,² 'indispensable to the execution of the trust'; then, in
 the case, until the discretion is exercised, or the necessity arises
 and on, or after the particular purposes are answered, or if the sale
 indispensable, there is no change in the quality of the property; and
 the estate must continue to be held and transmitted as heritable."
 In the case Lord Cranworth said³: "If there was an absolute duty
 upon these trustees to sell at all events and without reference to
 opinion on their part for the convenience of those who were interested
 to reduce, if there was an absolute duty imposed upon them to turn
 the property into money, then, whether they had turned it into money or not would
 be immaterial, and in whatever form it was then held it would be treated
 as money for the purpose of succession as if it were money." These two dicta supply
 the answers to the questions raised here. Can it be affirmed that there was an
 absolute duty on the trustees of Mr M'Conochie to sell all the heritable
 property belonging to the trust? In other words, could they have com-
 pelled the heir to take his succession in the form of money? I do not
 think they had any such duty or right. So far as indispensable for the
 execution of the trust, they had no doubt a duty to convert, but beyond
 that I think they had no duty; and it is perfectly plain that a large pro-
 portion of the heritable estate need never have been converted into money
 if they had complied strictly with the direction to invest the sum of
 £10,000 for James's three children. Even where trustees holding only a
 heritable property find themselves compelled to realise it as a *unum*
 in order to meet debts or legacies, the price of the heritage, so far as
 is required to fulfil the trust purposes, remains heritable in the person of
 the trustee. This was expressly decided in *The Advocate-General v. Smith*,⁴
 where Lord Rutherford delivered the unanimous opinion of five Judges.
 The estate of the deceased consisted of £4000 of moveable funds and
 a heritable bond for £16,000. In order to pay debts and special legacies
 it was required to apply £10,000 of the sum in the heritable bond.
 Accordingly the trustee uplifted the whole heritable debt and re-invested the
 sum. It was held that the power to sell granted by the deed did not
 in the circumstances imply a direction to realise the whole heritable
 estate, but that the balance of £6000 was to be treated as heritable succes-
 sion, not as money arising from the sale of heritable estate. That case
 was affirmed on appeal,⁵ and appears to me to be conclusive of the question

q. 374, at p. 379.
 q., at p. 384.

² 10 D. 166, at p. 187.
³ 14 D. 585.

⁵ 1 Macq. 760.

Mar. 7, 1912. raised in the present case. In dealing with the argument founded on the actual realisation of the heritable bond, which was undoubtedly the terms of the express power of sale, Lord Rutherford said: "We apply it to be involved as a principle, that what the trustees do, if the trust is founded on, shall be done by them in the necessary or at least the ordinary and natural course of their execution of the trust. For if the trust is not in the execution of the trust—not in obedience to the testator's intention—their actings have no relevancy. In like manner, if the trustees change an investment from one form to another, simply in ordinary management, and for better preservation of the estate, that change of investment would not be considered as a part of the execution of the trust. The circumstance of a temporary alteration of the investment of the trust into money, not for ultimate distribution, be held to have changed the trust from a conditional into an absolute direction." The power to sell in the deed construed was as absolute as it is in Mr M'Conochie's deed, but if construed as a conditional direction to sell, the condition to be read "so far as necessary in the execution of the trust."

The case of *Buchanan v. Angus*¹ is also an authority upon the question argued for the next of kin. They maintained that even without the authority of *Cowan's case*,² James as heir was entitled only to the portion of a mixed estate corresponding to the amount of heritable property left over after satisfying the charges with which the testator had burdened it, the estate in his person became moveable and was thus transferred to his executors. The argument was based upon a rule which applied in England, and which was given effect to in *Wright v. Curtis*.⁴ It is to be noted, however, that in all the cases in which the rule has been applied there was an express direction to convert the heritable estate; and while this was held not sufficient to oust the heir, it had the effect of making the estate in his person moveable succession. The right in holding that there was no implied direction to sell by the trustees was necessary for the fulfilment of the operative trust purposes, and it has no application. The reasoning on which they proceeded did not commend itself to so eminent a Judge as Lord McLaren; and there is no case in Scotland where they have been followed. I refrain, therefore, from expressing an opinion as to whether the rule which they laid down is a rule which we ought to apply, as, in the view I take, the question does not arise. In *Buchanan's case*¹ the controversy was exactly as between the heir and next of kin of the testator's heir, and the declaratory conclusion of the summons, to which the judgment of the House of Lords substantially gave effect, was that one equal part of the residue of the trust-estate "of the deceased John Smith, in which consisted of heritable property, remained in the *hereditas jacens* of John Smith and now belongs to the present appellant as his heir." *Mutatis mutandis*, these words apply to the present case.

The only other thing that remains is to apply the principles laid down in the foregoing. The estate held by the trustees is in fact all heritable, and

¹ 4 Macq. 374.

² 16 Ves. jun. 188.

³ 14 R. 670.

⁴ 10 Ch. D. 172.

used to hold that as the trustees could have been made personally Mar
 a question with the next of kin for their failure to set aside the M'C
 of £1500, they must be held to have nursed the heritable pro-Tru
 the benefit of the persons who might ultimately become entitled M'C
 and that the next of kin's claim would be satisfied if they received Lon
 amount of the personal estate which existed at the testator's death,
 interest as was not required to meet the due proportion of the
 and charges falling to be borne by the moveable estate. On
 ation, however, I have come to be satisfied that this view is
 and that the estate falls to be divided in the manner proposed by
 daa. If the trustees, instead of retaining the heritable property
 ing the moveable funds for the purpose of its development, had
 e heritage and invested the proceeds in moveable securities which
 eciated, it would scarcely have been equitable to hold that the
 peciation effeired to the moveable estate, and that no part of it
 credited to the price of the heritage. If so, the converse proposi-
 also hold good. The result is that the existing property falls to
 l between the heir and the next of kin according to the respective
 the heritable and moveable estate as existing at the date of the
 death after due implement of the effective purposes of the trust.
 od has also the merit of being more equitable than if the whole
 e given to one or other of the competing claimants.
 ously agree with your Lordship that the interlocutor of the Lord
 should be recalled, and that we should pronounce findings in
 those suggested. I do not apprehend there will be any difficulty
 ties working out our judgment.

JUSTICE-CLERK.—I will confess that at first I was inclined to
 on of the Lord Ordinary, in view of the undoubted rule of law
 ch a case as this an implied direction is as effectual to convert as
 e direction. But I have come to see that—looking to the position
 n this estate came by the fact that a large part of the estate fell
 tacy by the decision of the Court that the testator's desire to
 itable bequests fell from uncertainty—what the testator's inten-
 t be could not be implied in regard to a state of circumstances
 s not in his contemplation, and as to which, therefore, he could
 formed an intention at all. I have therefore come to the same
 as your Lordships, and content myself with expressing my entire
 ce in the opinion of Lord Dundas, which I have had an oppor-
 tunity of studying.

7th March 1912 the Court pronounced the following inter-
 cutor:—"Recall the said interlocutor reclaimed against:
 ind (1) that the late George Charles M'Conochie died in
 1879 leaving a trust-settlement, and an estate more than
 efficient to implement the trust purposes so far as operative,
 hich purposes fell, in terms of the settlement, to be imple-
 mented out of his heritable and moveable estate in rateable
 proportions; (2) that the truster's directions for the disposal
 the residue of his estate were (as was determined by the

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Court in 1909) void from uncertainty, and that the residue died intestate *quoad* said residue; (3) that the right residue passed on the truster's death to his brother James as his heir and sole next of kin *ab intestato*; (4) that there was no express or implied direction to convert the trust property into a fee simple estate to any greater extent than was necessary for the due execution of the operative purposes of the trust; (5) that to that extent, but no further, the trustees must be held to have realised said heritage; (6) that the residue which the truster's brother, James M'Conochie, acquired must be held to have been heritable and moveable in the proportion which the values of the heritable and moveable estate of the truster bore to the total value of his estate at his death; (7) that, on the death of the truster's brother James as intestate, the said residue passed to his heir in heritable right as his next of kin in the proportions foresaid; and (8) that the said heir and next of kin of the truster's brother is entitled to the said residue, being the fund in *medietate* in the proportions foresaid: Find no expenses due to or by the claimants in the Inner House, and meantime concur in the cause."

THE COURT subsequently pronounced this further in favour of the claimants:—"The Lords having heard counsel for the respondents resumed consideration of the cause, find that the respondents of the late James M'Conochie are liable to account to the representatives of the deceased Mrs Mary Ann M'Conochie for the share of the moveable estate of the said James M'Conochie which passed on his death intestate as *jus relictæ* to Mrs Mary Ann M'Conochie; and remit the cause to the Lord Ordinary to proceed therein as accords."

MORTON, SMART, MACDONALD, & PROSSER, W.S.—BOYD, JAMESON, & YOUNG, W.S.—BEVERIDGE, SUTHERLAND, & SMITH, S.S.C.—Agents.

No. 99.

Mar. 8, 1912.

M'Ginn v.
Udston Coal
Co., Limited.

JOHN M'GINN, Appellant.—*Moncrieff*.
THE UDESTON COAL COMPANY, LIMITED, Respondents.—*Horne, K.C.—Russell*.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), sec. 1 (1), (2), and Third Schedule—Industrial disease—Certificates of surgeon and of medical referees—Claimant certified to be suffering from a scheduled disease—Finding that disease not due to employment—Right to prove contrary—Onus.

A miner, claiming compensation under the Workmen's Compensation Act, 1906, in respect of an industrial disease, obtained from a surgeon a certificate that he was suffering from, and died of, "nystagmus," one of the scheduled diseases applicable to the occupation of "mining." A medical referee, to whom the case was referred on the application of the employers, found that the miner suffered from nystagmus, but that it was not miner's nystagmus, but one of the other forms of that disease. The arbitrator dismissed the claim on the ground that, in view of the referee's finding, the miner had not obtained the certificate, required by sec. 8 of the Act, that he was suffering from a scheduled disease.

In an appeal held (1) that the claimant had obtained the

cate that he was suffering from a scheduled disease, (2) that the Mar. on of the medical referee was not final as to whether that disease or was not due to the claimant's employment, and (3) that the M'G of the finding that it was not due to his employment was to dis- Udsi Co., the presumption in his favour, and to throw on him the onus of ng affirmatively that it was; and case *remitted* to the arbitrator ow a proof.

inion that it is competent for a medical referee, while affirming ertificate of a certifying surgeon that a claimant is suffering from eduled disease, to vary that certificate by finding that the disease is not, due to his employment.

bitration under the Workmen's Compensation Act, 1906, 1er n the Sheriff Court of Lanarkshire, at Hamilton, in which Sher ninn, a miner at Burnbank, claimed compensation from the Lan: oal Company, Limited, on the ground that he was suffering industrial disease,* the Sheriff-substitute (Hay Shennan) o award compensation, and, at the request of the workman, ase for appeal.

ee stated that the appellant, who, it was admitted, had been as a miner by the respondents for some time prior to 7th 1911, produced with his application for compensation the documents:—

certificate from a certifying surgeon (Dr Crawford), dated ruary 1911, in these terms:—"I . . . hereby certify ng personally examined John M'Ginn on the 20th day of

Workmen's Compensation Act, 1906, enacts, sec. 8:—

here—
the certifying surgeon appointed under the Factory and Work- shop Act, 1901, for the district in which a workman is employed certifies that the workman is suffering from a disease mentioned in the Third Schedule to this Act and is thereby disabled from earning full wages at the work at which he is employed, . . .

disease is due to the nature of any employment in which the was employed at any time within the twelve months previous to the disablement, . . . he or his dependants shall be entitled sation under this Act as if the disease . . . were a personal accident arising out of and in course of that employment, subject owing modifications:— . . .

If an employer or a workman is aggrieved by the action of a certifying or other surgeon in giving or refusing to give a certificate of disablement . . . the matter shall, in accordance with regulations made by the Secretary of State, be referred to a medical referee, whose decision shall be final.

the workman at or immediately before the date of the disable- . . . was employed in any process mentioned in the second the Third Schedule to this Act, and the disease contracted is the the first column of that schedule set opposite the description of s, the disease, except where the certifying surgeon certifies that nion the disease was not due to the nature of the employment, eemed to have been due to the nature of that employment, unless yer proves the contrary."

ird Schedule (as extended by the Secretary for State by Order dated 22nd May 1907) includes—"Description of Disease or Nystagmus. Process.—Mining."

Mar. 8, 1912. February 1911, I am satisfied that he is suffering from nystagmus, being one of the diseases to which the Workmen's Compensation Act applies, and is thereby disabled from earning full wages at which he has been employed; and I certify that the disability commenced on the 7th day of February 1911."

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(2) An application by the respondents, dated 28th February 1911, for reference to a medical referee in the matter of this appeal, pursuant to section 8, subsection 1 (f), of the Workmen's Compensation Act, 1906.

(3) A decision by the medical referee (Dr Freeland Ferguson) in the matter had been referred, dated 9th March 1911, in these terms:—"I allow the appeal of the Udston Coal Company against the decision given to John M'Ginn by Dr Crawford on the 20th day of February 1911, and that for reasons given in the note which accompanied the decision."

The medical referee's note was as follows:—

"The facts of this case are briefly these:—M'Ginn unquestionably has nystagmus, particularly on fixation in the upper part of the field of vision, and the question which occurs to my mind is whether the nystagmus being that form of it known as miner's nystagmus, the probability in this case is that it is not miner's nystagmus, but is one of the other signs of nerve degeneration. For example, the optic nerves are markedly affected, as shown by their appearance, by marked contraction of the field of vision, and by loss of visual acuteness. The knee jerks are absent, and altogether I think that the case is one of sclerosis or nerve degeneration than of ordinary miner's nystagmus. This view of the case is confirmed by the following facts:—He says that he was idle for a period of five months, namely from August 8th 1910 to January 11th 1911; that he resumed work on January 11th; and that shortly thereafter the nystagmus developed so that he was incapacitated for work by the 6th February. He avers that during the time of his being off work his sight was perfectly good, and that he had no nystagmus until shortly after he resumed work on January the 11th the nystagmus appeared. If we take his own statement as correct, that he had nothing wrong with his sight on January the 11th, it seems to me that the period was too short to have caused ordinary miner's nystagmus to appear, and that fact, taken with the other symptoms of nerve degeneration which I have found, have caused me to form the opinion that this is not in the ordinary acceptance of the term miner's nystagmus, but is one of the other forms of the disease."

The case proceeded to state:—

"The appellant claimed compensation from the respondents on the ground that the aforesaid certificate, decision, and note certified that he was suffering from nystagmus, being an industrial disease to which the Workmen's Compensation Act applies, and that it lay on the respondents to prove that this was not miner's nystagmus. The respondents disputed the claim, on the ground that it was not certified by the aforesaid decision of the medical referee, allowing the appeal, against the certificate of the certifying surgeon."

"Parties were heard on 2nd October 1911, and the award was issued on 10th October 1911."

"The Sheriff-substitute was of opinion that the decision of the medical referee and the note which accompanied it were not contradictory; that the decision and note read together amounted to a finding that while the appellant was suffering from nystagmus, it was not miner's nystagmus, but was one of the other forms of the disease."

was not due to the nature of his employment as a miner; Mar. it was competent for the medical referee to allow the appeal ground. Accordingly the Sheriff-substitute dismissed the M'Gill Udstc Co., I incompetent, on the ground that the appellant had not a certificate as required by section 8 of the Workmen's Compensation Act, 1906."

Questions of law for the determination of the Court were:— (1) Was the Sheriff-substitute right in dismissing the appellant's appeal on the ground that he was incompetent? or (2) Ought the Sheriff-substitute to have required the appellant to produce a proof? (3) Was the medical referee entitled to allow the appeal at the instance of the respondents and to recall the decision of the certifying surgeon, on the ground that the nystagmus in which the appellant suffered was not due to the nature of his employment as a miner?"

The case was heard before the First Division on 1st February

for the appellant;—The only questions which the statute provided for the determination of the certifying surgeon and the medical referee, and on which the decision of the latter was final,¹ were (1) Was the workman suffering from a disease mentioned in the Third Schedule? and (2) was he thereby disabled from earning full wages?² These two questions fell to be answered in the affirmative, and if these officials were entitled to refuse to grant a certificate, the workman had further to establish that the disease was due to the nature of the employment,² but this was not one which was submitted for the determination of the medical officials; it had to be proved by the workman in the same way as any other fact in the case. The rules of section 8 (2) placed with the onus of proof. In the ordinary case the onus of proving all questions of fact was on the workman. The effect of subsection (2) was to provide that, where a workman employed in a business mentioned in the Schedule was suffering from the disease specified in that process, a presumption arose that the disease was due to the nature of the employment, and that it was for the workman to rebut this presumption; but in the case where the certifying surgeon (or, by virtue of the provisions of subsection (1) (f), the medical referee) certified an opinion that the disease was not so caused, the presumption created by the subsection was excluded. The effect of this provision was, therefore, to give to the expressed opinion of the medical officials, in certain circumstances, a particular weight as an item of evidence in the case. In the present case both the certifying surgeon and the medical referee had found that this miner was suffering from "nystagmus," one of the diseases mentioned in the Schedule, and was thereby disabled from earning full wages. They had therefore no option but to grant a certificate. It was contended that the disease was inadequately described in the Schedule, and that the Court must take the words of the Schedule as they stood. The medical referee had erred in describing his decision as an allowance of the appeal against the certificate, and the arbitrator had also erred in treating it as such, and consequently in dismissing the claim on the ground that the claimant had not obtained a certificate. The true import of the referee's decision was to amend the certificate by adding to it a finding that the disease was not due to the nature of the employment. The effect of such a certificate

¹ Sec. 8 (1) (f).

² Sec. 8 (1) (i).

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M'Ginn v.
Udston Coal
Co., Limited.

was that there was no longer any statutory presumption disease was due to the employment, but it was still open to man to prove that fact in the ordinary way. Proof should have been allowed.¹

Argued for the respondents;—The terms of section 8 would not bear the construction which the appellant sought upon them. The true import of this section was that the man must obtain a certificate to the effect, not only that he was suffering from an industrial disease, but also that the disease was of the nature of his employment.² Such a certificate might be refused either by the certifying surgeon or, on appeal, by the medical referee, the decision of the latter being final. The fact that the disease was not due to the nature of the employment was a ground for the refusal of a certificate, and in the present case the medical referee, in allowing the appeal, had properly refused the certificate on this ground. The arbitrator was therefore right in his decision that the workman had failed to bring himself within the provisions of section 8.

At advising on 8th March 1912,—

LORD PRESIDENT.—In this case a miner applied to the certifying surgeon of the district and got from him a certificate which used these words:—"I am satisfied that he"—that is the miner—"is suffering from a disease being one of the diseases to which the Workmen's Compensation Act applies, and is thereby disabled from earning full wages at the time at which he has been employed; and I certify that the disablement commenced on the 7th day of February 1911." Armed with that certificate the appellant presented an application in ordinary form for compensation. An appeal was taken, as is provided by the statute, by the employer against the certificate, and, in accordance with section 8, subsection (1), the matter was referred to a medical referee.

The medical referee pronounced a finding or judgment in which he expressed his opinion as follows:—"I allow the appeal of the Udston Coal Company against the certificate given to John M'Ginn by Dr Crawford on the 20th day of February 1911, and that for reasons given in the note which accompanies the certificate. Then, in the note, he says:—"The facts of the case are briefly as follows:—John M'Ginn unquestionably has nystagmus, particularly on fixation in the upper part of the field of vision, and the question which occurs to my mind is whether the nystagmus being that form of it known as miner's nystagmus. Then he goes into particulars which I need not read. I need only state the conclusion to which he comes, which is, "That the case is rather more of a sclerosis or nerve degeneration than of ordinary miner's nystagmus." He finishes up his note by saying that, in his opinion, "this is not the ordinary acceptance of the term a case of miner's nystagmus, but rather one of the other forms of the disease." Upon that the Sheriff-substitute

¹ The following authorities were referred to as to the form and content of the certificates of a certifying surgeon and of a medical referee:—*Waddell & Son*, 1911 S. C. 1168, and *Winters v. Addie & Sons' Limited*, 1911 S. C. 1174.

² Reference was made to Rule 5 of the Statutory Rules and Orders made by the Secretary of State under sec. 8 of the Act, dated 25th Jan.

as incompetent, and the stated case is presented against that Mar. 8, 1
 ion.

rdships are well aware that this matter of industrial diseases was M'Ginn
 Udston C
 Co., Ltd.
 compensation for accidents alone, and, as a rule, disease is spoken Ld. Presi
 tithe to accident. But the Workmen's Compensation Act of
 ed the Act to certain industrial diseases. The scheme of the Act
 y section 8, subsection (1), "Where the certifying surgeon . . .
 at the workman is suffering from a disease mentioned in the Third
 of this Act and is thereby disabled from earning full wages . . .
 e disease is due to the nature of any employment in which the work-
 employed at any time within the twelve months previous to the
 e disablement . . . he or his dependants shall be entitled
 sation as if the disease . . . were a personal injury by

And then there are certain other provisions. The effect of
 at if you have an industrial disease, and if that industrial dis-
 e to the nature of your employment and prevents you working,
 e shall be, so to speak, a fictional accident, and the case shall
 the ordinary way to the ascertainment of compensation. This
 disease is not in the Schedule originally annexed to the Act;
 does not matter, because there is a power in the Home Secre-
 plify the Schedule by an Order in Council. That has been done,
 is no question that nystagmus is one of the diseases in the ampli-
 rule.

t step is, obviously, the procuring of a certificate from a certifying
 at the workman is suffering from a disease mentioned in the
 edule of the Act. There is the provision which I have already
 l, under section 8 (1) (f), providing for an appeal to the medical
 nd the medical referee can review the certificate given by the
 surgeon and either say that it was rightly given or that it ought
 e been given.

e another provision to which I should call attention. Subsection
 e same section enacts that "If the workman, at or immediately
 date of the disablement or suspension, was employed in any process
 in the second column of the Third Schedule to this Act, and the
 ntracted is the disease in the first column of that schedule set
 he description of the process, the disease, except where the certi-
 geon certifies that, in his opinion, the disease was not due to the
 the employment, shall be deemed to have been due to the nature
 employment unless the employer proves the contrary." Now, I
 effect of that section is not doubtful. It means this: First of
 ust get the certificate of the certifying surgeon that the man is
 rom a disease which is in the Schedule. Then, if he says nothing
 l if, as a matter of fact, the workman has been working at the
 n which, in the second column, is set opposite that disease, there
 mption that the disease was due to the employment. That is to
 e as he is concerned, he has fulfilled not only the first requirement
 d 1, that of obtaining a certificate from a certifying surgeon, but
 lfilled also the duty put upon him by the general words which

Mar. 8, 1912. come after, of showing that the "disease is due to the nature of the employment in which the workman was employed." The employer M'Ginn v. Udston Coal Co., Limited. that presumption, but the workman, so far as he is concerned, says any more. But then there are the words "except where the Ld. President. surgeon certifies that, in his opinion, the disease was not due to the nature of the employment." I think that, where he does put that addendum on his certificate, the result is only that the presumption is gone; the presumption, and therefore it is necessary for the workman to show, on the terms of the first section, that the disease was due to the nature of the employment.

Next, I think it is quite clear that the medical referee may do what that the certifying surgeon could have done. And therefore, if the certifying surgeon puts an addendum to the effect that the disease is not due to the nature of the employment, I think the medical referee may take it out, or, on the other hand, if the certifying surgeon leaves it in, I think the medical referee may put it in.

The question that really arises here is what is the precise nature of the report of the medical referee. In terms, in its first words, it purports to allow an appeal. Now, allowing an appeal would strictly mean that the certificate given ought not to have been given, and if the certificate is not there, then the whole matter must necessarily fall, because the condition precedent to the application of section 8 has not been fulfilled. This is really the view the Sheriff-substitute has taken. And the finding of the referee, as regards whatever he does say, is final. But we have decided in the case of *Winters v. Addie*,¹ that, when a medical referee says, "I allow an appeal subject to the following note," we are to read the note along with the finding in order to see what he has done. Now, when I read the whole thing here, I cannot read the finding as a determination by the medical referee as saying that the certifying surgeon ought never to have given any certificate at all. What the medical referee says is that the man is suffering from nystagmus, but that the nystagmus is not due to the nature of the employment in which he was engaged. In other words, I think the effect of this finding is that there ought to have been no certificate given, but that the certificate ought to have had the addendum which the certifying surgeon did not put in.

The result is, in my view, that this case must go on, but with the presumption in favour of the workman. On the contrary, it will be for him if he is to recover compensation, to show affirmatively that the disease of nystagmus, from which he is certified to be suffering, is not due to his employment, and did not arise from other diseases such as sclerosis, a possibility which the medical referee points out. This is the opinion to which I am driven by the way in which I find the disease mentioned in the schedule, where it is mentioned as purely a disease of nystagmus. Here the certifying surgeon says that the man is suffering from nystagmus, and, that being so, I cannot read this addendum from the medical referee that the man is not suffering from industrial

¹ 1911 S. C. 1174.

the case. I come to that conclusion with great regret, because I am maintained that the real view of the medical referee is that he is not from an industrial disease. But the fault is the fault of the Home Secretary and not mine. The fault is that nystagmus is put in the schedule as simply nystagmus, instead of being put in as miner's nystagmus. I do not know that I have any right to know these matters, and if my attention is turned upon it, I should not consider that I had any right to say anything upon it. But, by the best advice I have got upon the question, it seems to be no question that miner's nystagmus, that is to say, nystagmus induced by the position in which, to do his work, the miner has his eye, is a pathological condition of the eye which is idiopathic. Other forms of nystagmus are not so, but are the symptoms of various diseases of which this sclerosis is one, and there are several. Now, if the Home Secretary had been awake to that, and had put the disease in the schedule as "miner's nystagmus," then a certificate such as the medical referee here has given would be a proof that the workman is not suffering from an industrial disease. One can get a very good illustration of that from the disease that comes next in the schedule. The next disease is scrofulous cancer of the chimney-sweep's cancer. I have no doubt whatsoever that a man that a man was suffering from cancer would never be a good workman under section 8, because cancer is not an industrial disease, but chimney-sweep's cancer is. I cannot help thinking that nystagmus should have been treated in the same way. But as it is, I have to look at the schedule and I find nystagmus, and I am told by the medical referee that a man has nystagmus; that seems to be equivalent to an industrial disease in spite of his note, with the additional opinion that the disease is due to the nature of the employment.

My opinion, therefore, upon the whole matter, is that the case must go to the Sheriff-substitute that he may allow the matter to go on in order to let the man prove, if he can, because he has no presumption in his favour that the nystagmus from which he is suffering is a nystagmus which is due to the nature of his employment, and not from sclerosis or any other cause.

KINNEAR.—I entirely agree with your Lordship. But I have had some doubts in the case, not from any obscurity in the statute, but from uncertainty as to the true intention of the medical referee's decision. The provisions of the statute with reference to industrial diseases seem to me to be very clearly and distinctly clear. A workman who makes a claim must, in the first place, obtain a certificate from the district surgeon that he is suffering from one of the diseases mentioned in the Act or in the extension of the Act made by the Home Secretary's order. If he fails to obtain such a certificate, his claim upon which his claim arises has fallen and he has no right to it. If he succeeds in getting that certificate, then it must be shown also that the disease—that is, the industrial disease defined in the Schedule—is due to the nature of the employment in which he was employed at the time. If he has obtained a certificate without any qualification, then, under the provisions of the clause, he is to be deemed to have satisfied that

Mar. 8, 1912. other requirement that the disease is due to the nature of the employment. That raises a presumption which the employer is allowed to rebut. If the case stops there and the employer does not succeed in rebutting the presumption, the workman is entitled to his compensation. But if there is a qualification inserted, and if the surgeon says that the workman is suffering from the disease but that, in his opinion, it is not of the nature of the employment, the condition of the first subsection—disease must not only be established by the certifying surgeon's certificate but also that it must be due to the nature of the employment in which the workman is engaged—has still to be satisfied. He must go on to show that he has the disease but, inasmuch as the certifying surgeon's certificate states that the disease is not due to the nature of the employment, he must go on to show that it is.

Now I quite agree with your Lordship's view that, when the Act provides that the certificate of the certifying surgeon may be appealed against by the instance of either party to a medical referee whose decision is final, it puts the decision of the medical referee, to all effects, in place of the certificate of the certifying surgeon. If he sustains the certificate of course there is no question. If he allows an appeal, he may have the effect of refusing a certificate altogether, or to the effect of modifying its terms if he thinks that the certifying surgeon has erroneously issued it without qualification.

Now, it is upon the effect of the medical referee's decision upon an appeal with reference to these conditions that my difficulty arises. The question is whether he means to recall the certifying surgeon's certificate altogether and put nothing in its place, or whether he means to modify it by expressing and insert a qualification which he thinks the certifying surgeon ought to have inserted and failed to insert. I agree with your Lordship that, upon the fair construction of the medical referee's note, these two views must be taken to be what he meant. If he meant that this man is not suffering from nystagmus but from a different disease—sclerosis—which causes certain affections of the eye which may be taken for nystagmus but which, in reality, are only the symptoms of sclerosis, and the certifying surgeon has gone wrong because he has taken the symptoms of sclerosis for the industrial disease of nystagmus, that were the true meaning of his decision, I should say it recalled the certificate and put nothing in its place, and, therefore, that the condition of the workman's case had gone. But then, he does not say so as your Lordship has pointed out. He says, in the plainest words, "The workman unquestionably has nystagmus. He begins with that expression, and he ends with a repetition of it. But then he qualifies it in this way, that he says he does not think it is miner's nystagmus—say, he does not say there is one disease called nystagmus, which corresponds with the industrial disease in the schedule, and something else which does not correspond with that description but is a mere symptom of the disease. He says, "There is nystagmus, but I do not think it is nystagmus which is caused by the miner's employment."

Accordingly, I think the Sheriff-substitute puts quite reasonable construction of law which he thinks arose upon the medical referee's decision.

Was the medical referee entitled to allow the appeal and recall the certificate on the ground that the nystagmus from which the appellant was certified was not due to the nature of his employment as a miner? I say, although not without considerable difficulty, I consider that in the same way as the Sheriff-substitute considered it. I think, from the information we possess judicially, we cannot read the delivery of the medical referee as meaning that the man is not suffering from a disease specified in the Schedule as nystagmus, although he considers it not due to his employment as a miner. Now, whether it is due to his employment as a miner or not is not a question which is submitted to the final decision of the medical referee. It is a question which must be proved by one or other of the parties, the employer or the workman, according as the onus is laid by the terms of the medical certificate.

The result is that the workman is entitled to go on and prove that, notwithstanding the medical opinion, the morbid condition of his eye was due to his employment. And, accordingly, I agree with your Lordship that the decree you propose.

JOHNSTON.—I have experienced very much greater difficulty in this case than, apparently, your Lordships have, for I cannot personally interpret the provisions of section 8 (1) (i), followed as it is by the words "the disease is due to the nature" of the workman's employment, with the result of the referee's determination under section 8 (1) (f), and with section 8 (2). But my own reading of the statute is not, to my mind, very satisfactory to justify me in differing from the judgment your Lordships propose.

LACKENZIE.—There is, I think, much to be said in support of the decision reached by the Sheriff-substitute, but I do not feel it safe to take a contrary view. If one was in a position to consider the certificate of the medical referee as being equivalent to this, that the workman was not suffering from industrial disease, then, of course, that would be equivalent to saying that there never had been any accident, and there would be no need for any further procedure. It is just because I do not feel that, in this case, one has sufficient knowledge of where the medical referee passes the line between the region of science into the region of fact that I am unable to concur in the certificate in that way.

I agree with your Lordship's observation that probably the whole difficulty in this case has arisen from the way in which the Order in Council was framed, and that, had it been framed so as to apply to miner's nystagmus, the difficulty in this case would not have arisen.

The COURT answered the first question of law in the case in the negative, the second question in the affirmative; recalled the determination of the Sheriff-substitute as arbitrator, and committed the cause to him to allow the parties a proof of whether the nystagmus from which the appellant was certified as suffering was or was not due to his employment with the respondents, and to proceed as accords.

SIMPSON & MARWICK, W.S.—W. & J. BURNES, W.S.—Agents.

No. 100.

Mar. 8, 1912.

Christie v.
Magistrates
of Leven.ROBERT MAITLAND CHRISTIE AND OTHERS, Appellants
*Sandeman, K.C.—J. A. Christie.*THE PROVOST, MAGISTRATES, AND COUNCILLORS OF THE BURGH
OF LEVEN, Respondents.—*D.-F. Dickson—D. P. Fleming.**Burgh—Orders and requisitions of Magistrates—Process—Appeal—Competency—Appeal against order for formation of streets—Appeal against order that appellant's property not in burgh—Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), sec. 339.**Held* that the right of appeal given by sec. 339 of the Burgh Police (Scotland) Act, 1892, to any person aggrieved by any order or resolution of the Magistrates made under the Act is given upon the hypothesis that the property in respect of which the order is made is situated within the burgh, and accordingly that an appeal against an order to form a street by a person whose ground of objection was that his property was not situated within the burgh was incompetent.*Observed* that his proper course was to take no notice of the order and allow the Magistrates to raise the question in an ordinary process.*Burgh—Boundary of administrative area—Sea boundary—High-water mark.**Opinion per curiam* that the boundary of the administrative area of a burgh fixed as "the line of high-water mark" was a boundary, and accordingly that land from which the sea was visible was within the administrative area.*Leith Dock Commissioners v. Magistrates of Leith, 1911 S.C. 100, followed.**Burgh—Orders and requisitions of Magistrates—Formation of streets—Cost of formation—Subjects assessable—Subjects not assessable—Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), secs. 137, 365.**Opinion per curiam* that notices given by the Magistrates under the Burgh Police (Scotland) Act, 1892, requiring the owners of a private street in the burgh, were valid although the property in respect of which the notices had been served were not entered in the burgh Valuation-roll.

1ST DIVISION. ON 1st December 1911 Robert Maitland Christie and others appealed to the First Division of the Court of Session under section 339 of the Burgh Police (Scotland) Act, 1892,* against an order by the Magistrates of the burgh of Leven issued in terms of section 137 of the Act, as amended by section 104 (2) (d) of the Burgh Police (Scotland) Act, 1903,† requiring them to do certain work upon a private street called Promenade Road in that burgh.

* The Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), sec. 339. "Any person liable to pay or to contribute to the expense of any work ordered or required by the Commissioners of the burgh, and any person whose property may be affected, or who thinks himself aggrieved, by any order, or resolution, or deliverance, or act of the Commissioners made or done under any of the provisions herein contained, may, unless otherwise in this Act specially provided, appeal either to the Court of Session or to the Court of the burgh."

† 3 Edw. VII. cap. 33.

ts of the case are given in the following statements made Ma
pellants :—

he appellant Robert Maitland Christie of Durie is proprietor ^{Chr}
all piece of ground on the north side of Promenade Road, ^{Ma}
nd of nearly the whole ground on the south side thereof.
appellants are feuars of parts of the estate of Durie, whose
t the said road. The whole of the buildings on their feus
ed on the north side of said road, and there are no buildings
nth side thereof. . . .

he respondents by notices served on the appellants as owners
use of the Burgh Police (Scotland) Acts, 1892 to 1903, of
situated at and fronting or abutting on the private street
Promenade Road, Leven, on 17th November 1911 intimated
that the respondents had resolved in terms of the Burgh
cotland) Acts, 1892 to 1903, and in particular section 133 of
h Police (Scotland) Act, 1892, as amended by the Burgh
cotland) Act, 1903, to cause the carriageway of Promenade
thin the burgh of Leven, to be freed from obstruction, and
properly levelled, macadamised, flagged, channelled, and com-
ith fences, &c., all in terms of the plans, sections, and specifica-
rein mentioned. . . .

y notices of the same date served upon the appellants the
nts, by virtue of the Burgh Police (Scotland) Act, 1903, and
rly section 16 thereof, required the appellants to cause the
before their properties on the north side of the said street to
d in the manner therein specified, namely, the existing foot-
nding to 6 feet in breadth, which had already been temporarily
o be made with concrete in accordance with the plans, sec-
l specifications therein mentioned.

y a further notice of the same date the respondents required
ilant Robert Maitland Christie to cause the footway before
rty on the south side of the said street to be formed in the
herein mentioned, namely, the footway to be 6 feet in breadth
be formed in a temporary manner, with ashes blinded with
dam, and provided with fire-clay kerbs and water channels, all
of the plans, sections, and specifications therein mentioned.

The appellants are aggrieved by the said resolutions and
and they appeal against the same on the ground that they
vires of the respondents and are illegal and oppressive.

By interlocutor, dated 15th January 1867, the then Sheriff of
Kinross found the boundaries of the burgh of Leven on the
le to be as follows :—‘ Commencing at the south-east corner
a Bridge thence by the line of high-water mark as far east-
Scoonie Burn, thence by the west side or margin of Scoonie
to the south fence or boundary of the Leven and East of
lway.’

The sea has gradually receded opposite the town of Leven,
a great part to the erection of the new docks at Methil, ‘in
on with which walls have been thrown out seawards, thus
the flow of the currents eastwards *ex adverso* of the burgh of
The sea, however, still occasionally washes up upon what is
own as Promenade Road, when spring tides coincide with
and south-easterly winds. The greater portion of the road,
s now called Promenade Road, is situated below the high-
ark as it existed in 1867. In particular, the solum of the

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said road *ex adverso* of the properties of the appellants to seaward of the line of high-water mark in 1867 and outside said burgh of Leven. Practically the whole of the property on said road belonging to the appellant Robert Maitland to seaward of said high-water mark and outside said burgh.

"(10) . . . The buildings erected on the feua lying north side of Promenade Road have been entered in the Valuation-roll as being within the burgh of Leven, and assessments levied in respect thereof. . . . The appellant Robert Christie has never paid any burgh assessments in respect of property lying to the south side of Promenade Road. Said property was entered in the Valuation-roll as 'landward,' i.e., outside the burgh and is not assessable or assessed by the respondents. Said property was so entered at the time of the resolution and notices served against it. The appellant Robert Maitland Christie is assessed in respect thereof by the county authorities. . . ."

"(11) In terms of said resolutions, notices, and relative provisions, the respondents propose to form the said carriage-way, *alio*, of tarred metal, blinded with tarred chips, being what is known as tar-macadam. . . . The Burgh Police Acts do not provide for streets being laid in this manner, and the respondents have no right to call upon the appellants to complete a private road in this fashion. . . ."

The case was heard before the First Division on 8th February 1912.

Argued for the appellants;—The notices were incompetent in respect of which they were served did not appear in the Valuation-roll of the burgh, and, as private improvements under section 365 of the Act of 1892 were only leviable on property assessed in the burgh, on that ground alone the appeal was sustained. Further, however, the Magistrates were, under the Act of 1892, entitled to issue notices and orders only in relation to property situated within the burgh, and the appellants' lands in respect of which the notices were issued were situated outwith the burgh. That was evident from the fact that they were entered in the Valuation-roll, and were assessed by the county authorities. The claims of the respondents accordingly involved a direct conflict with the interests and rights of the county for the purposes of, and in relation to, the Valuation-roll,¹ and it was obvious that the county should have been made a party to any case in which that question was tried, failing which a plea of "all parties not called" was to be sustained.² That the lands were outwith the burgh was evident if the burgh boundaries were examined. The boundary of the burgh had been fixed by the Sheriff in 1867 in the line of high-water mark. The appellants' property was below the high-water mark of 1867 and was therefore outside the burgh.

¹ Valuation of Lands (Scotland) Act, 1854 (17 and 18 Vict. cap. 17, 37, 38; Police and Improvement (Scotland) Act, 1861 (26 Vict. cap. 101), sec. 7; Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), secs. 9, 348; Local Government (Scotland) Act, 1894 (57 and 58 Vict. cap. 58), sec. 45 (1).

² Leith Dock Commissioners v. Magistrates of Leith, 1911 S.C. 101; North British Railway Co. v. North Eastern Railway Co., (1891) 19 H. L. 19, Lord Watson, at p. 30.

, seeing that the burgh boundary was not extended by Mar. that the sea had receded since 1867, a delimitation by high-^{Chris}rk being in no sense a fluctuating boundary, and the ^{Magi}delimitation of the area of a burgh being equivalent to of Le ng charter so far as affecting proprietary, and a *fortiori* ative, rights.¹ If the burgh wished to extend its boundaries, dopt the statutory procedure.² The case of *Smart & Com-own Board of Suva*³ was not binding upon the Court, and reconcilable with the Scotch decisions.

for the respondents;—It was immaterial in a question of or private improvement expenses whether the subjects were ot entered in the Valuation-roll. The Valuation-roll had o do with the question. The Act of 1892 imposed these expressly on the owners of all subjects "fronting or abut- private streets," as the same shall be ascertained and fixed mmissioners,"⁴ whether they were assessable in the burgh he Valuation-roll was nowhere referred to in the statutory e dealing with private improvement expenses except in n Police (Scotland) Act, 1903, and then only in connection ed ownership of premises.⁵ The statutory definition of d premises"⁶ could not be read as excluding subjects not the Valuation-roll.⁷ Further, it was clear that the subjects on were within the boundary of the burgh, the seaward having been extended by the recession of the sea. It had that a boundary by low-water mark was a fluctuating and in this respect there was no logical difference between mark and high-water mark.⁸ This, at anyrate, was true tion as to administrative areas, whatever it might be in a of title to property. The cases of *Blyth's Trustees v. Shaw* and *Magistrates of Montrose v. Commercial Bank of Scotland*¹⁰ ffect any question as to administrative areas.

v. Magistrates of Dundee, (1797) 3 Pat. 606, 8 Brown's Cases ent, 119; Lord Advocate *v. Wemyss*, (1899) 2 F. (H. L.) 1; Kerr , (1840) 3 D. 154, 1 Bell's App. 499; Berry *v. Holden*, (1840) Todd *v. Dunlop and Others*, (1841) 2 Rob. App. Cas. 333; Lord Advocate, &c., (1869) 7 Macph. 899; *Blyth's Trustees v. wart*, (1883) 11 R. 99; *Magistrates of Montrose v. Commercial cotland*, (1886) 13 R. 947.

aries of Burghs Extension (Scotland) Act, 1857 (20 and 21 70); *Dunoon Commissioners v. Hunter's Trustees*, (1895) 22

A. C. 301.

1856 Vict. cap. 55, secs. 137 and 365.

1856 Vict. cap. 33, sec. 104 (2) (u).

1856 Vict. cap. 55, sec. 4 (16).

Head, Municipal and Police Government, 2nd ed. 6.

ases cited for the appellants were discussed, and the following referred to:—*Forth Bridge Railway Co. and Others v. Assessor s and Canals in Scotland*, (1890) 1 Poor Law Magazine, 147; Co. *v. Town Board of Suva*, [1893] A. C. 301; *Fisherrow Har- missioners v. Musselburgh Real Estate Co.*, (1903) 5 F. 387, F. (H. L.) 113; *Leith Docks Commissioners v. Magistrates of 11 S. C. 1139*; *Campbell v. Brown*, F. C., Nov. 18, 1813; *North British Railway Co.*, (1887) 14 R. (H. L.) 53.

99. ¹⁰ 13 R. 947.

Mar. 8, 1912.

At advising on 8th March 1912,—

Christie v.
Magistrates
of Leven.

LORD PRESIDENT.—This is an appeal by certain persons who served with notices under the Burgh Police Acts of 1892 and 1903 owners of lands abutting on Promenade Road, Leven, requiring them to make in a proper manner the carriageway of that road, and to maintain pavement upon it. Promenade Road may be described as the road which forms the sea-front of this portion of the burgh, and the question of great extent turns upon whether the appellants' lands are in the burgh. The appellants object to these orders upon several grounds which we are presently dealing with, and they take an appeal to your Lordships upon the provisions of the Acts of 1892 and 1903.

The principal objection is that taken by Mr Christie as the sole opponent, to the effect that he has no lands at this place within the burgh. The meaning of that is that the burgh was defined, when it was delimited by the Sheriff, as bounded on the south by the high-water mark, which has receded, and Mr Christie says that the ground in respect of which notices have been served is not in the burgh at all, because it is outside the high-water mark as it was when the burgh was delimited.

The point of competency was not taken in argument, but I am sure that you and I understand all your Lordships agree, that we might dispose of these appeals upon the very simple ground that they are incompetent, and that is for this reason. The whole scheme of appealing against these orders of the burgh is upon the hypothesis that the people aggrieved are within the burgh. Where the objection of the aggrieved person is that he is not within the burgh at all, it is not the proper subject of an appeal. If he is within the burgh he might just as well be at Wick as within a few feet of the sea, and the present question would be properly raised by simply taking an appeal against the order at all. The Town-Council would then do the thing which they are bound to do, and would proceed to recover the cost, either by an ordinary action or by the process by which assessments are recovered and which is by statute applicable to such a debt, and thereupon the aggrieved persons would have to pay. Technically, therefore, I am of opinion that these appeals should be dismissed because they are incompetent. But the whole matter has been argued before your Lordships, and I think it would be a great waste of time to dismiss the matter here, and, therefore, while that will be the formal result of my opinion, I proceed to give my opinion upon the merits of the case as it has been argued.

The points were twofold. First, it was said this is a bad notice because there are no lands of the appellants *ex adverso* of this street which are in the burgh Valuation-roll. At first sight I was inclined to think that argument was a formidable one, but on further consideration I think it is not. This is not an assessment. It is quite obvious that the Council can only recover assessments imposed upon lands in the Valuation-roll, and not upon any others, because, of course, the assessment is levied at a certain rate per pound and, unless your lands are fairly valued, then in comparison with your neighbours you may have to pay more than your fair share. Accordingly in the Burgh Police Act there is provision made for

according to the Valuation-roll. But this is not assessment at all, first of all, a command to do a certain thing, and then the, not doing it is that the Town-Council proceed to do it themselves, then having done it recover from you the cost. No doubt it is a rate assessment, but it is not assessment in the proper sense of the word because you have to pay the cost irrespective of what your valuation is; what you have to pay is of the road and the pavement *ex adverso* of your frontage. It is simply a sum of money and nothing else; and although that cannot be recovered against you unless you are a proprietor of lands and heritages in the burgh, I do not think it is necessary that your lands and heritages should be in the Valuation-roll. That disposes of the first point. The second point is the one to which I have already referred, namely, that the appellant says, "I am not in the burgh at all"; and we have had a very learned argument upon the question of sea boundaries, in which the appellant tried to show that there was a very great difference between a high-water mark boundary and a low-water mark boundary. The low-water mark was admitted, followed the sea—the high-water mark, he maintained, was fixed. We are dealing here with a line which was fixed to delimit an area. The Sheriff undoubtedly fixed the high-water mark, and the whole question, I think, is this, whether a delimitation by a high-water mark means a fluctuating boundary or a stationary boundary. I think that has been fixed by a decision of the other Division in the case of *Leith Docks Commissioners v. Magistrates of Leith*.¹ That, I think, is a direct authority that there may be an administrative boundary which is a fluctuating boundary. If you once reach that, it does not seem to matter whether the fluctuating boundary is high or low-water mark, because in fact both these boundaries do, in certain cases, fluctuate. This is also in accordance with the case of *Smart & Company v. Town of Suva*,² which concerned a boundary fixed by proclamation in Fiji. It does not seem very much difference for the purposes of the present case between fixing a boundary by a proclamation or fixing a boundary by the various Burgh Police Acts. Accordingly, although I think the appeal should be dismissed upon the technical point, I also think they fail on their merits, so that, after what I have said, I think it will be quite unnecessary to say that the appellants here should proceed to take the course which would have otherwise been open to them, to raise the present question of suspension.

LINNEAR concurred.

JOHNSTON.—I agree in the opinion which your Lordship has just given.

But looking to the provisions of the statute, I think this appeal is incompetent. This depends on a comparison between certain provisions of the Act of 1892 (55 and 56 Vict. cap. 55). Section 137 provides that the expenses of such works as are here in question shall be paid by the Commissioners and shall be recovered as private improve-

¹ 1911 S. C. 1139.

² [1893] A. C. 301.

Mar. 8, 1912. ment expenses. Section 143 gives right to anyone who thinks himself
 aggrieved in this matter of streets and foot-pavements to appeal to the
 Sheriff in manner provided in the Act. And section 365 gives the Com-
 missioners the right to recover these private improvement expenses in the
 same manner as any assessment under the Act. When the terms of the
 latter section are looked at it is perfectly clear that the expenses there dealt
 with are to be recovered over and above any assessment to which the
 owner or occupier may be liable under the Act. Quite apart from the
 general consideration that it is impossible that a statute of this sort should
 indirectly extend the jurisdiction of the Magistrates beyond their own
 boundaries, the latter section makes it quite clear that the proprietors whom
 they are empowered to charge with private improvement expenses are those
 only whose properties they are entitled to assess. Then when you turn to
 the appeal section, 339, you find there that it is made quite clear that the
 person who is entitled to appeal under that section is some person who is
 bound to pay or contribute in respect of an order or resolution which the
 Magistrates could competently pronounce. Accordingly, the appeal there
 provided is a very limited appeal. It is an appeal either to the Sheriff or
 to this Court direct. There is no appeal from the Sheriff. But this pro-
 vision does not cover a direct challenge of the Magistrates' jurisdiction over
 the property in question. I think it is quite clear that this case should
 have been thrown out had an objection to competency been taken. This
 is not the process by which to raise the real question in the case. But I
 agree with your Lordship in holding that as no objection was taken and
 the matter has been debated, the opinion of the Court should be given
 upon it.

But there is another point on which I desire to reserve my opinion, and
 that is as to the effect of the terms of section 133 of the Act of 1892, under
 which this demand by the Town-Council is made, and section 141 of the
 same Act. The latter section provides that in a case of this sort—I am
 taking the case of Mr Christie alone—where there are no buildings, &c., *ex*
adverso of his part of the road, the Town-Council are not entitled to charge
 him with the whole expense if they cause the foot-pavement to be con-
 structed *ex adverso* of his piece of ground, and therefore I think it is right
 to reserve my opinion upon the bearing of these two sections one upon
 another, and whether the limitation of section 141 does not apply here.

LORD MACKENZIE.—I agree with your Lordships. There is one point
 which was put to us, and that was whether tar-macadam, which is the
 material to be used in the formation of this roadway, is macadam within
 the sense of this Act. I only mention it in order to express the view that
 I do not think there really can be any difficulty about that. If, by the
 progress of science, it has been found out that macadam can be laid down
 in a more effective way by covering the pieces of metal with a coating of
 tar, that is just macadam.

Another point was stated, that the requisition was served at such a time
 of the year as to make it impossible for the work to be done. It was
 explained that the reason for that was that an earlier notice proved abortive,
 and therefore there was delay, but, as I understood, counsel at the bar

if there was any difficulty in regard to that, there would be no Ma
 sole insistence by the Police Commissioners on the work being Ch
 that they would give reasonable time to allow the work to be Ma
 of

regard to the point upon the boundary, your Lordship's opinion is Lo
 legal effect of a boundary fixed by high-water mark, leaving, of ko
 on any question of fact that there may be between the parties as
 ch is included within the high-water mark, and the correct line
 sh that mark should run, because, although a plan was presented
 a line laid down upon it, I am not sure whether that line was
 on between the parties. Any question of fact as to where the
 should be is reserved, and will be open to the parties at a future

point which my brother Lord Johnston has suggested with regard
 a, a distinction is drawn between the footway to the north and
 e south. The requisition is for the footway to be formed in a
 manner on the north side, and that for the reason that there are
 utting. On the south there are no houses abutting, and therefore,
 ice runs, the footway is only to be formed in a temporary manner.
 llection serves me right, that is in accordance with the provisions
 16 of the Act of 1903 (3 Edw. VII. cap. 33), and therefore I
 e is no substantial difficulty with regard to that matter.

THE COURT dismissed the appeal as incompetent.

ANE & CAMPBELL, W.S.—LEWIS & SOMERVILLE, W.S.—Agents.

JOHN MACKENZIE, Pursuer (Appellant).—*Morison, K.C.*— 1
MacRobert.

HEANOR TAYLOR OR IMLAY AND OTHERS (Hugh Imlay's Ma
 es) and Others, Defenders (Respondents).—*Sandeman, K.C.* Ma
 Tr

*Security—Bond and disposition in security—Creditor in possession
 of insolvent debtor—Power to grant lease—Agreement between
 and tenant affecting the subjects—Rights and liabilities of bond-
 Heritable Securities (Scotland) Act, 1894 (57 and 58 Vict. cap.*

908 a company disposed certain heritable subjects to a bank
 security for an overdraft, for which three of its directors were
 personally liable. In May 1909 the company granted a five
 ' lease of a shop, forming part of the subjects, to an auctioneer,
 in July, in respect of a payment by him of a small sum down,
 took by letter not to let, during the currency of the lease, an
 ning shop, also forming part of the subjects, to any person carry-
 on an auctioneer's business. In 1910, the company being unable
 pay the overdraft, payment was made by the directors, who got
 the bank an assignation of the bond, and intimated to the com-
 that they intended to enter into possession of the subjects and
 ct the rents through certain factors. The company thereafter
 ed a resolution that it should be left to these factors to collect
 rents for behoof of the assignees, and notified the tenants to that

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effect. In 1911 the factors let the adjoining shop for a year to an auctioneer for the purposes of his business.

In an action in which the tenant under the earlier lease sought to interdict the assignees from granting the later lease, on the ground that the company's undertaking was binding on them, and (1) that in any event, they were not heritable creditors in possession, and had no title to grant the lease, the Court *refused* interdict, *holding* that the company's undertaking was not binding upon the bank, the bondholder, and therefore was not binding on the bank's assignees. (2) that the latter were in the position of heritable creditors in possession, and as such were entitled to grant the lease in question.

2d Division.
Sheriff of
Aberdeen,
Kincardine,
and Banff.

IN April 1911 Robert John Mackenzie, auctioneer and valuator, Aberdeen, brought an action in the Sheriff Court at Aberdeen against (1) the North of Scotland Property Company, Limited, (2) Eleanor Taylor or Imlay and others (Hugh Imlay's testate trustees), (3) John Brown, (4) James Murray, and (5) Messrs Hunter & Gordon.

The action concluded for interdict against "the defenders, any of them, or anyone acting for the defenders or under their instructions or for their behoof, from letting or attempting to give possession, or attempting to give possession, of the premises known as the Union Street, Aberdeen, to any company or firm, or other person, to be used by such company, firm, or person for the purpose of selling goods of any description by auction, or in any other way which would be a breach of the conditions of the lease and relative to the premises specified in the preamble hereto, and that at any time prior to the 28th day of May 1914."

The following narrative of the facts is taken from the opinion of Lord Dundas:—"The pursuer, an auctioneer and valuator, had obtained a formal written lease of a shop, No. 120 Union Street, Aberdeen, for five years from Whitsunday 1909, from the defenders the North of Scotland Property Company, Limited, the proprietors of Nos. 116, 118, and 120 Union Street. In July 1909 the Company, in consideration of a payment by the pursuer of £30, undertook not to let the premises 'for the purpose of selling goods of any description by auction' during the currency of the said lease. This arrangement was embodied in a couple of improbative letters, which are produced. In 1910 the Company had obtained from a bank a cash-credit for a large sum, the security for the repayment of which they had disposed of by mortgaging the property. Three of the directors, Mr Imlay, Mr Brown, and Mr Murray, were made personally liable for the overdraft. In 1910 the bank demanded payment; the Company were unable to pay, and the defenders Imlay's trustees, Brown, and Murray, were made personally liable for the overdraft, and got from the bank an assignation of the bond of the security subjects, as of course they were entitled to do so under the assignation to rents contained in the bond. The directors of the Company on or about 6th May passed a resolution, the substance of which is quoted in cond. 6. It narrated that in respect that these directors had paid the bank £20,323, due by the Company to the bank, and that they were now in right of the securities formerly held by the bank, they had taken possession of the property, and had 'intimated to the directors their intention of entering into possession, and collecting the rents of the subjects known as the Queen's Rooms' (i.e., Nos. 116, 118, and 120 Union Street), and had appointed Messrs Hunter & Gordon

as factors, the directors resolved 'that it be left to Messrs Mac Gordon to collect the rents thereof and to pay over the Mac behoof of' the said defenders; and, on the same day, the Imh agents notified the tenants that the rents would be col-Tru the said factors of the bondholders. In the spring of 1911 Hunter & Gordon, by missives which are produced, let the 118 to Mr Frank for a year from Whitsunday 1911 to May 1912, at a rent of £200, for carrying on his business as dealer of jewellery and miscellaneous goods. The pursuer, on being aware of this let, immediately brought the present action against the Company, the bondholders, and Hunter & Gordon, their agents, to have them interdicted 'from letting, or attempting to let, or giving possession, or attempting to give possession, of the shop' to any person for the purpose of selling goods by auction, or in breach of the lease and letters above mentioned between the Company." The pursuer also averred that John Brown and James Murray, as directors of the North of Scotland Property Company, Limited, were personally aware of the agreement between the Company and the pursuer at the time it was made. This was admitted on behalf of Brown and admitted on behalf of Murray.

The pursuer pleaded, *inter alia*;—(1) The defenders' statements are untrue and insufficient in law to support their pleas. (2) It is a condition of the pursuer's contract with the said Company that the shop 118 Union Street, Aberdeen, would not be let for the purpose of selling therein goods of any description by auction during the term of the pursuer's lease, and the defenders having no rights in the shop with pursuer higher or other than those of said Company, the pursuer is entitled to interdict as craved against all the defenders, with expenses.

The North of Scotland Property Company, Limited, did not lodge a defence.

Imlay's trustees, John Brown, and James Murray, pleaded, as follows;—(1) The action is incompetent. (2) The pursuer's averments are irrelevant and insufficient to support the conclusions of law sought.

Hunter & Gordon pleaded;—The defenders Hunter & Gordon are only factors for the property, and as such acting under the authority of the bondholders in possession, and having no other interest therein, should be assoilzied, with expenses.

On May 1911 the Sheriff-substitute (Laing) pronounced this decree:—"Sustains the first and second pleas in law for the pursuer against Imlay's Trustees, Brown, and Murray, and the plea in law for the defenders Hunter & Gordon, and assoilzies them from the claims of the action: *Quoad ultra*, in respect of no appearance, interdict as craved against the defenders The North of Scotland Property Company."*

REMARKS.— . . . On consideration I have felt compelled to refuse to interdict against the compearing defenders. The argument maintained by the pursuer was that, as the defenders the North of Scotland Property Company had not lodged defences, the defences of the compearing defenders must be held to be irrelevant, as they could have no higher rights in the property than those of the Company, and must be held to have taken the property *tantum et quantum* assessed by them, and therefore subject to the lease with the pursuer and the agreement of July 1910. This argument is, I think,

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The pursuer appealed to the Court of Session, and the heard before the Second Division on 9th and 20th February. Argued for the appellant;—(1) After the defenders the Scotland Property Company had disposed the premises to the Clydesdale Bank, they still retained the right to ordinary acts of administration. Their position was analogous to that of a proprietor under inhibition.¹ The lease of the premises to the pursuer and the agreement with him that the adjoining premises should not be let to a possible trade competitor, were ordinary acts of administration such as were within the power of the proprietor and were binding on the bondholders or their assignees. They did not affect the heritable right of the bondholders, and therefore the principles of *Morier*² and *Heron*³ had no application. (2) In any event the defenders Brown and Murray could not plead that the agreement was not binding on them, since they had personal knowledge of

the transaction and were not unsound in respect that it proceeds on the assumption that the defenders, Imlay's trustees, Brown, and Murray, represent the Company and must, therefore, be bound by the Company's contracts, and that the fact that they are the bank's assignees, and therefore stand in place of the bank. As between the pursuer and the compearing defenders there was privity of contract. The lease and letters upon which the pursuer relied constituted a contract solely between him and the Company; and as two of the compearing defenders were directors of the Company at the time the letters were written, it is not in that capacity that they are to be regarded as holders of bonds over the Company's property to which the pursuer has acquired right under their assignation from the bank. Being directors of the bank, what are the rights of the compearing defenders? On the overdraft of £24,000 from the Clydesdale Bank, the Company granted to them in security thereof the property 116-120 Union Street. The restriction of cash-credit and disposition in security by the Company in favour of the pursuer is dated August 1908, or nearly a year prior to the time when the Company leased No. 120 Union Street to the pursuer and placed a restriction on 118 Union Street the restriction referred to. At the time when the restriction was done the consent of the bank was not obtained; indeed, no restriction transaction appears to have been sent to the bank. A debtor cannot grant a disposition in security may, while he remains in possession, do ordinary acts of administration, such as granting leases of ordinary premises for a fair rent; but it is plain that, without his creditor's consent, he is not entitled to prejudice his security by contracts outside the ordinary course of management. Such contracts on the debtor's part would not be binding on the creditor—*Heron v. Martin*, (1893) 20 R. 1001; and *Brownlie & Watson*, (1895) 23 R. 67. After the bond and disposition in security had been granted to the bank by the Company it seems that the defenders were not entitled, without the bank's consent, to place on 118 Union Street any restriction which might affect its letting value, or, in other words, affect the value of the security disposed to the bank. If the restriction did affect the letting value is obvious from the fact that, if enforced, it will deprive the compearing defenders, who paid the pursuer an income of £200 a year. Had the bank entered into possession of the properties in the same way as the compearing defenders did, and proceeded to lease 118 Union Street for an auctioneer's

¹ Graham Stewart on Diligence, p. 562; Ross's Lectures, 2nd ed., p. 497; Bell's Comm., 7th ed., vol. 2, p. 142.

² *Morier v. Brownlie & Watson*, (1895) 23 R. 67.

³ *Heron v. Martin*, (1893) 20 R. 1001.

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action had been taken. Even an action of mails and d only a process for the recovery of rents.¹ (4) The action w tent. The pursuer was entitled to enforce his agreement defenders by means of an action of interdict.

Argued for the respondents;—(1) The agreement between suer and the North of Scotland Company, that the adjoin should not be let, was one which affected the value of the and was therefore an act beyond the power of the Company had disposed the subjects in security to the bank.² It than a mere act of administration. The agreement was the binding on the respondents, whose rights were derived, not North of Scotland Company but from the bank. (2) Whether the respondents personally knew of the agreement was i and irrelevant. (3) The validity of Mr Frank's lease depends whether or not the respondents were "creditors in possession as such, entitled to grant leases.³ The clause of assignatio

rents to them—the Company. The rights of these defenders to possession of the security subjects was conferred on them by the to rents in the bond assigned to them by the bank, and it seems the resolution of the Company, and their letter to their tenants, tively put them, the defenders, in the position of creditors in p at least for the purposes of administration,—as a decree in an action and duties would have done. In taking the course they did the law-agents followed a common practice, under which creditors entered possession of security subjects without a decree of mails and duties, debtor does not object to their doing so (*Craigie, Heritable Rights*, 949), and it appears to me that the Company's resolution and letter to tenants were simply intimations that they consented to the defenders entering into possession. It is not disputed that in p the compearing defenders have for a year exercised the powers of in possession, and I doubt whether it lies in the pursuer's mouth to the defenders as such, as for the past year he has recognised them as such, paying his rent to their factors, the defenders Messrs Hunter & Gordon. As suggesting the soundness of the argument that the compearing defenders represented the Company, it was maintained that they could not lease of No. 118 Union Street without the consent of the Company. On the point of fact these defenders have done so through their factors, Hunter & Gordon. For these reasons I think that the compearing defenders cannot be regarded as simply the agents or mandataries of the Company.

"In this view of the legal rights of the respective parties it seems immaterial whether the compearing defenders Brown and Murray were aware that the Company had placed a restriction on No. 118 Union Street. If the restriction was ineffective as regards the bank, who were the bondholders, it was, I think, equally ineffective as in a question of assignees, whoever they were. If, as bondholders, the compearing defenders Brown and Murray knew of the existence of the restriction, it must be that they also knew that it was ineffective. Knowledge of an ineffective restriction could not make the restriction binding on an assignee, a bondholder, whose right was not affected thereby (see opinion of the Justice-Clerk in *Morier v. Brownlie & Watson*, *supra*). On the whole, it appears to me that the party against whom alone the pursuer has a remedy by way of an action of damages is the North of Scotland Company. . . ."

¹ *Henderson v. Wallace*, (1875) 2 R. 272.

² *Morier v. Brownlie & Watson*, 23 R. 67; *Heron v. Martin*,

³ *Heritable Securities (Scotland) Act*, 1894, secs. 3, 6; *Belmont on Conveyancing*, 3rd ed., vol. ii. p. 1170.

Mar. 8, 1912. looked on as the landlords, which I think the Court would hold
 Mackenzie v. limited effect only. The creditors' remedy, when the proprie
 Imlay's aiding them, is to sell." But the point seems to be set at rest by
 Trustees. of the Heritable Securities (Scotland) Act, 1894, which provides
 Lord Dundas. creditor in possession of lands disposed in security may let such
 in security, or part thereof, on lease, for a period not exceeding
 in duration." The pursuer argued that the resolution of 6th May
 in effect at best a mere mandate by the debtor Company to the b
 to collect such rents as might be due and payable by the ten
 property, and formed no sort of equivalent to a decree of mails
 I do not agree with this view. The creditors had intimated their
 of entering into possession, as they had undoubted right to do
 Company resolved, no doubt very sensibly, that there was no nee
 them to take judicial steps, and accordingly stood aside. I consi
 ing with the Sheriff-substitute, that after the resolution and the
 intimation to the tenants, the bondholders were in as good a po
 they had taken out a decree of mails and duties. It was said fo
 suer that, assuming all this, an action of mails and duties is
 "nothing more than a process for recovery of the rents, and carri
 more" (*per* Lord President Inglis in *Henderson*¹); and, accordi
 a decree in such a process would not place the bondholders "in p
 of the unlet subject, No. 118, so as to entitle them to let it
 bondholders' right to enter into possession depended not on
 decree, but on their bond and infestment, and the statutory effe
 —a right independent of, and counter to, the debtors' title o
 So far as I can see, the debtors never attempted to prevent th
 from taking possession of the security subjects; but, on the co
 their actings, virtually put them in possession. In any case,
 not have defeated the creditors' right to enter into possession,
 paying the debt. The latter were in a position to enforce en
 competent process, and I do not know that they could in fact l
 possession of No. 118 in any more effective manner than by let
 think, therefore, that these defenders must, in a question with t
 be regarded as heritable creditors in possession of the security su
 entitled as such to let part of these as they did. I do not see
 ground the pursuer can successfully maintain that such was not
 tion and character, or question the validity of the lease of No
 other words, he has, in my judgment, stated no relevant case for
 vention of the Court.

I have dealt with the case upon the lines of the arguments
 presented to us. But the matter does seem to me to be capabl
 resolved by an even simpler view of it. If the bondholders are,
 they are, entitled to enter into possession by the statutory virt
 bond and infestment, I do not see how the pursuer can effectiv
 them, or anyone (*e.g.*, Mr Frank), who bears their authority, fro
 apart altogether from any question as to the validity of this parti

I should add in conclusion that the question of knowledge on

¹ 2 R., at p. 276 ft.

more of the bondholders of the informal agreement between the pur- Mar. 8
the Company, embodied in the letters of July 1909, seems to me to Macke
material and irrelevant. Assuming such knowledge, it would not, in Inlay
ment, bar these defenders from pleading their rights as assignees Truste
ank. Lord I

he reasons now stated, I agree with the conclusion arrived at by
ned Sheriff-substitute, and substantially also in his carefully-reasoned

LORD JUSTICE-CLERK, LORD SALVESEN, and LORD GUTHRIE concurred.

THE COURT affirmed.

MACKAY & YOUNG, W.S.—ALEX. MORISON & Co., W.S.—Agents.

GRACE DAVIDSON'S TRUSTEES AND OTHERS (First, Second, No.
Third, Fourth, Fifth, Sixth, Seventh, and Eighth Parties). Mar. 8

—Special case—Method of stating questions of law.

Observations *per curiam* on the way in which questions of law should David
stated in special cases. Truste

AL case, presented for the opinion and judgment of the Court EXTRA
ertain questions arising out of the testamentary writings of the Divisi
ss Grace Davidson, was heard before the Extra Division (con- Lord I
of Lord Kinnear, Lord Dundas, and Lord Mackenzie) on 14th Lord I
h November 1911. kenzie

divising on 9th March 1912 the following observations as to
hod of stating questions of law in special cases were made by
undas.

DUNDAS.—[After dealing with the merits of the case]—I desire
to add a few observations which occur to me, arising out of the way
the questions of law have here been stated. They are nominally
in number, but, if regard is had to divisions and subheads, amount
at two dozen. One of your Lordships, I think, remarked during
ussion that they resemble an examination-paper set to the Court
an anything else. It may be that such prodigality of interrogation
seems to me to be growing more and more common in practice) is the
of an over-zealous attempt to satisfy some supposed requirement or
tum of the Court; but I think it is both unnecessary and undesirable.
ught not to be any undue difficulty about stating the questions of law
al cases within reasonable compass, if broad considerations of sense
ediency are kept in view. Each of the questions should, of course,
a proposition of law, and not (as sometimes occurs) more or less of
of mere arithmetic. The questions come substantially in place of
s in law which counsel for the various parties would have had to
the dispute had arisen in the form of an action of some sort. It is
y convenient that they should be capable of a categorical answer—
o; but this is not indispensable; and if, for any sufficient reason,
form is adopted, the answer can be (and often is) given by way of

Mar. 9, 1912. a finding in appropriate terms. The questions ought to raise the
 Davidson's which the parties wish to have determined ; but I do not think
 Trustees. sary or desirable for counsel to endeavour (as was perhaps inten
 Lord Dundas. case) to anticipate and cover in specific detail the whole gamut
 contingencies which may arise as affecting the individual intere
 and every party to the case. On the other hand, it would ob
 do for counsel to table to the Court a deed or deeds of some
 few relative dates and facts, and a bare general "question of la
 "Upon a sound construction of the said deeds, who are the part
 whom the estate should be distributed, and at what time or ti
 what shares or proportions, and subject to what (if any) conditi
 tions, or limitations?" Between the two extremes indicated, a
 medium must, in each case, be aimed at. It sometimes ha
 during the arguments, a suggestion from the bench may indi
 true legal solution of some point, one which is not specifically
 any of the questions stated, and the parties agree in adjusting an
 new question to meet the situation. But I do not think it is
 the Court's duty or function to investigate and determine, *ex pr*
 all the possible legal aspects of a special case ; it is for the parties
 the questions of law which they seek to have decided, and for
 (primarily at least) to answer these, and these only. It wo
 apprehend, be difficult to point to reported cases where a solu
 not say the correct solution, but at least a very plausible and at
 —of some problem of vesting or the like has apparently escaped
 of all concerned ; a solution which, if the parties had suggeste
 have affected the result of the decision. The proper statement
 in a special case, just as of pleas in law, or of declaratory (or ot
 sions of the summons of an action, is a matter requiring skill
 discrimination ; but I do not see why it should present any
 peculiar difficulty. I shall say no more ; and these few observat
 are, of course, merely the expression, in a general way, of my
 vidual views, are obviously not intended as an exhaustive treat
 interesting topic of practice and procedure.

LORD KINNEAR and LORD MACKENZIE concurred in the foregoi
 tions of Lord Dundas.

No. 103. HIS GRACE JOHN DOUGLAS SUTHERLAND, DUKE OF ARGYLL
 (Respondent).—*Macphail, K.C.—Chree.*
 Mar. 11, 1911. MISS LOUISA MARGARETTA RIDDELL, Defender (Reclaim
 Constable, K.C.—*Hon. W. Watson.*
 Duke of Superior and Vassal—Casualty—Composition or relief—Entail.
 Argyll v. Riddell.

In 1849 a vassal, on payment of a composition, obtained
 superior a charter of certain lands in favour of himself an
 and assignees whomsoever, under which he was duly en
 1851 he entailed the lands. The destination in the deed o
 to himself and the heirs-male of his body, whom failing, h
 brother and the heirs-male of his body, whom failing, the h
 of the body of the entailor's grandfather ; and after various
 stitutions there followed this clause, "The eldest heir-fem

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son of the deceased Thomas Milles Riddell, and the heir of his body, whom failing the heirs-female of the body of Sir James Riddell, his grandfather, whom failing the heirs-female of the said Thomas Milles Riddell, whom failing the nearest heirs-whomsoever of the said Sir James Milles Riddell, whom failing the nearest heirs and assignees whomsoever of the said Sir James Milles Riddell, the eldest heir-female and the descendants of the said Sir James Milles Riddell, always excluding heirs-portioners, and succeeding without interruption throughout the whole course of succession of heirs-whomsoever as well as of heirs of provision, so oft as the same should die without issue females.

"The destination under the said deed of entail thus differs from that of the former investiture under the charter of confirmation of 1849, which was in favour of Sir James Milles Riddell, the said Sir James, and his heirs and assignees whomsoever.

"The deed of entail of 1851 contained a double manner of holding, and Sir James, the entailer, took infeftment *de me* under the said deed, holding the lands base of himself as mid-superior.

"By disposition, dated in 1860, Sir James propelled the lands to his only son, Thomas Milles Riddell. Sir James died in 1861, survived by Thomas, who in 1872 obtained from the Duke of Argyll a writ of confirmation, confirming the disposition of the lands. This writ of confirmation contained the following clause of confirmation:—'And it is hereby declared that I, the said Duke, by these presents, do not exclude myself or my successors from any claim which I or they may have at law to a full year's rent of the lands within contained whenever the heir of entail to whom the lands shall open shall happen not to be the heir of lineal descent of a person who was last entered by me or my foresaids, but to the contrary I hereby reserve such claim entire.'

"Entry having thus been obtained by Sir Thomas Milles Riddell as the heir of the former investiture under the charter of confirmation of 1849—apparently on payment of relief only—the subsequent course of succession has been as follows:—Sir Thomas died in 1881 without issue, and was succeeded by his cousin, Sir Rodney Milles Riddell, as next heir-substitute under the entail. Sir Rodney Milles Riddell admittedly have been entitled to succeed Sir Thomas as heir of the former investiture of 1849 if the same had still subsisted. Sir Rodney died on 2nd January 1907 leaving no issue, but survived by three sisters who were his heirs-portioners, and of whom the eldest is the eldest. By virtue of the clause excluding heirs-portioners in the deed of entail of 1851 the defender has succeeded as heir-substitute of entail to the whole lands. So far as regards one of the lands *indiviso*, she would have succeeded thereto on Sir Rodney's death as one of his three heirs-portioners in terms of the former investiture of 1849 had it still subsisted, but *quoad* the remaining two-thirds of the lands would not have been the heir of the former investiture, but in relation to it, a singular successor."

The pursuer pleaded;—The defender being liable to the pursuer in payment of a casualty or composition of two-third parts of the annual rent or annual value of the said lands and others, and of one-third of the said annual feu-duty, as condescended on, decree should be pronounced as concluded for.

The defender pleaded, *inter alia*;—(3) The defender being liable only in relief-duty in respect of her entry as heir of entail.

Mar. 11, 1911. The defender reclaimed.

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The case was heard before the First Division, consisting of Lord Kinnear, Lord Johnston, and Lord Salvesen, on 30th June and 1st July 1910; and was re-heard before the Lord President, Lord Kinnear, Lord Johnston, Lord Salvesen, and Lord Mackenzie, on 21st and 22nd December 1910.

Argued for the reclaimer;—The defender was liable for the relief-duty as a casualty of relief. A series of enactments had gradually modified the common law rule that a superior was not bound to grant relief to any person except the heir of the vassal last infeft. By the Act 1469, cap. 36, creditor appraisers obtained the right to force payment on payment of a year's rent. This right was extended to all by the Act 1672, cap. 19, and to purchasers at judicial sales by the Act 1681, cap. 17. In 1747 ordinary purchasers obtained a right to relief by resignation,¹ and by the Lands Transference Act, 1847,

event occurs, to the payment of a year's rent from the party the defender is to enter.'

"In the more recent case of the *Lord Advocate v. Moray*, Lord Kinnear stated the law on the subject thus:—'But it has been decided in the cases of *Mackenzie v. Mackenzie* and the *Marquess of Hastings v. Oswald*, first, that if the institute under a deed is also the heir of the existing investiture he is entitled to the benefit of the character of heir and to enter for relief, notwithstanding that, to avoid a forfeiture, he has been compelled to make up his title by entail, which necessarily means that he has entered in form as heir or singular successor, and, secondly, that the superior who had been compelled to enter the institute for relief-duty might effectually claim for composition on the entry of the first substitute under the investiture who should not be the then existing heir of the former investiture. The second proposition was held to be a corollary of the first because, as Lord Wood explains in the *Marquess of Hastings* case, it is "a necessary adjunct" of the doctrine that the heir of a party under a new tailzied investiture for relief-duty only. The doctrine thus established is anomalous. It can be no question that, in this Court at least, it must be treated as such law.'

"The defender did not, I think, dispute that the Duke of Argyll, in entering Sir Thomas Milles Riddell in 1872, was entitled to demand his right to a composition. She says, however, that the reservation could only lie against Sir Rodney Riddell, the first heir-substitute entering after Sir Thomas; and that the fact that the superior accepted relief instead of composition from Sir Rodney gives him no right to claim composition from any subsequent heir-substitute. The defender argues that by the entry of Sir Thomas Milles Riddell in 1872 the investiture of 1849 was sopited and extinguished; that accordingly Sir Rodney could not, on succeeding, tender himself as the heir of Sir Thomas as Sir Thomas was in a position to do in 1872; and that, accordingly, the superior was entitled to demand composition from Sir Rodney as a singular successor. It is true that Sir Rodney was not in a position to tender himself as heir under the extinguished investiture of 1849. It is true, however, that he succeeded to the lands as the heir of Sir Thomas under the established investiture under the writ of confirmation of 1872, and was accordingly entitled to entry on payment of the relief-duty applicable to such an heir unless by force of the anomalous reserved right in the

¹ 20 Geo. II. cap. 50.

² 10 and 11 Vict. cap. 4.

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of the then subsisting investiture. If the reservation was bad, Sir Rodney should have paid a composition as the first entering after the old investiture was extinguished. He was allowed to enter upon payment of relief, and from that moment the land was enfranchised. The superior's right to demand a composition was therefore determined, and he was barred from entering the defender as a singular successor.¹ If, however, the reservation was taken on the footing that the old investiture still subsisted for the purpose of ascertaining the capacity in which the new vassal entered, it followed from a series of decisions² that the defender was entitled to enter in relief. She was an heir whomsoever, and the tailzied destination established by Sir James Riddell did not travel outside the family. His heirs whomsoever, who were enfranchised by the charter, were confirmed in the firmation granted to him in 1849 on payment of a composition. The order only called them in a different order. The fact that the defender was an heir-portioner was immaterial; it was sufficient that she was an heir *hæredes*. Further, even if the reservation was effectual, it could not affect the defender, as she was in fact an heir of line. The reservation was bad, because the superior had sought to reserve rights which, even giving his rights their widest interpretation, he was quite clear he did not possess.

Argued for the respondent;—Originally a superior was not bound to enter in the lands any person other than the heirs to whom himself had limited the descent by the investiture.³ But the right to refuse an entry had been gradually modified, and the superior was now bound to receive all singular successors. The principle governing the order of succession was a composition which was paid at the time the series of heirs was changed, and a superior was not bound to refuse a charter with a new destination, provided the proper composition was tendered at entry.⁴ Prior to the Conveyancing Act of 1828 it was held that a superior was not bound to enter a corporate vassal.⁵ The law had been accurately stated by Mr Ross⁷ in the following series of propositions:—(1) "A superior is not bound to enter a corporation as his vassal." (2) "On payment of a single

Vassal, Appx. No. 2, 5 Br. Sup. 613, 2 Ross's Leading Cases (Land Rights) 398; Marquess of Hastings v. Oswald, (1859) 21 D. 871; also Stuart v. Hamilton, (1889) 16 R. 1030, *per* Lord Shand, p. 1030.

¹ Lord Advocate v. Moray, (1894) 21 R. 553; Stuart v. Hamilton, (1889) 16 R. 1030; Mackintosh v. Mackintosh, (1886) 13 R. 692.

² Lockhart v. Denham, (1760) M. 15,047, 2 Ross's Leading Cases (Land Rights), 329; Mackenzie v. Mackenzie, M. 15,053, M. *voce* Superior v. Vassal, Appx. No. 2, 5 Br. Sup. 613, 2 Ross's Leading Cases (Land Rights) 398; Duke of Argyll v. Earl of Dunmore, (1795), M. 15,063, 2 Ross's Leading Cases (Land Rights), 335; Duke of Hamilton v. Bailie, (1796) 6 S. 94, 2 Ross's Leading Cases (Land Rights), 389; Duke of Hamilton v. Earl of Hopetoun, (1839) 1 D. 689; Stirling v. Ewart, 4 D. 68; Duke of Hamilton v. Oswald, App. 128, 2 Ross's Leading Cases (Land Rights), 340; Marquess of Hastings v. Oswald, 21 D. 871.

³ Ersk. Inst., ii. 7, 5; Stair, ii. 3, 5.

⁴ Magistrates of Aberdeen v. Burnet, (1808) M. *voce* Superior v. Vassal, Appx. No. 4.

⁵ 37 and 38 Vict. cap. 94.

⁶ Hill v. Merchant Company, Jan. 17, 1815, F. C., 2 Ross's Leading Cases (Land Rights), 320.

⁷ Leading Cases (Land Rights), vol. ii., pp. 320, 329, 398.

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was not the heir of the old investiture. She was merely portioner, and, as such, was not a joint proprietor.¹ As an portioner she could execute a deed of entail which, *quoad* her *pro* share of the estate, would be valid after division.² *Quoad* the ing two-thirds of the estate she was a singular successor and heir. The reservation being of an existing right was valid, was immaterial that the superior had reserved more than he was entitled to, seeing that he had reserved all that was required for his present claim. Moreover, the defender was the first person in 1849 from whom a composition could be demanded. It could not have been claimed from Sir Rodney, who was heir of line of the original entered vassal. This case was distinguishable from *Advocate v. Swinton*,⁴ the question there dealt with being one of partition and not of a deliberate alteration of the investiture.

At advising on 11th March 1911,—

LORD JOHNSTON.—In this case it has to be determined whether Riddell of Sunart, who is admittedly due an entry to the Duke of Argyll as superior of those lands, is bound, as regards two-thirds of the composition, to pay composition or merely relief. I agree with the Lord Ordinary that the duty exigible as regards these two-thirds is composition, and so on the grounds most clearly stated by him.

It is necessary, in the first place, to see how the title stands and what question arises.

The Riddell family have been in possession of Sunart since 1784, at that date Sir James Riddell only acquired the *dominium utile* subaltern title, holding of Lochnell as mid-superior between himself and the Duke of Argyll. This subfeud he entailed in 1784. His grandson James Milles Riddell, acquired the mid-superiority from Lochnell, and thereafter held the entailed subjects of himself as mid-superior. In 1849 Sir James Milles Riddell obtained from the Duke of Argyll a charter of confirmation of this mid-superiority in favour of himself "and his heirs and assignees whomsoever," on which he paid a composition for a fee-simple of £388, 17s. 3d., calculated, as I think right to notice, on the basis of the subfeud-duty, not of the rental of the lands. On this charter of confirmation he was infeft, and thus became entered with his superior in the mid-superiority, on a title to himself and his heirs and assignees which was a fee-simple. The entailed *dominium utile* he still held of himself. But in 1851 he entailed this *dominium utile*, and then consolidated it, now free of the mid-superiority, with his fee-simple mid-superiority. In 1851, therefore, the entail became the ruling entry, not of the mid-superiority merely, but of the *dominium plenum*, and Sir James Milles Riddell came to hold this *dominium plenum* of the Duke of Argyll, as his superior, on a fee-simple of

¹ *Cargill v. Muir*, (1837) 15 S. 408, *per* Lord Moncreiff, and *M'Neight v. Lockhart*, (1843) 6 D. 128, *per* Lord Justice-Clerk, p. 136.

² *Stewart v. Nicolson*, (1859) 22 D. 72; *Mackintosh v. Mackintosh*, R. 692.

³ *Marquess of Hastings v. Oswald*, 21 D. 871.

⁴ (1854) 17 D. 21.

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Mar. 11, 1811. of the case was deemed desirable, and of the course which the hearing took, I feel that I must now regard the case as one of *fact* and may therefore be excused if I state at some length the reasons which have led me to the above conclusions.

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Ld. Johnston. The first two of the propositions which I have above stated can be controverted. I thought the third was in the same position, what appears to me to be a misapprehension of the case of *Hamilton v. Hopetoun*,¹ a strenuous attempt was made to dispute it.

First. There can be no question that Sir James Milles Riddell's combined effect of his entry in 1849 in the mid-superiority on payment of composition, and of his consolidation in 1851, was entered in the *plenum* of the estate, and that the destination enfranchised in his charter was to himself and his heirs whomsoever.

Second. There can be equally little question, I think, that in 1849 he executed his entail of that year, though the tailzied destination which he then provided, did not, so far as appears, go beyond his own heirs. Sir James Milles Riddell sought to disturb the line or legal order of succession, both directly and by the exclusion of heirs-portioners. It has been fully recognised that when an heir of blood is taken out of the ordinary line of heirs of line, he is as much a singular successor as is a stranger heir introduced (*Lord Advocate v. Moray of Abercairney*²). There, the son, though called as a substitute heir of provision in an entail created by his uncle in favour of himself and the heirs of his body, whom failing, his sister, whom failing, her second son, was the heir who actually entered the superior, but the Crown, as superior, entered him by mistake "instead of exacting the composition for which he was undoubtedly entitled as a singular successor."

Third. If this new destination was to be enfranchised by an act of the superior, there can, I think, be no doubt that the joint act of Sir James Milles Riddell and his superior was required to effect it. An argument to the contrary was, as I have said, at the second hearing, founded on the case of *Hamilton v. Hopetoun*.¹ But it was only made stateable by the fact that to observe the distinction in fact between that case and the present case, both, the superior on payment of a composition granted a charter of entail to the heirs whatsoever and assignees. In both, the grantee of the charter sought to create a tailzied destination, disturbing the line, though not going beyond the blood. But the difference between the two cases is this (which is essential): In the present case Sir James Milles Riddell sought to do this after the superior's precept was exhausted by infeftment in himself, and when he was an entered vassal, whereas in *Hamilton v. Hopetoun*,¹ Charles, Earl of Hopetoun, sought to do so while the superior's precept was as yet unexecuted, and therefore assignable. The one case proceeded by a disposition and deed of entail, the other could proceed by a disposition and assignation and deed of entail. I think that this is the further distinction between the two cases. For Charles, Earl of Hopetoun, though creating a destination differing from that of his heirs of line, did not go beyond his heirs at law, whereas I think that Sir James

¹ 1 D. 689.

² 21 R. 5.

Mar. 11, 1911. take the assignation, provided the destination of the heirs did not go further than his heirs of law."

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Ld. Johnston.

There is no question of the importance of this decision, though as hostile to the defender's contention. It appears to me to be based on feudal principle, but on the practice which had grown up, and became more and more transmissible at the will of the vassal. They were, I think, exercised in ascertaining how far this practice led. And the decision was a compromise between feudal instinct and a relaxation supported by practice. For I cannot escape the conclusion that there is a good deal underneath the limitation, repeated both in the original purchaser or grantee of the charter and to the assignee, thus, "provided only he" (the original purchaser) "shall not, by his assignation, go beyond his heirs of law to strangers" (p. 694), and "provided the destination of the heirs" (of the assignee) "did not go further than his heirs of law" (p. 696). It was more than once asserted in subsequent cases that the limitation meant no more than that the court would not decide more than was necessary for determination of the case before them. But this was disclaimed by Lord Mackenzie, who took part in the decision, and, as he says in *Stirling v. Ewart*,¹ wrote the opinion, and whose words imply that the limitation was deliberate. And because, I am persuaded, the Court saw that a decision carrying over the right of the purchaser to dictate to the superior any destination he pleased would have made an encroachment on the rights of superior, and might lead to the further encroachment of sustaining the right of the assignee to use his assignation as a means of imposing on the superior an equally wide destination—a step for which the Court was not prepared. But the fact that they imposed a limitation on their judgment, which was removed by the immediately subsequent decision of *Stirling v. Ewart*, does not detract from the value of their judgment so far as it carried the law. And again I must emphasize the fact that the condition preceding the enfranchisement of the destination to heirs of provision named in the assignation was the payment of a composition by the cedent, who was obliged to assign because he held a still open or unexecuted precept from the superior.

I turn now to the special bearing of this decision, taking it as it stands with its limitation, on the present case. Once a purchaser has gone to the superior, paid his composition of a year's rent, and got a new charter or precept, whether to himself and his heirs whatsoever and assignes, or to his heirs whatsoever in any particular order he may choose to direct, the superior has done all he can be required to do. There is nothing in the decision to warrant the idea that the purchaser can go back to the superior and demand another charter in different terms, selecting among his heirs even if the precept given him is unexecuted, still less if it has been executed and the purchaser is infeft. But the decision does not leave the purchaser, who still holds the precept unexecuted—who still holds a charter, said, an open charter and precept—without remedy. He may, even within the limits of the decision, effect the purpose of his selection, provided

¹ 4 D. 684, at p. 703.

does not go beyond the class of his heirs at law, by assignation. That is Mar. 11, 1911. exactly what Charles, Lord Hopetoun, having paid a composition, did, and the infestment following on his assignation was held to enfranchise the Duke of Argyll v. Riddell. destination which he inserted in his assignation, no stranger in blood being introduced. But this course was not open to Sir James Milles Riddell in Ld. Johnston. 1851. He had closed the door upon himself by taking infestment in 1849 upon the precept which he then obtained. He could then only effect his purpose by going to his superior. And the question then was: On what terms was his superior bound to comply with his request for a new charter either by resignation or confirmation?

It is of no materiality to the present question that, as regards the purchaser and the series of heirs which he may dictate to the superior, the limitation imposed by the Court in the case of *Hamilton v. Hopetoun*¹ was, as I have said, removed by the decision in *Stirling v. Ewart*.² The substantial result of the case of *Hamilton v. Hopetoun*¹ would have been just the same had it occurred after *Stirling v. Ewart*,² if Earl Charles, having paid his composition, had inserted in his assignation not merely heirs of line of his assignee out of their order, but stranger substitutes. His assignee, using the open precept (Earl Charles having necessarily paid the composition on receiving the charter), would on taking infestment have been entered with the superior on an enfranchised destination in favour of all such substitutes, and not merely of those who were of the blood, as heirs of provision.

Fourth and fifth. On what terms, then, was the superior bound to comply with Sir James Milles Riddell's, or, as it happened, his heir Sir Thomas Milles Riddell's demand for recognition of the new destination of 1851? The writ of confirmation of 1872 was the equivalent at that date of the former charter of confirmation and precept.

The situation created when the heir in possession under a tailzied destination—that is, an heir of provision—desired to alter that destination while retaining the heirs immediately substituted to him in the order of the existing destination, as the first called in his new destination, had given rise to much litigation extending over more than a century before Sir Thomas Milles Riddell in 1872 obtained his writ of confirmation from his superior. The present is a late recrudescence of the same question in slightly altered form. In the long series of decisions referred to there have, I think, been several departures from strict feudal principles, but these departures have been made, and must, so far as we are concerned, be taken as settling the law. I suppose it may be said that custom, and the Court recognising custom, has interposed on equitable grounds to mitigate the rigour of strict feudal principles. But in doing so they have fixed the law just as firmly as an English Court of Equity could have done.

It is trite in legal history, that the earliest conception of a feu was a personal grant; that then a substitution of heirs, at least of male heirs, came to be implied, afterwards of heirs general; but that it took centuries to make fiefs alienable at the will of the grantee or his heirs. This was effected by the Acts 1469, cap. 36; 1669, cap. 39; and 20 Geo. II. cap.

¹ 1 D. 689.² 4 D. 684, 3 Bell's App. 128.

Mar. 11, 1911. 50, section 12, which conditioned the payment of a composition of a year's rent. But there was nothing in these Acts which compelled the superior to enter anyone but a singular successor or disponent, and by necessary implication his heirs of line, or required him to accept such a series of heirs as his new vassal might choose to name to him. That extension of the obligation imposed upon them by these Acts was long disputed by superiors. But by the case of *Stirling v. Ewart*,¹ following and supplementing that of *Hamilton v. Hopetoun*,² it was finally decided that on payment of a composition by vassal or purchaser a superior should be bound to grant a charter in favour of whatever series of heirs the vassal or purchaser might choose, assignable to the assignees of such vassal or purchaser and the series of heirs which the assignee might choose to have inserted in his assignation; and that by accepting the composition the superior enfranchised such destination—either that in the charter or that in the assignation according to the infeftment taken upon his precept—each heir in which became an heir of the investiture and entitled thereafter to enter for relief, whether heirs of line were called in their natural order or out of their natural order, or strangers in blood were introduced. The reasoning of the first Lord Mackenzie to the contrary, in *Stirling v. Ewart*,¹ is, I think, unanswered. But it did not prevail, not by reason of want of feudal principle to support it, but by departure from feudal principle, sanctioned by custom, and on equitable grounds. And the rule was fixed and has since prevailed as I have stated it.

But it constantly happened, as I have indicated above, that an heir possessing under a destination sought to change that destination though retaining those heirs immediately substituted to himself in the old investiture as the first substitutes in the new. To enfranchise this new investiture it was necessary to go to the superior, and the hardship was felt that a composition should be exigible when the institute, and possibly more than half the series of substitutes, could enter for relief under the old investiture. At the same time it was equally felt that any remedy which would entirely deprive the superior of his composition, where sooner or later an heir was bound to come in who was not an heir of the old investiture, would work injustice on the other side. The result of the series of cases bearing on this subject was what I think may be described as a compromise which, again with an equitable object, made a further departure from feudal principle. This was effected by *Mackenzie's case*,³ confirmed in 1859 by *Hastings v. Oswald*.⁴

It was held settled, as I have said, that if a superior is called on to grant a charter with a destination varying from the standing investiture he must do so on tender of a composition, and must accept the series of heirs, whether related by blood or strangers, dictated to him. If he admitted the first heir for relief because he was the heir of the standing investiture, feudally he enfranchised the whole new investiture, and lost his opportunity of claiming a composition.⁵ It was too late to say to the first substitute who

¹ 4 D. 684, 3 Bell's App. 128.

² 1 D. 689.

³ M. voce Superior and Vassal Appx. No. 2.

⁴ 21 D. 871.

⁵ Lord Advocate v. Moray, 21 R. 553.

happened not to be an heir of the old investiture, "You can only be received on payment of a composition, not on relief." Nor could the superior, strictly speaking, save himself by any reservation, for, or no reservation, he would, by entering the institute, have enfranchised the destination. Yet in *Hastings v. Oswald*¹ he was compelled by the Court to give an entry for relief under a new destination, reserving his right to claim a year's rent upon the entry of the first substitute who should not be the then existing heir under the former investiture, and to the vassal any legal defence against any such claim, and he was so compelled on the ground, as stated by the Court, that the reservation would preserve his right. Even without the distinct statement of Lord Wood in giving the judgment of the Court, it is impossible to conceive that the Court intended to compel the superior, for equitable reasons, to forego under reservation his immediate right, and to refuse, when the time came, a counter equity in the enforcement of his reserved claim.

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Ld. Johnston.

Why I think this was an equitable compromise is that on strict feudal principle the entry of a vassal under a new investiture enfranchised the whole investiture, and that agreement between the superior and the institute to enter the institute under reservation could not bind a substitute succeeding under a tailzied destination who *ex hypothesi* did not represent him. This course of decision, itself more than probably based on practice, has certainly founded a practice. Multitudes of similar transactions have been settled on the faith of it, and multitudes of titles have been made up in reliance upon it. It may be contrary to feudal principle. I think it is. One of your Lordships in the case of *Lord Advocate v. Moray*² has described it as "anomalous." And I think we both mean the same thing. But no Court would think of disturbing a train of decision on which the conveyancing practice of over fifty years, if counted merely from the judgment in *Hastings v. Oswald*,¹ has rested. I am prepared to accept that *Hastings v. Oswald*¹ decides that the superior must enfranchise the new investiture tendered to him in such circumstances, under reservation, and that the reservation will by intervention of the Court be made effectual.

The present is just one of the many cases in which conveyancing has relied on and followed—and would have been compelled by the Court to follow—the decision in *Hastings v. Oswald*.¹ For it appears to me that it applies to heirs who are *alioquin successuri* in the most general sense, and that it is immaterial whether it is an heir of provision who wishes to alter a destination, though preserving in the immediate succession to himself one or more of those already substituted to him in their order, or a fee-simple proprietor who desires to create a destination, though calling as those immediately to succeed him under that destination one or more of those who would have succeeded at law. The superior here had in 1849 enfranchised a destination to A, his heirs and assignees whomsoever. On this enfranchisement the title was made up and rested from 1849 to 1872. There is no question of an open precept and an assignation. A, being so infeft and entered, proceeded to make a new disposition of his estate in favour of a long series of heirs, and his successor asked that it should be

¹ 21 D. 871.² 21 R. 553.

Mar. 11, 1911. 50, section 12, which conditioned the payment of a composition on the superior's consent. But there was nothing in these Acts which compelled the superior to enter anyone but a singular successor or donee, and by necessity his heirs of line, or required him to accept such a series of heirs. His new vassal might choose to name to him. That extension of obligation imposed upon them by these Acts was long disputed by the courts. But by the case of *Stirling v. Ewart*,¹ following and supplementing *Hamilton v. Hopetoun*,² it was finally decided that on payment of a composition by vassal or purchaser a superior should be bound to grant a charter in favour of whatever series of heirs the vassal or purchaser might choose, assignable to the assignees of such vassal or purchaser of any series of heirs which the assignee might choose to have inserted in the charter of assignation; and that by accepting the composition the superior entered into such destination—either that in the charter or that in the assignment—according to the investiture taken upon his precept—each heir who became an heir of the investiture and entitled thereafter to enter upon it, whether heirs of line were called in their natural order or out of the order, or strangers in blood were introduced. The reasoning of the majority in *Mackenzie* to the contrary, in *Stirling v. Ewart*,¹ is, I think, untenable. But it did not prevail, not by reason of want of feudal principle, but by departure from feudal principle, sanctioned by custom on equitable grounds. And the rule was fixed and has since prevailed. I have stated it.

But it constantly happened, as I have indicated above, that an heir inheriting under a destination sought to change that destination though he substituted those heirs immediately substituted to himself in the old investiture, and first substitutes in the new. To enfranchise this new investiture was necessary to go to the superior, and the hardship was felt that a composition should be exigible when the instituta, and possibly more than one series of substitutes, could enter for relief under the old investiture. At the same time it was equally felt that any remedy which would deprive the superior of his composition, where sooner or later an heir was bound to come in who was not an heir of the old investiture, would be injustice on the other side. The result of the series of cases bearing on this subject was what I think may be described as a compromise. It was again with an equitable object, made a further departure from feudal principle. This was effected by *Mackenzie's* case,³ confirmed in *Hastings v. Oswald*.⁴

It was held settled, as I have said, that if a superior is called upon to grant a charter with a destination varying from the standing investiture, he must do so on tender of a composition, and must accept the series of heirs designated, whether related by blood or strangers, dictated to him. If he admitted a stranger as heir for relief because he was the heir of the standing investiture, he enfranchised the whole new investiture, and lost his opportunity of claiming a composition.⁵ It was too late to say to the first sub-

¹ 4 D. 684, 3 Bell's App. 128.

² M. voce Superior and Vassal Appx. No. 2.

³ Lord Advocate v. Moray, 21 R. 553.

⁴ 1 D. 68.

⁵ 21 D. 8.

happened not to be an heir of the old investiture, "You can only be received on payment of a composition, not on relief." Nor could the superior, strictly speaking, save himself by any reservation, for, or no reservation, he would, by entering the institute, have enfranchised the destination. Yet in *Hastings v. Oswald*¹ he was compelled by the Court to give an entry for relief under a new destination, reserving his right to claim a year's rent upon the entry of the first substitute who should not be the then existing heir under the former investiture, and to the vassal any legal defence against any such claim, and he was so compelled on the ground, as stated by the Court, that the reservation would preserve his right. Even without the distinct statement of Lord Wood in giving the judgment of the Court, it is impossible to conceive that the Court intended to compel the superior, for equitable reasons, to forego under reservation his immediate right, and to refuse, when the time came, a counter equity in the enforcement of his reserved claim.

Why I think this was an equitable compromise is that on strict feudal principle the entry of a vassal under a new investiture enfranchised the whole investiture, and that agreement between the superior and the institute to enter the institute under reservation could not bind a substitute succeeding under a tailzied destination who *ex hypothesi* did not represent him. This course of decision, itself more than probably based on practice, has certainly founded a practice. Multitudes of similar transactions have been settled on the faith of it, and multitudes of titles have been made up in reliance upon it. It may be contrary to feudal principle. I think it is. One of your Lordships in the case of *Lord Advocate v. Moray*² has described it as "anomalous." And I think we both mean the same thing. But no Court would think of disturbing a train of decision on which the conveyancing practice of over fifty years, if counted merely from the judgment in *Hastings v. Oswald*,¹ has rested. I am prepared to accept that *Hastings v. Oswald*¹ decides that the superior must enfranchise the new investiture tendered to him in such circumstances, under reservation, and that the reservation will by intervention of the Court be made effectual.

The present is just one of the many cases in which conveyancing has relied on and followed—and would have been compelled by the Court to follow—the decision in *Hastings v. Oswald*.¹ For it appears to me that it applies to heirs who are *alioquin successuri* in the most general sense, and that it is immaterial whether it is an heir of provision who wishes to alter a destination, though preserving in the immediate succession to himself one or more of those already substituted to him in their order, or a fee-simple proprietor who desires to create a destination, though calling as those immediately to succeed him under that destination one or more of those who would have succeeded at law. The superior here had in 1849 enfranchised a destination to A, his heirs and assignees whomsoever. On this enfranchisement the title was made up and rested from 1849 to 1872. There is no question of an open precept and an assignation. A, being so infest and entered, proceeded to make a new disposition of his estate in favour of a long series of heirs, and his successor asked that it should be

¹ 21 D. 871.² 21 R. 553.

Mar. 11, 1911. confirmed. The immediate successor was undoubtedly heir of line, and entitled to be entered, under the standing fee-simple investiture, for relief, and accordingly, as the law then stood, the superior did what he would have been compelled to do, accepted relief and granted a writ of confirmation under reservation of any claim which he or his successors might have at law to a full year's rent of the lands, whenever the heir to whom the succession should open should happen not to be the heir of line of the person last entered by them. If he had not done so voluntarily, he would have been compelled to do so. I regard Lord Wood's statement in *Hastings v. Oswald*¹ as an undertaking by the Court that what they directed should be made effectual, and as covering the present case. And the superior no more departed from his claim in entering Sir Rodney than he had already done in entering Sir Thomas Milles Riddell. I am wholly unable to follow the distinction which the defender seeks to draw between the position of Sir Thomas and Sir Rodney, on which her defence was in argument primarily founded. If the investiture were enfranchised so as to exclude any subsequent claim, it was so on Sir Thomas's entry in 1872, just as completely as on Sir Rodney's in 1883.

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Argyll v.
Riddell.

Ld. Johnston.

The result of the case of *Hastings v. Oswald*,¹ as I read it, is to compel a superior to give an entry for relief to an institute, and thereafter to any number of substitutes in succession who would have been heirs under a previous destination, under reservation of a claim for composition from the first substitute who should not be such heir; and by the rider (however expressed, or by implication) reserving "to the vassal any legal defence against such claim," to enable the vassal to state any defence on the merits of the claim, but not to enable him to plead that the very act of granting (under compulsion of the Court, without then exacting composition) a confirmation of the right of the institute or any succeeding substitute, *ipso facto* annulled the right (the reservation of which the Court made a condition of the granting) and forfeited any claim to composition from the first substitute who should be a stranger to the last investiture.

But though nothing that I have not dealt with is raised as a defence on the record, it has been maintained that the vassal has some defence. I am not sure that I fully understand the contention, but I gather it is this, that just as a purchaser is entitled *on paying a composition* to go to the superior and demand a charter and precept or the modern equivalent in favour of himself and any series of heirs (whether related to him by blood or strangers) he may dictate, so a vassal already infeft or his heir is entitled, the one free, the other on paying relief, to go to his superior and demand a charter and precept or the modern equivalent to himself and any series of heirs (whether related to him by blood or strangers) which he or his predecessors may dictate, and that the granting of such charter and precept enfranchises the latter destination just as much as the granting of the charter and precept for composition enfranchises the former.

I know that in the statement of the contention it was not carried to its logical conclusion as I have carried it. It was, like the judgment in *Hamilton v. Hopetoun*,² limited to this, that a vassal infeft or his heir was

¹ 21 D. 871.

² 1 D. 689.

entitled, the one free, the other on payment of relief, to demand a charter Mar. 11, 1911. and precept in favour of himself and his heirs in any order he or his predecessor chose, provided they did not go beyond his heirs at law (and I suppose his heirs of provision). But it is impossible to admit this limitation as in any way availing him. As I have said, it is fully recognised (*Lord Advocate v. Moray*, 21 R. 553) that one in the line of heirs at law, taken out of his order in such line, is as much a singular successor as a stranger; and if the defender is to maintain her contention, she must, I think, be prepared to follow it to its logical conclusion, and maintain it to the full extent which I have stated.

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Whether limited or unlimited the contention is, I think, void of support. And I have not been able to find where the defender gets her compulsitor on the superior, who has already granted one precept, which has been exhausted, to grant another at the will of his vassal. It must be remembered that the rule of law that the granting of a charter to an institute and his heirs of provision enfranchises the whole destination, and makes the heirs of provision heirs of the investiture to the same effect as if they were heirs at law, may be referred to feudal principle. But no feudal principle required the superior to grant such charter at all. That obligation arose from the statute 1469, cap. 36, and the other statutes already quoted, as extended by custom endorsed by the Courts. For there was nothing in those statutes to compel the superior to do more than accept the adjudger or disponee, and by necessary implication his heir at law, and that on condition of receiving a composition of a year's rent. While the rule of law that the granting of a charter containing a destination to heirs of provision enfranchises the destination contained in the charter would equally apply in the case of an heir tendering relief and obtaining such charter, there is no feudal principle and there is neither statute nor custom requiring the superior to grant to the heir such charter for relief. Composition is not a feudal casualty (*Stirling v. Ewart*, 4 D. 684, 3 Bell's App. 128). Relief is a feudal casualty, and, as I have always understood, entitles the heir coming forward as heir to claim an entry for himself on the standing investiture. I am unable to see on what principle or chain of reasoning he is entitled to ask more—and particularly to ask an entry to himself and a new series of heirs dictated by him. The heir on feudal principles may enter for relief as heir at law or heir of provision as the case may be; if he does so, he enters on the investiture already enfranchised, and his heir, either at law or of provision, may again in his turn enter under the same investiture which has been renewed to his predecessor. But if a vassal infeft or his heir wishes to change the investiture, or is required to do so by the act of the vassal last infeft, he can only do so with consent of the superior, and that consent the superior is no more obliged to give for the purpose of breaking the line of the heirs at law, than of introducing strangers into the destination. Where the contention emphatically breaks down is here. If an heir entitled to enter as heir at law or of provision demands to be entered on a destination altering the order of his heirs at law or of provision, then not only at the point where he alters that order does he introduce a singular succession, but he cannot logically stop there. He must maintain that if he calls one heir *alioquin successurus* after himself he may introduce any heirs he pleases,

Mar. 11, 1911. strangers as well as heirs of the blood, and consequently that what he cannot do directly without paying a composition he can do indirectly by calling first his heir under the existing investiture and then strangers. For this there is neither principle nor decision to found upon, nor practice to adduce.

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But an argument has been founded on the Entail Act, 1685, cap. 26, empowering His Majesty's subjects to tailzie their lands and substitute heirs in their tailzies, and I understand that it is maintained on the strength of some observations by Lord Cottenham in *Stirling v. Ewart*,¹ that this statute gives the vassal in possession the right to impose a tailzied destination upon his superior, without involving him or them or any of them in a composition for the enfranchisement of the new investiture, provided he does not go beyond his own blood, though I am not sure that that condition is or logically can be adjected. I think that this is to misapply the statute, and to misapprehend the decision in *Stirling v. Ewart*.² It must be kept in mind that every destination which tailzies or cuts off the legal line of successors at any point is a tailzied destination. Every heir of provision is strictly an heir of entail, though we have long been accustomed to confine that term to heirs of provision under a strict entail, or one fenced with irritant and resolute clauses, to which the Act of 1685 gives effect. It cannot be, and I do not think it is, maintained that a vassal could at his own hand enfranchise a destination to his heirs of line out of their order, and therefore in law to strangers, if he imposed no fetters on the tailzie; and I am unable to see that he is empowered by the Act of 1685 to do so if he only makes his tailzie strict, or subjects it to the necessary fetters. In truth, the argument ignores the true purpose and effect of the Act. It does not make it lawful to vassals to tailzie their lands and substitute heirs in their tailzies—that they were quite entitled to do already without its assistance—but to do so under provisions and conditions, and to fence these with irritant and resolute clauses, so that they may be legally effectual to carry out the object of the tailzie. Above all, it does not empower them to impose such destinations or tailzies upon their superiors, to the effect of obtaining feudal recognition of the destination by enfranchisement of the investiture. The object of the Act is therefore to effectuate the prohibitions of the entail, and so make the tailzie or tailzied destination enduring, notwithstanding the possible inimical acts of the heir in possession or the efforts to attach of his creditors. And hence the saving clause as to the superior's rights, which is directed, and this was all that was necessary, not in the interest of the superior, but of the vassal, to the avoidance of any contravention of the prohibitions which might be implied in undergoing the obligation for a casualty, and consequent incurring of an irritancy.

And what is said by Lord Cottenham must be read, not merely in relation to this, but to the question at issue in *Stirling v. Ewart*.² That question was not whether the superior was bound on one consideration or another to enfranchise a destination by confirmation or its equivalent, but whether the superior, who had once enfranchised a destination and therefore

¹ 3 Bell's App., at p. 249.

² 4 D. 684, 3 Bell's App. 128.

received a composition on the first entry, was entitled to regard a succeed-^{Mar. 11, 1911.}
 ing heir of provision, whenever there was a departure from the line of
 blood, as a singular successor to be entered only on a further composition,^{Duke of}
 whenever the destination or tailzie was fenced with irritant and resolute^{Argyll v.}
 clauses. Superiors had felt the effect of the Entail Act of 1685 in checking^{Riddell.}
 the traffic in land and the natural change of ownership on sale, by effectuat-
 ing the prohibition against alienation, &c., and so depriving them of
 accruing compositions, and the case may be described as a last struggle
 against this result. But a composition had already been paid in *Stirling*
v. Ewart,¹ the tailzied destination had been enfranchised, and the attempt
 was to exact a second composition on an entry under the already enfran-
 chised destination. Thus Lord Cuninghame says²: "The Act 1685, giving
 validity to entails, certainly did not extend the rights of superiors. The
 object of it was to secure and render permanent the tailzied destinations in
 previous use, by giving effect to prohibitory, irritant, and resolute clauses;
 but while it declared that superiors should not be prejudged of their
 casualties, it did not enact that any new casualties should be leviable from
 heirs of tailzie which could not have been demanded from heirs of investiture,
 according to the former practice," and by "casualties" his Lordship
 meant casualties in the popular, not merely the technical, sense. Every-
 thing that is said in the case of *Stirling v. Ewart*¹ as to the effect of the
 Entail Act of 1685, in the important opinion of the Lord Justice-Clerk, as
 well as in that of Lord Cottenham, must be read in the light of the fact that
 they were considering and speaking of an entry under a tailzied destination
 which had been already enfranchised by payment of a composition, and of
 an attempt to fix on each succeeding heir of provision, on whose succession
 there occurred a change of the blood, the character of a singular successor
 by reason of the tailzie being strict or protected by fetters, and to impose
 on him the obligation to pay a further composition. The decision was that
 though not of the blood he was heir of provision under an investiture which
 had been already enfranchised, and so an heir. But in the present case
 that is not the situation. I do not, therefore, think that the argument
 founded on the Act of 1685 is sound, or that considerations attempted to
 be drawn from that Act have any application to the present question.

The series of decisions bearing upon this subject require to be distinguished, for they fall into two categories, a confusion between which confuses the issue.

In the first class the question was, What did the first entered vassal, paying a composition, get for his composition?

In *Lockhart v. Denham*³ the casualty was paid. But the charter of resignation in favour of the new destination of heirs affected to reserve a composition whenever a substitute heir presented himself who was not heir of line of the last entered vassal. Though the charter was accepted with this reservation, it was held that it was of no avail, and could not be pleaded against a subsequent heir offering to enter for relief, because the

¹ 4 D. 684, 3 Bell's App. 128, 2 Ross's Leading Cases (Land Rights), 340.

² 4 D., at p. 691.

³ M. 15,047, 2 Ross's Leading Cases (Land Rights), 329.

Mar. 11, 1911. superior receiving his composition and granting the charter could not do otherwise than enfranchise the whole destination. In *Argyle v. Dunmore*¹ a purchaser required a charter in favour of a tailzied destination of heirs and the institute tendered a composition. The superior maintained that he was entitled to reserve right to a composition on the entry of any heir who should happen not to be heir of line to the last entered vassal. It was held that he was not entitled to this, but the institute, having no interest to the contrary, voluntarily admitted a reservation which amounted to no more than *salvo jure cujuslibet*. In *Hamilton v. Baillie*² there was a charter enfranchising the investiture, with a very general saving of the superior's rights. The question at issue was really this, Did the fact of a strict entail affect the effect of the entry? But owing to the circumstances no conclusive decision was given. *Hamilton v. Hopetoun*³ I have already referred to at length. And lastly, in *Stirling v. Ewart*,⁴ a composition having been paid, it was afterwards held that such a reservation was of no avail, because the superior was bound for his composition to enfranchise, and had enfranchised, the whole investiture, and that the situation was not affected by the fact that the destination was fenced by the fetters of strict entail. If the judgment is carefully studied it will, I repeat, be found that the decision which finally settled the common law on the subject proceeded not on principle, not even on statute, but on custom following on statute and sanctioned by the Court.

Now all these cases bear, as I have said, on the question, What does the superior give and the vassal get in return for the statutory composition, or what is the effect of a statutory entry? and I am unable to see how they can bear on the question, What is a vassal entitled to get without a composition, and for relief only, where his entry is not statutory but at common law?

That question was the subject of two cases—*Mackenzie v. Mackenzie*⁵ and *Hastings v. Oswald*.⁶ In both an entail was made in favour of some at least of the heirs of the last investiture in their order and of other substitutes, though it is not very clear whether these substitutes were of the blood or not, and it was held that in recognising the investiture the superior, while on the one hand he ought not to receive more than a casualty of relief from the heirs of the old investiture, was entitled to reserve his right to composition on the entry of any substitute heir, not being heir of the last investiture, the vassal's defence to such claim being also reserved. But it is impossible to read the opinions without seeing that the Court were clearly of opinion, not merely that the reservation was really effectual, but that the claim reserved was a right. For instance, Lord Braxfield,⁷ after showing that the question was not affected by the fettering clauses of the entail, says: "But here strangers introduced, and question is, Can

¹ M. 15,068, 2 Ross's Leading Cases (Land Rights), 335.

² 6 S. 94, 2 Ross's Leading Cases (Land Rights), 389.

³ 1 D. 689.

⁴ 4 D. 684, 3 Bell's App. 128, 2 Ross's Leading Cases (Land Rights), 340.

⁵ M. 15,053, M. Appx. Superior and Vassal No. 2, 2 Ross's Leading Cases (Land Rights), 398.

⁶ 21 D. 871.

⁷ 2 Ross's Leading Cases (Land Rights), at p. 405.

superior be compelled to receive them? and unless a reservation in charter Mar. 11, 1911. is effectual to save superior's right, I think that the superior is entitled to a composition." This could not be unless he had such right. Nor Duke of Argyll v. Riddell. can I read Lord Wood's opinion in *Hastings v. Oswald*¹ in any other sense. But even if the vassal's defence is formally open, it must be substantiated, and I cannot see that it is so by any considerations drawn from the first class of cases, relating to the effect to be given to the statutory entry for a composition. Ld. Johnston.

I must not, however, leave this subject without referring to the opinion of Lord Corhouse, as counsel, quoted by Ross under the report of *Hamilton v. Hopetoun* in his *Leading Cases*, ii., p. 396, and on which much reliance was placed by the defender. However great the authority of Mr Cranstoun as a feudal lawyer, I should hesitate to accept as conclusive his opinion as counsel where I find that his grounds of opinion are not those on which the judgment of the Court proceeded. But I think that it must be discarded for this other reason, viz., that it proceeds on a misconception of the facts with which the case was concerned. Mr Cranstoun says: "But in the case of a transmission from the dead to the living, the investiture being altered in the lifetime of the vassal, and the fee taken to himself and his heirs-male instead of his heirs general, I do not see upon what ground the superior can claim anything but the relief upon an entry." In point of fact the investiture was not altered "in the lifetime of the vassal." There was no investiture to alter, for the purchaser who paid his composition never became vassal, but assigned without entering, and the Court were only enabled to reach their judgment on grounds appropriate to the circumstances before them, and very different from those tentatively suggested by Mr Cranstoun.

But, sixth, I understand that it is maintained that the reservation inserted in the writ of confirmation was inept and ineffective, not being in correct form. The precise words of the reservation are: Declaring "that I, the said Duke, by granting these presents, do not exclude myself or my successors from any claim which I or they may have at law to a full year's rent of the lands within contained, whenever the heir of entail to whom the succession shall open shall happen not to be the heir of line of the person who was last entered by me or my foresaids, but on the contrary I hereby reserve such claim entire."

The standing investiture prior to the confirmation of 1872 was to Sir James Milles Riddell and his heirs whatsoever. Assuming that the mid-superiority was conquest in Sir James Milles Riddell, and gave its character to the *dominium plenum* after consolidation, in the succession to Sir James Milles Riddell there was no difference between the line in conquest and in heritage. Even prior to 1874, when the distinction between heritage and conquest was abolished, the term "heir whatsoever" used in reference to heritage was equivalent to "heir of line" or "heir at law" as distinguished from heir of provision. Sir Thomas Milles Riddell being only son of Sir James Milles Riddell, was therefore his heir of line. He was entered for relief under the above reservation, according to the law as then established.

¹ 21 D. 871.

Mar. 11, 1911. At his death, had the succession continued to be at law, his heir of line would have been entitled to enter also for relief. And as Sir Rodney, the Duke of Argyll v. Riddell. heir of provision under the investiture of 1872, was also Sir Thomas's heir of line, he too was properly entered under the law, as then established, for relief. Ld. Johnston. No further or new reservation was required or could be made. It stood on the writ of 1872. Again, had Sir Rodney's heir of provision also been his heir of line, entry must have been given in the same way for relief. But if, *quoad* at anyrate two-thirds *pro indiviso* of the estate, the defender was not Sir Rodney's heir of line, then the reservation took effect. Once composition by virtue of the reservation fell to be paid, the new destination was enfranchised, and the reservation went no further.

It is said, however, that the heir of line of Sir Thomas or Sir Rodney might not have been heir whatsoever of Sir James Milles Riddell, and that this possibility makes the reservation inept. It is unnecessary here to discuss this possibility. Assuming that it might have been so, then too little was reserved and not too much, and as what was reserved was enough to meet the circumstances which have occurred, the reservation is effectual in the circumstances.

Seventh. Sir Rodney, on succeeding to Sir Thomas Milles Riddell, was entitled to an entry for relief. That this follows by reason of his position in the family as cousin and heir of line of Sir Thomas, is not disputed.

Eighth. The only question which remains to be determined is whether the defender can maintain that she is an heir of the last investiture, in respect that she is one of the heirs of line of Sir Rodney. I do not see how she can maintain this. Under the destination of 1849, had it been renewed each time the succession opened, and had it remained unaffected by the act of anyone *in titulo* to alter it, the defender would have succeeded along with her two sisters as heirs-portioners, her own right being to one-third *pro indiviso* of the estate. She and her sisters as heirs-portioners were among the heirs of line. She, as one of three heirs-portioners, was among the heirs of line only to the extent of her one-third *pro indiviso*. Had she succeeded under the former destination along with her two sisters as heirs-portioners *dispositione legis*, she could have done nothing to vest herself in the whole estate except *dispositione hominis*. There must have been either the intervention of Sir James or other proprietor succeeding him under the investiture of 1849, giving her by deed or disposition not merely her own one-third *pro indiviso* share, but the shares of her two sisters, or she must have obtained a conveyance from them of their respective *pro indiviso* shares. For by mere renunciation they could not have feudally vested her. She could not have gone to the superior and demanded an entry in her own person in the whole estate merely on the title of heir of line under the investiture of 1849 renewed to Sir Thomas and Sir Rodney. She must have produced a disposition in one form or another which took the lands out of that investiture and at once opened the superior's claim to composition, though, on the authority of *MacIntosh v. MacIntosh*,¹ she would have been entitled to enter as heir for relief in her own one-third *pro indiviso*, paying composition for the other two-thirds *pro indiviso* only. Now, what

¹ 13 R. 692.

I have said would have been necessary is exactly what has happened. The Mar. 11, 1911. entail of 1851 did intervene *dispositione hominis* to interfere with the investiture of 1849. Without it the defender would be heir merely in her own one-third *pro indiviso*. If she takes benefit by the entail of 1851, so as to disturb to any extent the succession under the former investiture, to that extent she happens "not to be the heir of line of the person who was last entered," and to that extent she is, I conceive, due a composition of a year's rent. I cannot find any principle on which she can escape, nor do I think that she has really very much to complain of. In point of fact, though this is no ground of judgment, the Riddell family have never paid a composition to the Duke of Argyll for their entry to these lands. Owing to the accidental state of the title prior to 1849, Sir James Milles Riddell was enabled to make up his title on paying a composition for entry merely in the mid-superiority. That this composition was as large as it was, was due to the large subfeu-duty of £300, which (and in those days it covered Ardnamurchan as well as Sunart), large as it was, was still a very small part of the value of the estate. Profiting by this accident of the title, Sir James Milles Riddell was able, by subsequent consolidation, to effect his entry in the *dominium plenum* without paying anything more. This he was perfectly entitled to do. It was one of those chances in the law of superior and vassal to which the superior had to submit. Now, I think the tables are turned, and Miss Riddell has, for the first time since her family came into possession of the estate, to pay composition for a change of investiture in the *dominium plenum*.

LORD KINNEAR.—I regret that I am unable to agree with the opinion which has just been delivered. I cannot have much confidence in my own opinion, since I know that your Lordships have come to the same conclusion as Lord Johnston. But I cannot persuade myself that the proposed judgment is right; and as the matter is of importance both to the parties and to the law, I will give my reasons for dissenting in some detail.

It is unnecessary to recapitulate the facts. But I observe in passing that I agree with Lord Johnston's observation that the pursuer could have had no claim for a year's rent or for anything more than a subfeu-duty had it not been for Sir James Riddell's consolidation of his two estates of *dominium utile* and mid-superiority; and I see the force of the suggestion that it would be a reproach to our system of conveyancing if a mere simplification of the vassal's title, by a process in which the superior is not required and has no title to intervene, should result in giving him a gratuitous benefit of so great an amount at the cost of the vassal's heir. But I am afraid this is hardly a relevant consideration, for I cannot assent to the view that the superior's claim for composition from a singular successor has ever been, or ought now to be, sustained or rejected on equitable considerations. It is matter of strict law resting ultimately upon statute; and the only question we have to consider is whether the particular claim is valid according to law.

The defender is already entered with the pursuer as her immediate lawful superior, by force of the statute of 1874. But she is still liable for the proper casualty; and it is common ground that the question whether

Mar. 11, 1911. that is to be relief duty only, or a composition of a full year's rent, must be determined by the same considerations as if she had demanded an entry under the law as it stood before 1874, when the superior's intervention was still necessary for the completion of the vassal's title. The general rule as to the terms of entry is very familiar. I do not know that it is stated anywhere more clearly than by Lord Blackburn in *Rankin's Trustees v. Lamont*¹: "A superior was entitled to receive a casualty on each change of his vassal . . . and when the fee became vacant (as sooner or later it must do by the death of the vassal last entered) so that the lands became in non-entry, the superior had a right to resume possession of the fief and hold it for his own use till one having a right to be entered as vassal came forward and paid the casualty—of relief if he entered as heir to the last vassal, of composition if his right was to be entered as a singular successor." For the application of this general rule it is only necessary to add, what indeed is as familiar and elementary as the rule itself, that the only method by which the singular successor could be entered was by obtaining a new charter of resignation or (since the Lands Transference Act of 1847) of confirmation, and that the payment of composition was the condition on which such new charter could be demanded; and that, on the other hand, the heir required no new charter but was entered by infektment, which the superior could be compelled to grant on a retoured service. The criterion, therefore, for deciding whether relief duty or a composition is payable is whether the person demanding entry is heir of the existing investiture or not. If he was such heir, he entered under the old law by service; if he was not, he must have produced a conveyance and obtained a new charter of resignation or confirmation, as the case might be. I think this is settled by the authority of the House of Lords affirming this Court in *Stirling v. Ewart*.² The historical origin of the claim for composition from a singular successor is fully explained in the elaborate opinions of the Judges. It is unnecessary to follow the history, which is now so familiar, in detail. But the material point is that the singular successor's right to enforce an entry rests upon statute, while the right of the heir depends upon common law, older than the earliest statute, and subject to no new statutory condition. By the earlier feudal law, the vassal had no power to transfer his feu without the superior's consent. But when the feu had become property recognised by law as transmissible to heirs, it followed in the natural course of things that it must become subject to the obligations of the proprietor; and the statutes of 1469 and 1669 were passed for the purpose of compelling the superior to receive his vassal's creditors, who had apprised or adjudged the lands, on payment of a year's rent. But the subject of the right was heritable, and the new charter which the superior was thus obliged to grant was therefore of necessity descendible to the heirs of the new vassal, just as the original right was descendible to the heirs of the original grantee. But such heirs, whether they were heirs at law or specially designed as heirs in the new investiture, required no new charter when the succession opened. The fee no longer

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¹ (1880) 7 R. (H. L.) 10, at p. 16.

² 4 D. 684, 3 Bell's App. 128, 2 Ross's Leading Cases (Land Rights), 340.

reverted to the superior on the vassal's death, but passed into his *hereditas* Mar. 11, 1911.
jacens. It was taken up as of right by the heir, who could force an entry Duke of
 on the retour of his service, and had no occasion to appeal to the statutes Argyll v.
 in favour of creditors and disponees, or to bring himself within their condi- Riddell.
 tions. I need not remind your Lordships that, although the more recent Lord Kinnear.
 procedure for compelling a superior to infeft an heir, until the Act of 1874
 rendered it unnecessary, was prescribed by the Act of 20 George II., that
 statute conferred no new right and imposed no new condition on heirs, but
 merely provided a simpler machinery in place of what Mr Erskine describes
 as "the former tedious method of running precepts against the superior."
 Accordingly, as the law is stated by Lord Cottenham in *Stirling v. Ewart*,¹
 "before the statute of 1685 all vassals had the means of changing the
 investiture, . . . but as those means were under the Acts of 1469
 and 1669, the superior was entitled to a composition of one year's rent,
 but as this was due only by virtue of those statutes, and as those statutes
 gave it only upon the entry of the appraisers or adjudgers, he was not
 entitled to it upon the succession of any one claiming under such entry."
 I need hardly say the position of a voluntary purchaser and his heirs
 under the Act of George II. was exactly the same as that of the adjudger
 and his heirs under the earlier Acts; and it is with reference to the case
 of such a purchaser that Lord Cottenham lays down the law in the terms
 that I have cited. The purchaser could only enter by obtaining a charter
 of resignation for which he was obliged to pay the statutory price. But
 the charter was in favour of him and his heirs, of whatever class; and
 when the succession opened, the heir obtained infeftment by virtue of his
 service, and became liable only for the proper feudal casualty of relief.

The question, then, is, In which of these two characters was the defen-
 der entitled to enter? It has been seen that she entered as heir to the
 last vassal, and she could not have made up a title in any other way.
 There was no disposition or conveyance in existence under which any one
 could pretend right to enter as a singular successor, and no tenable ground
 on which the defender's right to enter as heir of the investiture could be
 disputed.

This would be conclusive of the whole matter, were it not for the clause
 of reservation contained in the charter to Sir Thomas Riddell and his heirs
 of entail in 1872. To determine the legal effect of this clause it is neces-
 sary to consider, in the first place, what were the relative rights of superior
 and vassal when the charter so qualified was granted. The charter con-
 firmed the infeftment of Sir Thomas under his father's, Sir James's, deed of
 entail; and there is no question that when the entail was made Sir James
 held the estate directly of the Duke of Argyll, from whom he had obtained
 entry as a singular successor or purchaser, on payment of all the dues
 which could be legally exacted from him. It is equally beyond dispute
 that, holding under a charter which he had obtained on these terms in
 favour of himself and his heirs and assignees whosoever, Sir James had
 a perfect right to settle the succession to his lands as he thought fit, and
 to put his heirs under the fetters of an entail. But an entail in terms of

¹ 3 Bell's App., at p. 250.

Mar. 11, 1911. his own investiture was a legal impossibility, since it is trite law that a destination to heirs whomsoever cannot be made subject to the fetters. It was therefore necessary for Sir James to select a particular series from the general body of his heirs at law, and he did nothing more. All the heirs-substitute whom he calls to the succession are among his nearest heirs in blood, and the destination varies from the exact order of legal succession in two points only, viz., first, in the postponement of the heirs-female to the heirs-male of the first two stirpes; and, secondly, in the exclusion of heirs-portioners. This last condition was essential if the entail was to stand good, because I need not remind your Lordships that an entail is brought to an end by the succession of heirs-portioners. This exclusion, however, is the sole ground of the pursuer's claim for composition. The defender, although one of the heirs, is not the sole heir of line of the last vassal, because she is the eldest of three sisters who, by the ordinary rule of law, would have taken jointly as heirs-portioners; and, because the entail provides that instead of taking simultaneously they shall take in the order of seniority, the pursuer maintains that the eldest is not an heir, but a singular successor.

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If Sir James had feudalised this entail by resignation in favour of himself and the heirs designated, his son Sir Thomas would on his death have entered as heir, and there can be no question that the series of heirs called after him would, in their turn, have been entitled to take up the succession in their character as heirs of the investiture. He did not do so, but took infestment *de se*, and so held the *dominium utile* of himself as mid-superior. In 1860 he propelled the fee to Sir Thomas, who, in 1872, obtained the charter of confirmation in question from the Duke of Argyll. Sir James had died in 1861, and but for the fetters of the entail, Sir Thomas, as his heir at law, would have been entitled to serve and enter under the old investiture. There was no feudal obstacle to his entering in this way. But to do so would have been an infringement of the entail, and would have involved a forfeiture. He was bound to demand a charter which would give effect to the entail, and the superior was bound to grant it. He therefore entered in form as a singular successor. But he was in fact the heir at law of the last vassal, and, in accordance with the settled rule of law, he was therefore admitted and obtained his charter without composition, and so became liable for the ordinary feudal casualty of relief and nothing more. It was in this charter that the reservation was introduced on which the pursuer relies; but it is obvious that this cannot be in itself the foundation of any right. It is not a condition of the grant, but a mere saving clause to keep open a contingent claim, which may or may not be good in law, but is not to be foreclosed. The superior and his heirs are not to be excluded "from any claim which . . . they may have at law to a full year's rent . . . whenever the heir of entail to whom the succession shall open shall happen not to be the heir of line of the person who was last entered." The question, therefore, is whether, in the absence of express stipulation, there is a rule of law by which a superior is entitled to payment of a full year's rent on the entry of every heir of provision who is not also heir of line. If there be any rule of law to this effect, it is for the pursuer to show where, and by what authority, it has been established.

There is no statute for it; no principle has been formulated from which it is to be deduced; and it cannot be alleged that it rests upon custom, because the pursuer has failed to find an instance in the books in which an heir of entail entering by service has been compelled to pay a year's rent for his entry.

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It is said that the entail departs from the line of descent sanctioned by the superior on the investiture of Sir James Riddell. But the superior had no power to give or withhold his sanction to any line of descent. He was bound to confirm a right which, being heritable, must of necessity pass to the vassal's heirs, if it has not been alienated during his life. But it was for the vassal to say whether they should be heirs general or heirs of a particular class; and the superior had no will or interest in the matter.

The title to which the pursuer appeals is not an original charter, which he might have granted on such terms as he pleased. It is a charter by progress following upon a sale; and its terms must therefore be fixed by a transaction between vendor and purchaser with which the superior has no concern. But the subject of the sale was an absolute right of property; and the terms of the conveyance which the superior was bound to confirm are such as simply to give effect to a transfer of that absolute right. A conveyance to a disponee and his heirs whomsoever has exactly the same effect in law as a conveyance to him absolutely without mention of heirs. But if heirs were to be named at all, it was for the purchaser to fix the order of succession to his own property; and neither the seller nor the superior had any title or interest to control his choice. If Sir James had taken a conveyance from Lochnell with a destination to a particular class of heirs instead of to heirs general, he would have entered for the same composition as he actually paid; and the superior must thereafter have admitted the heirs of this new investiture in their character as heirs, and could not have pretended a right to treat them as disponees or singular successors. I am not sure whether this was contested. But at least the pursuer's counsel did not peril his case on any attempt to disprove it. And yet it is fundamental. For if the purchaser has a right to name his own heirs, all the rest follows. But if any point in this controversy can be fixed by decision, it is settled that while a purchaser must pay composition for his entry as a singular successor, such entry must be given to him and any series of heirs he chooses to name, whether heirs at law simply, or heirs-male to the exclusion of heirs-female, or any other arrangement of the body of his heirs at law; and all persons so described are held in law to take by inheritance and not by conveyance. It follows that a preference of heirs-male to heirs-female, or of the eldest heir-female to heirs-portioners, cannot be, in itself, an encroachment on the superior's feudal rights.

But then it is said that the pursuer has acquired right to reject heirs of provision, because Sir James Riddell on his entry took his title in favour of himself and his heirs general. The argument was, that the subsequent limitation to a particular class of heirs brings in strangers to the investiture. If this were material—which, if we are to follow *Stirling v. Ewart*,¹ I think

¹ 4 D. 684, 3 Bell's App. 128, 2 Ross's Leading Cases (Land Rights), 340.

Mar. 11, 1911. it is not—the statement is inexact. It is true that a grant to a man and his heirs whomsoever will not carry the estate to heirs of a special destination, because no particular destination has been made. But for that very reason, it excludes no particular class. It does not confine the succession to the blood of the first taker. As Lord Justice-Clerk Inglis points out in *Leny v. Leny*,¹ the transmission of an estate to heirs whomsoever depends upon an infinite variety of contingencies which no man can foresee or approve beforehand. A man's heir at law is the person who at his death is entitled to take up his estate by service. If the legal order of succession is thereafter undisturbed, the next heir may not be a relation of his at all, but will take the estate as heir of the person last vest and seised as of fee. The investiture of a vassal and his heirs or his heirs whomsoever secures nothing, therefore, to the superior beyond what is involved in a grant to the vassal absolutely—to wit, that everybody who claims to enter as heir must prove his right by serving to the vassal last infett. It must of course be conceded that the nearest heir, in the absence of a special destination, is the heir of line. But the point is, that the substitution of heirs of provision breaks no order of succession specially sanctioned by the superior, or which he has any rational interest to preserve. The mention of heirs in the infettment is a mere recognition, no doubt superfluous, of the heritable character of the feu. There is nothing of compact or paction in the matter. The pursuer's case, therefore, must be rested on an absolute right in the superior who has feued out lands to a vassal and his heirs to reject any heir of provision who is not also the heir of line, or, in other words, to admit him only on payment of composition as a singular successor. So far as regards the institute, not being the entailor himself this would be within his right, for the institute is not an heir and cannot take otherwise than as disponee. Nobody disputes that Sir Thomas Riddell must have paid composition if he had not been heir of line as well as disponee. But the question is whether heirs substituted to him who are not disponees and who could not, if they would, use the feudal clauses of any conveyance to force an entry under the statutes, are not entitled to the privileges of heirs, in which character alone they can enter at all. This is the only question to be determined; and in the present state of the authorities it is really a simple one, although I need not say I cannot think it free from difficulty, since I have the misfortune to differ from your Lordships. The defender is admittedly one of the heirs at law of the deceased vassal, she is also his heir of entail, and she is the only person who can take the estate out of his *hereditas jacens* by a service as heir. She has served accordingly, and is entered under the Act of 1874 to the same effect as if under the old law she had compelled the superior to give his infettment upon the retour of her service. Why, then, should she be required to pay a fine imposed by the statutes on those persons only who apply to the superior for a charter by progress, which under the old law she did not require and had no right to obtain?

The pursuer's answer is that heirs of entail, although they must necessarily enter as heirs, are nevertheless, in a question with the superior, to be treated as singular successors or disponees who must pay composition for

¹ (1860) 22 D. 1272.

entry. The privilege of heirs to enter for relief-duty is, according to his Mar. 11, 1911. argument, confined to heirs at law, and does not extend to heirs of tailzie and provision. This has been maintained on two grounds, which if the Duke of Argyll v. Riddell. question were open would require respectful attention, but both of them have been completely refuted by final decisions. Lord Kinnear.

1. In the earlier stages of the controversy the cases seem to show that the superior's objection was not to the mere substitution of a special destination in place of heirs general, but to a special destination protected by the fetters of a strict entail. This was said to be an encroachment upon his feudal right, because it prohibited alienation and so deprived him of his chance of composition so long as the entail lasted, contrary to the conditions of the Act of 1685, which, while allowing entails, expressly provided that the casualties of superiority should not be prejudiced. The answer which was sustained as conclusive in *Stirling v. Ewart*,¹ is very clearly stated by Lord Cuninghame, Lord Moncreiff, and Lord Justice-Clerk Hope. The former, in particular, points out that a tailzied destination was not a novelty introduced for the first time by the Act of 1685, since it was established by the writings of all the great lawyers of the seventeenth century—including Hope, Mackenzie, and Stair—that tailzies with prohibitory clauses, and often with irritant and resolute clauses also, were perfectly legal. These conditions laid the vassal under obligations of good faith, and were effectual against gratuitous alienations, although probably they may not have been sufficient to exclude the claims of creditors; and the superior was bound to insert them in his charter. Accordingly it is remarked by Lord Braxfield in *Mackenzie's case*² that a superior was always bound to grant a charter with prohibitory clauses, and it would have been anomalous and unreasonable to give him a compensation merely because an Act had been passed making prohibitions which had long been sanctioned and held good *inter hæredes* more operative and secure, since it was beyond dispute that vassals were previously entitled to make tailzies with such prohibitions, and that superiors *ab antiquo* were bound to repeat them in their charters. The claim of the superior was therefore held to be inadmissible and contrary to principle. But, further, it was shown that, properly construed, the Act of 1685, on which it was rested, was conclusive against it. For the Act made it lawful for the lieges "to tailzie their lands . . . and to substitute heirs in their tailzies," and the persons substituted in their order were therefore by force of the statute itself "heirs of the investiture," and must necessarily be entitled to take up the estate in that character when the succession opened, since the right to nominate heirs was absolute, and was not touched by the clause saving casualties of superiority. The proviso is that "nothing in this Act shall prejudice His Majesty as to confiscations or other fines as the punishment of crimes, or His Majesty or any other lawful superior of the casualties of superiority which may arise to them out of the tailzied estate; but these fines and casualties shall import

¹ 4 D. 684, 3 Bell's App. 128, 2 Ross's Leading Cases (Land Rights), 340.

² M. 15,053, M. voce Superior and Vassal, Appx. No. 2, 2 Ross's Leading Cases (Land Rights), 398.

Mar. 11, 1911. no contravention of the irritant clause." But the composition for the entry of a singular successor never was, like the relief, a feudal casualty payable out of the estate. It has within a comparatively recent period come to be called a casualty, and this inaccurate use of language cannot now be corrected, since it is sanctioned by a respectable usage, and now by the Act of 1874. But it cannot have been so used by the Parliament of 1685 before there was any general obligation on superiors to receive singular successors for payment of a year's rent, and whether it is called a casualty or not, it is certainly not a casualty payable out of the estate. This is demonstrated by Lord Justice-Clerk Hope. He points out that the Act was intended to protect the estate against debts which might be contracted by the owner, and if this were done effectually by prohibitory and irritant clauses, it might well have been contended that the superior's casualties, being also debts of the vassals, could no longer be enforced against the estate. The reservation was therefore inserted to preserve the superior's rights against the estate, notwithstanding the protecting clauses of the entail. But the claim for composition was never available against the estate. It was not *debitum fundi*; and therefore the superior could neither enter into possession nor poind the ground for it. It was a mere personal claim, and his only means of enforcing it was to withhold the charter until it was paid. The right to nominate the heirs of his investiture was therefore given absolutely to the landowner by the first part of the Act of 1685, and was in no way qualified by the saving clause.

2. The second ground of argument was equally applicable to all special destinations, whether tailzied or simple. It was maintained that the superior, conceding that he must admit such destinations in a vassal's investiture, had a right to stipulate that in relation to him heirs substitute should be treated as disponees, since they did not take by virtue of the common law of succession but by the pure act of the vassal himself, directly operating at each successive opening of a new substitution. The argument was urged with his usual force by Lord Fullerton, who dissented from the judgment in *Stirling v. Ewart*¹; and the conclusive answer to it is that it was expressly rejected by the Court and the House of Lords.

With these explanations, it might probably be enough to say that, in my opinion, the case is governed by *Stirling v. Ewart*.¹ But the bearing of that decision seems to me to have been very imperfectly understood, and it may therefore be useful to examine the earlier authorities on which it proceeded, and which the noble and learned Lords who took part in the judgment found it necessary to expound and confirm. To begin with, the law is laid down in clear and unhesitating terms by Mr Erskine²: "Though singular successors, whether adjudgers or voluntary purchasers, are liable in payment of a year's rent to the superior for changing the former investiture, yet, where a proprietor entails his lands, the superior is not entitled to the composition of a year's rent from every successive heir of entail who is not heir of line to him who stood last infeft, on pretence that he is a singular successor. The heir of the last investiture cannot be called a singular

¹ 4 D. 684, 3 Bell's App. 128, 2 Ross's Leading Cases (Land Rights), 340.

² Institutes, ii. 7, 7.

successor, and he is founded in a right to demand an entry, upon payment Mar. 11, 1911.
 to the superior of the sum due to him by law, in name of relief, upon the entry of an heir." If this is good law, it is a direct negative of the assumption upon which the pursuer's reservation proceeds. In support of this doctrine, Mr Erskine refers to the case of *Lockhart v. Denham*,¹ in which it was held that a substitute, not being the heir at law of the last infeft, was entitled to enter for relief, notwithstanding an express condition embodied in the charters, that "every heir of entail shall be obliged to pay a year's rent for his entry, unless he be at the time heir of line to the person last vest and seised." A minority of the Judges in *Stirling v. Ewart*² thought that this judgment was wrong and not binding on the Court, and rejected the doctrine laid down by Erskine, on the ground that it was based on an unsound decision. But the authority of *Lockhart v. Denham*¹ was supported by the judgment of the Court, and by the House of Lords; and, as to Mr Erskine, it was observed in both Courts that his statement of the law was authoritative in itself, independently of the decision to which he refers. Lord Brougham, in particular, says³: "It is a clear and an unhesitating and an unqualified opinion, or rather, which augments its weight, it is given as a known principle and not as a matter of any doubt or controversy, upon which, however, had any dispute existed, his opinion would as such have been entitled to the greatest respect. But he states it as known law, and no matter of controversy at all." Again he says⁴: "But it seems this opinion, or rather this authoritative statement, of Mr Erskine is entitled to little deference, because it cites as its support the case of *Lockhart v. Denham*,¹ then, it is said, recently decided. The decision was, however, thirteen years old when Mr Erskine wrote the passage in question. . . . Had it not given satisfaction among conveyancers, among the learned feudalists of the day, he doubtless would have stated the doctrine which it supports with some qualification. Had it not met with his own full approval and been backed by his high authority, he probably might have expressed himself differently too. But it is to be observed that he does not lay it down as any new law first declared by that decision. Though he refers to the decision, he does not give it as forming the only ground of his statement." On the same point Lord Cottenham says⁵: "The case of *Denham*¹ in 1760 appears to be a decisive authority. The very point was raised and decided against the superior, although there was a reservation of the supposed right. . . . Erskine thought this decision conclusive, and I do not find any subsequent case displacing the authority of this decision. That of *Mackenzie*,⁶ indeed, in 1777 confirms it, and particularly the observation of Lord Braxfield, that the granting of the first charter was an enfranchisement of all the subsequent disponees."

As to the disregard of the reservation in *Lockhart v. Denham*,¹ it may be

¹ M. 15,047, 2 Ross's Leading Cases (Land Rights), 329.

² 4 D. 684, 2 Bell's App. 128, 2 Ross's Leading Cases (Land Rights), 340.

³ 3 Bell's App., at p. 242.

⁴ 3 Bell's App., at p. 243.

⁵ 3 Bell's App., at p. 251.

⁶ M. 15,053, M. voce Superior and Vassal, Appx. No. 2, 2 Ross's Leading Cases (Land Rights), 398.

Mar. 11, 1911. observed that some of the Judges who questioned the decision have thought that it was rested on the superior's consent, which he assumed that he might have withheld, to grant a charter embroiled with a tailzied destination; and the form of the interlocutor affords scope for this criticism.

But if the superior were at liberty to give or withhold a charter in the terms asked, it could not possibly have been held that the charter actually granted was unqualified, or that a condition expressed was ineffectual. The true ground of judgment there must have been what Mr Erskine took it to be, that the superior had no power to make any such stipulation. This was the material point in the argument on either side; and there can be no question that the approval of the decision by the House of Lords was given on the understanding that it determined, as between superior and vassal, the rights of entail, whether heir of line to his predecessor or not, was an heir of line, and was not a singular successor. Lord Fullerton dissented in this Court, took the same view, for he says¹: "In the case of *Lockhart v. Denham*² were understood to fix the law, and would be an end to the question. . . . But the authority of that case was superseded by the clearest of all implications in the cases of *Lockhart v. Denham* and the *Duke of Argyle*.⁴" But in the House of Lords it was held that neither of these cases overruled *Lockhart v. Denham*,² and we must therefore hold that Lord Cottenham³ thought *Mackenzie's* case³ confirmed it.

In the case of *Mackenzie* (July 1777),³ the heir of entail who entered on an entry, being the heir *aliouquin successurus* of the last vassal, refused to make the composition of a singular successor, and the Court held that the defender "was obliged to enter the defender . . . upon receiving a discharge of the feu-duty, and was not entitled to demand from him a year's re-compensation . . . ; reserving to the superior and his successors superiority any right which he or they might have to a year's re-compensation on the entry of any future heir of tailzie not an heir of line investiture prior to the tailzie." The terms of this reservation are not clear. It proceeds upon an assumption as to the law which is irreconcilable with that of the pursuer's reservation, because it rejects altogether the pursuer's notion that the heir of line of the vassal last infeft is in the meantime entitled to enter for relief, and assumes that this right belongs to the heirs of a former investiture which has been extinguished by the present. If this meant that the casualty payable by every substitute heir for generations is to be determined, not by the existing investiture which he makes up his title, but by an extinguished investiture which no one could take any real right, it would be irreconcilable with feudal principle, and would be unworkable in practice. It is assumed that whenever a tailzied fee becomes vacant a similar case must have occurred at the same time under a prior investiture, or

¹ 4 D., at p. 705.

² M. 15,047, 2 Ross's Leading Cases (Land Rights), 329.

³ M. 15,053, M. voce Superior and Vassal, Appx. No. 2, 2 Ross's Leading Cases (Land Rights), 398.

⁴ M. 15,068, 2 Ross's Leading Cases (Land Rights), 335.

⁵ 3 Bell's App., at p. 251.

person who would have been entitled to fill it can be ascertained as readily Mar. 11, 1911. as if he were in a position to serve in special to the last infeft. But this cannot be the meaning intended. The interlocutor must, in my opinion, be interpreted with reference to the doctrine which distinguishes between heirs of blood and mere strangers, and allows the vassal to substitute heirs of his own blood in any order he pleases, without his being held to have gone outside the limits of an investiture to him and his heirs. I do not enquire at present whether this distinction is sound; but, rightly or wrongly, it was certainly accepted as a rule of practice before the decision of *Stirling v. Ewart*¹; and the fact of its acceptance is a guide to a reasonable construction of the interlocutor in the case of *Mackenzie*.² It is a construction which conforms to the grammatical sense, for the clause assumes that the right to composition will be excluded on the entry, not only of the heir who would at the time be entitled to take up the estate by service, but on the entry "of any heir of tailzie not an heir" of the prior investiture. If the indefinite article is used with intention, it points to a class of persons any one of whom will answer the description; and that can only be the class which, according to the then accepted doctrine, was defined as the "whole body of the heirs at law," meaning all the persons who, in any event, might be entitled to inherit, by reason of their nearness in blood to the grantee, without reference to the legal order of inheritance or the probability of their inheriting in the ordinary course of succession. This is the only view which is reconcilable with the opinion ascribed to Lord Braxfield, who, after pointing out that the person desiring an entry as disponee was in fact heir of the investiture, and that it was of no consequence whether he made up his title in form on the disposition, is reported to have said: "If stript of this tailzie he would be entitled to an entry on a duplicand. Even if stript of substitution to strangers the superior would be obliged to enter under the clauses *de non alienando*, &c., in the entail. The superior is not entitled to say he suffers loss by land being tied up from alienation. Therefore the cause does not lie on irritant clauses. But here strangers are introduced." It cannot be supposed that Lord Braxfield would have described a preference of heirs-male to heirs-female, or of the eldest heir-female to heirs-portioners, as the introduction of strangers. For he clearly holds that the disponee, being also heir of the investiture, was entitled to enter for relief duty in terms of the deed of entail; and there can be no entail except in favour of a selected order of heirs as distinguished from the order of law. This is the view taken of the case by Lord Mackenzie, and I think also by Lord Fullerton, who agreed with him in supporting the superior's claim in *Stirling v. Ewart*.¹ Lord Mackenzie says³: "It is plain . . . that the Court were not satisfied that the superior, though bound to admit Mackenzie and his heirs, was bound to admit strangers as heirs of investiture, without payment of a year's rent for that admission. . . . It rather appears that the entailor had been himself vassal before the entail,

¹ 4 D., 684, 3 Bell's App. 128, 2 Ross's Leading Cases (Land Rights), 340.

² M. 15,053, M. voce Superior and Vassal, Appx. No. 2, 2 Ross's Leading Cases (Land Rights), 398.

³ 4 D., at p. 702.

Mar. 11, 1911. and so was not under the necessity of paying one year's rent to himself and his heirs of law and of the former investiture. The Duke of Argyll v. Riddell. pause to observe that that was exactly the position of Sir James Mackenzie in the present case. His Lordship goes on: "But if it was so, there would be little difference, since there is no doubt in practice, nor was it a vassal resigning may, without payment of any casualty, do so, and be infeftment to himself and his own proper heirs of law and of the former investiture. The demand of the superior, therefore, in *Mackenzie v. Mackenzie* was rested, and the reservation admitted, solely in reference to the introduction of a stranger as heir of investiture." No one who has read the opinion and the opinion of the Court in *Hamilton v. Hopetoun* can fail to see the care which they demand, will entertain any doubt that by "law and of the former investiture," in the passage cited, Lord Mackenzie meant precisely the same thing as he meant by the body of his opinion in *Hamilton v. Hopetoun*.²

If this view is correct, the reservation in *Mackenzie's* case¹ was not binding on the pursuer. But if, contrary to my opinion, it must be taken as a decision suggesting an inference, for it certainly is not a decision, that the pursuer would be entitled to a composition on the entry of any heir suffect, or the nearest heir of line, all the weight which might otherwise be given to it is completely displaced by the judgment in *Stirling v. Stirling*. It ought to be observed that the report in *Morrison* is very uncertain. But the opinions of the Judges are printed by Mr Ross from the reports of various eminent lawyers; and from these it is possible to gather the difficulties were which induced the Court to withhold a decision on the question which was properly before it. It is true that loose reports of this kind must be read with caution, for the reasons given by Lord Mackenzie in *Inglis v. Hutchison*⁴; and in the present case the reports are less conclusive, because they are much compressed, and the various meanings of the different connotators do not in all respects agree with each other. But making due allowance for these defects, I think that when the reports are read with reference to the printed arguments, it may safely be inferred that the Court was satisfied, first, that the heir was entitled to enter for relief, although in form he was entering as a singular heir; and, secondly, that a charter in the terms asked, if granted with reservation, would give all the heirs substitute named in the deed the absolute right to be entered as heirs in their turn, for payment of the feu only. There would still have been no question, so far as I can see, of an unqualified charter carrying with it this legal consequence must be granted, if all the heirs substitute had been persons within the class of heirs of the old investiture, although they might have been outside the legal order of succession, so as to displace the heirs of the old investiture; only the substitution of strangers outside the scope of the old investiture, altogether which was thought to cause any serious difficulty. C.

¹ M. 15,053, M. voce Superior and Vassal, Appx. No. 2, 2 in the 1st Series of Cases (Land Rights), 398.

² 1 D. 689.

³ 4 D. 684, 3 Bell's App. 128, 2 Ross's Leading Cases (Land Rights), 128.

⁴ (1872) 11 Macph. 229, at p. 233.

it was recognised that the decision in *Lockhart v. Denham*¹ was against Mar. 11, 1911. the superior's claim. But it appears from the notes that the Judges were not prepared to accept that decision as binding, but neither, on the other hand, were they prepared to overrule it. They escaped from the difficulty by allowing the superior, in Lord Braxfield's phrase, "to throw in a reservation." There is some force in Lord Justice-Clerk Hope's criticism of this procedure, that the Court was bound to decide the question before it, and ought not to have put it aside. The heir had an obvious title and interest to insist upon the charter being granted, because although, so far as the superior was concerned, he might have entered by infeftment on his retoured service as heir, he would by so doing have incurred an irritancy and forfeitd the estate; and the superior, on the other hand, had as clear an interest, if he had a right in law, to treat the entail as an alienation, and refuse a charter except for composition. The question was distinctly raised between the parties; and if the Court had followed *Lockhart v. Denham*,¹ it must have been decided against the superior. But in *Stirling v. Ewart*² it was held that *Lockhart v. Denham*¹ was rightly decided; and the grounds on which the question was reserved in *Mackenzie's* case³ were found to be without foundation. So far, then, as the decision goes, the case of *Mackenzie*³ is in favour of the defender; and the reservation by which it was qualified may be disregarded, because it only served to keep open a question which is now closed by a judgment of the House of Lords.

The case of the *Duke of Hamilton v. Hopetoun*,⁴ which has been hitherto regarded as a decision of great importance, seems to me to have been misunderstood in the present discussion. The material facts are stated by Lord Cuninghame in *Stirling v. Ewart*⁵:—"The superior had granted a charter in the ordinary terms to a purchaser and his heirs and assignees. No special substitution was set forth in the charter, but the vassal having got the charter in the preceding general terms, assigned it in his son's contract of marriage to his heirs-male and other heirs of tailzie, excluding heirs of line. As the superior was not a party to the assignation, it was contended that he had given no consent to the new investiture, and was not bound to give a new investiture under it without a new composition. But it was held sufficient for the determination of the case to state that in any view of a superior's rights a purchaser was entitled to substitute all his own heirs in any order he chose without the superior's consent." It is said that this case is not in point, because there was no change of investiture, since the original purchaser was not infeft, and the first demand for infeftment under the charter was made by the assignee. But the superior's objection was that the infeftment or investiture demanded by the assignee was not consistent with the terms of the charter, inasmuch as it brought in a special series of heirs, different from the heirs at law; and his argument was exactly that which affords the only possible basis for the pursuer's case—to wit, that no one can be made an heir of investi-

¹ M. 15,047, 2 Ross's Leading Cases (Land Rights), 329.

² 4 D. 684, 2 Bell's App. 128, 2 Ross's Leading Cases (Land Rights), 340.

³ M. 15,053, M. voce Superior and Vassal, Appx. No. 2, 2 Ross's Leading Cases (Land Rights), 398.

⁴ 1 D. 689.

⁵ 4 D., at p. 692.

must be entitled to do so in such a form as will enable them to take up Mar. 11, 1911.
 the succession; and by resigning for new infeftment to himself and any series of heirs he names, he encroaches upon no right which has ever been ascribed to the superior. He cannot be required to pay either composition or relief, because there is no change of vassal, since he still remains in the fee; and, when a change is brought about by his death, the heir he has called to the succession will, *ex hypothesi*, be entitled to enter as heir of the investiture. I add that, if it were otherwise, the argument on the Act of 1685, to which so much weight was attached both here and in the House of Lords, would be futile. For no effectual entail can be made but by a proprietor duly infeft.

Duke of
Argyll v.
Riddell.

Lord Kinnear.

The great importance, however, of the decision in the *Duke of Hamilton v. Hopetoun*¹ is that while it stops short of a satisfactory principle, it completely overturns the basis on which the superior's right to distinguish between heirs as *hæredes juris* and *hæredes facti* has been rested. The superior's case on this point is most forcibly stated by the minority of the Court in *Stirling v. Ewart*,² and particularly by Lord Fullerton; and to put it shortly it comes to this: that although the vassal claiming the entry may have the right to create any number of substitutes, and thus to render them in form heirs of the investiture, still the superior has a right to stipulate that in a question with him they shall be treated as dispoonees, inasmuch as they take by the act of the entailer and not by disposition of law. It was conceded that the supposed principle on which this claim depends—to wit, that the superior is bound to recognise no heir but the heir at law—had been so far broken in upon by the practice recognised and confirmed in the case of the *Duke of Hamilton*,¹ that the vassal getting the entry may name heirs of law simply or any special arrangement of the body of his heirs at law he thinks fit. But then it was said that this rule was laid down under the qualification that he should “not go beyond his heirs at law to strangers.” The question then arose in *Stirling v. Ewart*² whether this qualification could be maintained. But it followed that the Court must, in the first place, accept or reject the rule to which it applied; and the judgment was that the rule was perfectly sound and that the qualification was unmaintainable; that the vassal was entitled to name his heirs, without restriction; and that the superior has no title or interest to inquire whether they were strangers to his blood or his nearest of kin.

The facts in *Stirling v. Ewart*² were these: The institute under a deed of entail who was not the heir at law of the entailer obtained from the superior a charter of resignation in favour of himself and the other heirs of entail; and as a matter of course paid composition for his entry. In this charter there was inserted a clause of reservation in the same terms as that now under consideration, reserving to the superior any claim he might have at law to a full year's rent “whenever the heir of entail to whom the succession shall open shall happen not to be the heir of line of the person who was last entered and infeft.” On the death of the first heir substitute the succession opened to a second

¹ 1 D. 689.

² 4 D. 684, 3 Ball's App. 128, 2 Ross's Leading Cases (Land Rights), 340.

Mar. 11, 1911. substitute who was not related either to the institute or to the infest. The superior claimed a year's rent as on the entry of successor, founding on what he alleged to be the legal right, been expressly reserved in the charter acknowledging the entail.

Duke of Argyll v. Riddell.
Lord Kinnear. held that all the persons named in the destination, although s blood to the entailer or to the institute or to each other, were heirs of the investiture, to obtain an entry on payment of the relief; and this judgment was affirmed by the House of Lords. my opinion, conclusive of the present case, because it means the existing investiture is the sole test of the right to enter as an heir; there is no solid distinction between one heir of that investiture and another; and that all the heirs in the destination so established have a right to enter in their order as heirs of provision on payment of relief, whether they are natural heirs of one another, and whether they are heirs of the older investiture or not.

It may be useful, however, to see how the question was presented to the House of Lords. The Judges were almost equally divided; and the arguments on both sides are elaborate and full of learning; but the point at issue is brought to a very simple issue. No one disputed the law laid down in the *Duke of Hamilton v. Hopetoun*.¹ But accepting it as sound, the majority refused to extend it to the case of strangers to the investiture; the minority held that there was no distinction between one heir and another. The reasoning of the minority is entirely in accordance with the argument already cited from Lord Fullerton. But the point is in its sharpest and most uncompromising form in the opinion of Lord Macmillan. He held that the case of the *Duke of Hamilton*¹ necessarily implied that "while a vassal might require his superior to grant an investiture to the whole of his natural heirs in whatever order he might choose, his right, at all events, went no further; and that it was a necessary and reasonable condition in any series of heirs so sought to be enfranchised that they should all hold that character *jure sanguinis* and not *provisionis*." "In strictness of principle, indeed," says Lord Jeffrey, "and with reference to the genius and history of feudal holdings, what we call a heir of provision (if he has no other or additional character) I cannot say to be an heir at all, but a disponee or singular successor merely." There can be no doubt as to the meaning of this last proposition, or as to its effect, if it be sound. But, as Lord Brougham points out, some confusion has been introduced into the discussion by an ambiguous use of the word "singular successor," and it may be well that it should be cleared up. In one sense every heir of entail is a singular successor, because he succeeds by a singular title not involving universal representation. But in another common and legitimate use, according to which it means the same as Mr Duff's definition—every person who presents himself to the superior with any other character than that of heir of the last investiture, whether that of a purchaser or of a gratuitous disponee. Is it true, then, that a heir of provision is in this sense a singular successor? No doubt

¹ 1 D. 689.

² 4 D., at p. 1.

from the act of the entailer, but it is a right of inheritance. From Mar. 1800 it became well-established law that a fee, instead of returning to the superior on the death of the vassal, passed into the vassal's *hereditas*.¹ It followed of necessity that the heir who could take it out of the hands of the *heredes jacens* must be the only heir who could enter to the fee in room of the deceased. But the particular person who shall take up the fee in room of the deceased depends on no feudal or contractual right in the superior, but on the law of succession regulating the descent of the particular estate. In other words, it is the heir of the investiture. I agree that it does not solve the question whether the superior may not have rights reserved in the constitution of the investiture. But the immediate question is whether, when the fee has been settled, the heirs of provision who have been made members of the investiture are to be regarded as vassals, if they have not the additional character of blood relationship. The answer may be put in the words of Lord Justice-Clerk Hope, 1811: "I hold just the reverse. I hold that the heir of provision is to be regarded in the character to which feudal law looks, and no other; that any other additional character which the party possesses is of no moment and is looked to and is altogether irrelevant; that if the party is the heir of the grant or investiture, his right and character as such is exactly the same whether he is a stranger in blood or the eldest son." But setting aside the element of blood relationship, the assumption of the argument is considering is that the vassal cannot give a right of inheritance to his heir, who is not his heir at law without making him a disponee, and liable to composition when he enters to the land. But the law distinguishes between transmission *inter vivos* and transmission from the dead to the living. If a vassal conveys his land from himself to another his heir must pay composition, because he cannot complete a real right coming under the statutes which give the superior a right to exact composition. It makes no difference if the conveyance is *mortis causa* and held to be completed on the death of the granter, because the disponee is still within the scope of the statutes. But the statutes do not touch the law by which a vassal infeft may convey to a disponee and a series of substitutes who are not disponees but heirs, or may settle his own lands upon a series of substitutes one after another so that each in his turn may present himself to the superior in the character of heir. And such heirs are not liable to composition, because they are not within the scope of the statute. It is said that the superior must be entitled to a composition upon every change of the investiture. But this is a mere assumption for which no authority has been produced. Investiture means infeftment; and upon every change of infeftment, or substitution of a new vassal for an old one, the superior has a claim, not necessarily for composition, but for relief or redemption as the case may be. But the new vassal's liability to the one or the other must be determined by his own relation as heir or as successor to the other, and is not affected by the character of the investiture, if any, by which his infeftment may be qualified. It is idle to examine the arguments on either side in detail as if the

¹ 4 D., at p. 713.

Mar. 11, 1911. question were still open. It is finally decided by the judgment of the House of Lords. The whole controversy is shortly summed up in *Cottenham*¹ to the following effect. Under the statutes of 1706 and 1709, the superior to give entry to singular successors, he was entitled to give him a year's rent, but the vassal was at liberty to make the composition in favour of such heirs as he chose; and as the composition was given by virtue of these statutes, and as these statutes gave it only to the appraisers, adjudgers, or disponees, the superior was not entitled to give entry on the succession of anyone claiming under such entry. In *Cottenham* he was not entitled to it on the entry of an heir of provision, but only on the entry of an heir at law. The Act of 1685 in giving effect to the make tailzies gave a right against the lord to give effect to the claim as the claim for composition then in question was not within the scope of casualties contained in that Act and certainly was not given by the Act, there could not be any legal foundation for it. Upon general principles Lord Cottenham thought that tolerably clear; but he found the case strongly confirmed by the decisions in *Lockhart v. Mackenzie*,² and *Hamilton v. Hopetoun*³; and as to the last of these he says that if, as was there decided, the vassal is not bound to follow the legal order of succession but may substitute any persons of his own choice of the first taker, without reference to their order or the probability of their inheriting according to the rules of inheritance, the only principle on which the claim can be supported seems to be removed, for if the party named be a perfect stranger, or so remotely connected with the family with so many before him as to make his chance of inheriting a mere matter of indifference to the superior. The ancient rule of primogeniture, by this decision, do not regulate the superior's claim.

If this judgment is to be followed, it seems to me out of the question to reject the defender's claim to enter as heir of provision, on the ground that the deed of entail under which she takes disturbs the legal order of inheritance by excluding heirs-portioners.

It is said that *Stirling v. Ewart*⁴ is inapplicable, because in that case the institute paid composition for entry, and no composition was paid in the case of Thomas Riddell. But the entail was made, not by Sir Thomas Riddell, but by Sir James James; and it follows from the judgment that Sir James, who bought the land as a purchaser on the usual terms, was entitled to entail his land, and to require the superior to give effect to his entail. If he had made the entail in title, as he might have done, to himself and the heirs of entail, the latter would beyond question have been entitled to enter in the land as heirs. But he propelled the succession to his son, and therefore he had to complete his title by the form applicable to a singular successor. This is the peculiarity in the title which allows of the present question being raised. For it is settled law, and is in no way disputed, that Thomas was entitled, notwithstanding the form of his entry,

¹ 3 Bell's App., at p. 248 *et seq.*

² M. 15,047, 2 Ross's Leading Cases (Land Rights), 329.

³ M. 15,053, M. voce Superior and Vassal, Appx. No. 2, 2 Ross's Leading Cases (Land Rights), 398.

⁴ 4 D. 684, 3 Bell's App. 128, 2 Ross's Leading Cases (Land Rights), 411.

is character as heir, and was therefore liable for relief-duty only. However, that as the superior could not exact a year's rent from the defender. But because the disponee received as an heir, being heir in fact, it does not follow that a disponee is to be treated as a disponee. The assumption is that wherever a new destination to a different series of heirs, the superior must exact rent from one or other of the new series, or, in other words, is not bound to recognise the entail. But Sir Thomas was bound to do so, and it is not open to dispute that he was entitled to demand a composition which should give effect to it. That he was entitled to a charter of composition; and as the subject of the right was heritable, the obligation to the superior necessarily implied the descent of that right to his heirs. The superior, then, has a right to say that it must descend to the heirs at law, and not to the heirs of entail! That is the very point decided against *Living v. Ewart*.¹ If the *Duke of Hamilton v. Hopetoun*² had been decided, it is clear that the substitution of the defender must have been made, because she is one of the heirs at law, and an heir who would have come along with others *pro indiviso* if there had been no entail. But in *Living v. Ewart*¹ that is an immaterial consideration. Her right as heir is conclusive irrespective of her relation to the entailer or to the superior in the fee. It is said that throughout the opinions in *Living v. Ewart*¹ the payment of composition on entry is put forward as the condition on which the superior is precluded from demanding a second composition from heirs. But that is because in the particular case this was the condition on which a charter could have been obtained. The substance of the point on previous payment is contained in a sentence of Lord St. Vincent's opinion,³ when he says that in *Lockhart v. Denham*⁴ the defender was "barred from claiming a new composition from a succeeding investiture which he had already acknowledged for the highest composition that the law gave him right to exact." But that is the position of the present superior, who received for the entry of the charter of Riddell and the acknowledgment of his heirs of provision the consideration which the law gave him right to exact. The point is sometimes stated in a way which seems to me to be entirely misleading. It has been said that according to a dictum of Lord St. Vincent the payment of the composition on entry is the enfranchisement of the whole destination. But that is a misapprehension. Lord Braxfield really said, and the House of Lords treated it as an authoritative and important statement of the law, was that "the first charter is the enfranchisement of all the subsequent destinations." It is the charter and not the price which is paid for it which is treated as the enfranchisement of the heirs of tailzie. According to the judgment of the House of Lords is that when the superior has granted a charter which in law he was bound to grant, embodying the right to heirs, he is altogether outside the statutes entitling him

¹ 3 Bell's App. 128, 2 Ross's Leading Cases (Land Rights), 340.

² 4 D., at p. 692.

³ 17, 2 Ross's Leading Cases (Land Rights), 329.

Mar. 11, 1911. to composition on entry when he demands composition from

such heirs.

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Lord Kinnear. no more than follow *Mackenzie v. Mackenzie*.³ The decision v
institute under a deed of entail who was also heir *alioquin succed*
be entered for relief, reserving to the superior "his right to cla
rent, upon the entry of the first substitute under the new invest
shall not be the then existing heir under the former investiture,
vassal any legal defence against such claim."

This is said to imply that the claim when it arose would be
the opinion of the Court is said to be expressed to the effect tha
vation would be effectual. But the reservation covers not
superior's claim, but also the vassal's defence. It is obvious tha
do no more than keep the matter open. For the Court could n
defence and repel it in the same breath; and if they did thei
would bind nobody. The question before the Court was w
vassal should pay composition or relief, and the reservation was
the instance of the vassal himself, who was perfectly willing
should at some future time be allowed to emerge against strange
vided he himself was exempt from payment. It is impossib
Court should expressly or by implication have decided a que
had not yet arisen, against parties who were not before them,
rights on that hypothesis had been surrendered for his own adv
litigant who had no title to represent and no interest to protec
take it, therefore, that when Lord Wood says that the reservati
effectual, he means exactly what he says, that it will be effectua
vation of the question or, in other words, effectual to keep th
open. An effectual reservation of a question which decides th
reserved is a contradiction in terms. If this were otherwise de
intention of the Court would be cleared by Lord Wood's refer
cases of the *Duke of Argyll v. Lord Dunmore*,⁴ and *Stirling*
This last he cites to prove that a reservation was effectual to k
tion open, just because it was found after litigation that it was
ficial efficacy to the superior, inasmuch as he had no legal right

I am of course very far from suggesting that *Marquess of
Oswald*¹ is not a very important judgment for all that it really d
the contrary, it is, in my opinion, of the highest authority as a c
of the actual decision in *Mackenzie v. Mackenzie*,³ by which the
Thomas to obtain his charter on payment of relief is fully estab

LORD PRESIDENT.—The sharp divergence of opinion that has
between the judgment of the Lord Ordinary, which has been f
my brother Lord Johnston, and the judgment just delivered

¹ 21 D. 871.

² 4 D. 684, 3 Bell's App. 128, 2 Ross's Leading Cases (Land R

³ M. 15,053, M. voce Superior and Vassal, Appx. No. 2, 2 F
ing Cases (Land Rights), 398.

⁴ M. 15,068, 2 Ross's Leading Cases (Land Rights), 335.

Mar. 11, 1911. he really in his comments pretty well foresees *Stirling v. Ewart*.
 Duke of think, foresees it rightly. His work was written in 1838; *Stirling*
 Argyll v. was decided in 1844. Now, Mr Duff, on page 216, under the
 Riddell. "Who accounted singular successors," says: "It may be stated a

Ld. President. rule that with the exception of a donator of the Crown all w
 themselves to the superior in any other character than that of l
 last investiture, whether purchasers or mere gratuitous disponees,
 the legal composition," and then he gives as an illustration of t
 familiar case, which I think is rather cogent in this matter, n
 case of *Grindlay v. Hill*.² Now, *Grindlay v. Hill*² was decide
 January 1810, and has again and again been held as ruling this p
 rubric of it is that "The trust disponees of a deceased vassal to
 estate was disposed in trust for the heir, whom failing to strange
 entitled to demand an entry from the superior without paying th
 of superiority as singular successors." Now, one might suppose
 point of that decision was that, if the trustees had been granted
 they, having been duly entered upon payment of relief, might b
 ment with the heir—for he could have discharged them if he had li
 trust in his favour—have been enabled to grant a conveyance to
 In other words, it might have presented the same class of question
 in the equally well-known case of the *Magistrates of Musselburgh* v
 where it was held that, although an heir is entitled to an entry u
 nevertheless he must take his deed in such a form as will not enable
 he has got his entry and the fee is full, to push in a singular successor.
 was not the true ground of the decision in *Grindlay v. Hill*.² I
 quite plain if you look at the report of the case. What is said
 that George Grindlay, being infeft upon a simple destination to hi
 his heirs whomsoever, died leaving a son. The trustees made up
 the estate by an action of adjudication and implement upon the t
 and demanded from Mr Robert Hill, the superior, a charter of ad
 on payment of relief, and offered to take infeftment on it im
 that is to say, that they would not keep the charter in such a
 enable them to introduce a stranger. One sees, accordingly, that,
 as they made these offers, it was truly the heir that was going t
 benefit of the charter, and the heir alone. The only thing that
 wards to follow was a conveyance by the trustees to the heir whe
 of age. Accordingly, I think that illustration which Mr Duff
 really a very strong argument showing that the only thing th
 looked at is the standing investiture.

I think the same thing is very clearly brought out by what se
 the acknowledged position as regards a *mortis causa* deed by a
 favour of his second son, instead of his eldest son,—assuming
 father is infeft on a deed under which his heirs whomsoever a
 What that is seems perfectly well settled, because I find it twice m
 The one place where it is mentioned is in the opinion of the
 Judges in *Stirling v. Ewart*,¹ and it has been already referred to

¹ 4 D. 684, 3 Bell's App. 128, 2 Ross's Leading Cases (Land Rig

² Jan. 18, 1810, F. C.

³ (1804) M. 15,036

Mar. 11, 1911. character and enables me to link myself personally with the investiture,"—then he will get an entry as an heir. But if, on the other hand, he has to show a deed from the last vassal, then he is really making an entry in respect, not of something that has made him an heir, but in respect of an *inter vivos* conveyance.

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Argyll v.
Riddell.

Ld. President.

With these views I come to the question in hand, and it seems to me a perfectly fair test of it to suppose that this particular question had arisen in 1872. Of course I do not mean it could have arisen in 1872 in the state of the family as it was; but if the family had been otherwise, the same question might have arisen in 1872. But if I am not to be allowed to take liberties with other people's families, suppose the lands had been allowed to lie out in non-entry all these years. Suppose they had been brought to the superior in 1872, and the lands had been lying in non-entry all that time—the thing is not unknown, lands have been, through carelessness, in non-entry for hundreds of years, with possession on appearance all that time. I take it the position under either of these circumstances would have been exactly the same. Let me take it at its simplest; the lands had been in non-entry, and the question has arisen now. The superior has been seen, *ex hypothesi*, the deed of entail under which the present defender is claiming. Could the defender have served under the old deed of entail as heir in special to the estate which she takes up under the deed of entail? Clearly she could not. She could, of course, have expedited a special service as an heir-portioner to her *pro indiviso* share of the estate, but she could not have served as an heir who takes up the whole estate, as she does under the deed of entail. Having settled that, could the superior have been induced to grant a new charter with this new destination? If I am right in the view I have expressed, he could not. *Stirling v. Ewart*,¹ the authority which I absolutely admit, does not seem to me to touch that question really, because in *Stirling v. Ewart*¹ a composition was being tendered and a new destination was being asked. Of course, if a composition is tendered and a new charter asked you can get what destination you please. But that does not touch the present question, because here admittedly there was no tender of composition. It does not seem to me, accordingly, that *Stirling v. Ewart* could have been in what I call the simple position of being brought to approach the superior with a service in special, and of saying,—“Now you see the rest of it in the investiture, which is the standing title, and you have enfranchised by your charters.” It is of necessity, to establish the defender's title, that she produce the deed of entail, and for that purpose in terms of the deed of entail no composition has ever been paid.

I have taken the matter, of course, at this moment as if there had been no writ of confirmation granted in 1872. If I am right so far, the fact of the writ of confirmation granted in 1872 makes no difference. From the view of strict law it seems to me that in 1872 composition might have been demanded; but it could not have been successfully demanded. There is a good reason that the person who then wanted an entry was in a position to do just what this person cannot do, namely, to serve as heir in special under the old investiture and take precisely the same estate as

¹ 2 Ross's Leading Cases (Land Rights), 340.

Mar. 11, 1911. held his estate in fee-simple by charter to himself and his heirs
 Duke of resigned for infektment to himself and his heirs-male also in
 Argyll v. that a composition was ever demanded." I cannot quite get
 Riddell. Corehouse's remark in the way my brother Lord Johnston has

Ld. President. it, because he seems to think Lord Corehouse vitiated his remark
 a wrong view of the case of the *Duke of Hamilton v. Hope*. I do
 not think his remark, however, is based on any one case. I think it
 is his own impression as to practice; and I am afraid that I regard
 Corehouse as a very great authority on a matter of practice at a time
 there was practice, and at a time when our predecessors knew
 more about this matter than we can possibly know. But were I to
 make a guess at the matter, I venture to think that what he must have
 said, that, when a man had a charter in that way and went to the superior
 said, "I want to alter the destination from heirs whatsoever to
 heirs I am going to pick out; give me another charter," I can understand
 that that charter would be given without another payment of
 composition. It is quite within one's knowledge that superiors do
 insist on their extreme rights. The Crown, for instance, gives
 less than could be demanded. The Crown in the case of
Moray,¹ mentioned by Lord Johnston, gave entry for less, and
 that subject-superiors have acted in the same way. Now, I think
 that if Sir James Riddell, after he had got his charter in
 made up his mind about his entail at once, and had gone to the
 superior, say the next week, and said: "Now, I have gone from
 from you to my heirs whomsoever, but in the meantime I was
 my affairs by entail; I propose to do that by a procuratory of
 and I propose to get a charter of resignation from you and take
 myself and start my own entail," I do not think the superior, or
 his agent had been a Shylock, would have had the face to ask
 tion. Now that class of thing, I cannot help guessing, is what
 house is referring to. But it is a different thing to say that
 could have been forced to do it. And if the whole thing was
 and the vassal afterwards disposed of his estate by *mortis causa*,
 no title was taken upon it till the year 1872, the situation
 entirely altered, and I do not think the superior would be a
 1872 in demanding his composition. I do not mean demand
 Sir Thomas, for he was entirely shut out from that by the decision
 case of *Mackenzie*² and the *Marquis of Hastings*.³

Your Lordships will have observed that hitherto I have treated
 entirely upon the view of what the superior could have been forced
 I now come to the one remaining question, viz., whether the effect
 of the charter of confirmation of 1872 and the reservation therein
 difference. Here I confess I have had the very greatest difficulty, as
 part of the case which, to my mind, is much thinner than the ground
 so well argued by Lord Kinneir. There is no question that, as

¹ 1 D. 689.

² 21 R. 553.

³ M. 15,053, M. voce Superior and Vassal, Appx. No. 2, 2 Ross
 Cases (Land Rights), 398.

⁴ 21 D. 871.

Mar. 14, 1912. him. We shall therefore make no express finding on the point of fact expenses will be taxed as between agent and client.
 Fairgrieve v. Chalmers.

THE COURT found the co-defender liable to the expenses, and remitted the account thereof to the Court to tax and to report.

JOHN ROBERTSON, Solicitor—J. OGILVY GREY, S.S.C.—Agent.

No. 105. WILLIAM BERNHARDT, Pursuer (Respondent).—*M. P. Fraser*.
 BENJAMIN ABRAHAMS, Defender (Appellant).—*G. Watt, Ingram*.
 Mar. 19, 1912.

Bernhardt v. Abrahams. *Reparation—Slander—Slander uttered in foreign language—Innuendo.*

Where the words complained of in an action of slander uttered in a foreign language, not only must they be set forth as spoken in that language, but their English equivalent must be set forth in the same way as an innuendo is set forth. The pursuer must prove (first) that the words were actually uttered, (second) that their English equivalent is that which he averred.

Martin v. M'Lean, (1844) 6 D. 981, followed; *Anderson v. Anderson*, (1891) 18 R. 467, distinguished.

Reparation—Slander—Proof—Innuendo—Innuendo not proved.

The pursuer in an action of slander put in issue a private letter in which he innuendoes as accusing him of dishonesty, and which had been shown by the defender to three persons. The Court gave a verdict of a jury for the pursuer, and ordered a new trial on the ground that the innuendo had not been put to any of the witnesses, and that none of them had testified that he considered the letter contained an accusation of dishonesty.

1st Division. ON 29th July 1910 William Bernhardt, a commercial traveller, brought an action of damages for slander against Benjamin Abrahams, a merchant in Glasgow.
 Lord Dewar.

The slanders complained of appear from the following issues which were approved of for the trial of the cause:—

"1. Whether, on or about 5th June 1910, and in the warehouse in Main Street, Gorbals, Glasgow, the defender calumniously stated to Solomon Crivan, tobacco and cigar merchant, 13 Robson Street, Govanhill, Glasgow, that he, the defender, had brought an action which the firm of P. Abrahams & Company had brought about May 1910 in the Sheriff (Small-Debt) Court of Lanarkshire at Hamilton, against Mrs Angelina Verrechia, confectioner, meaning thereby that the pursuer had been guilty of perjury in the said action, or used words of the like import and effect concerning the pursuer, meaning thereby that the pursuer had been guilty of perjury to the loss, injury, and damage of the pursuer?"

"2. Whether, on or about 8th or 9th June 1910, and in the said Solomon Crivan's shop in Argyle Street, Glasgow, the pursuer exhibited to the said Solomon Crivan, and whether the said Solomon Crivan, at the defender's request, read a letter which he, the pursuer, had received from his solicitor, Mr Wilson, solicitor, 100 George Street, Glasgow, dated 3rd June 1910, and which is printed in the schedule of the summons?"

whether the said letter is, in whole or in part, of and Mar.
 e pursuer, and falsely and calumniously represents that
 in his position of trust as the defender's traveller, had ^{Bern}
 trust, and was a dishonest servant to the defender?

—' When this case was called to-day, proof was led as
 chia, Brandon Street, Motherwell, being due the account,
 s' own traveller went into the box and stated that he
 en Mrs Verrechia at Motherwell, and had no claim
 In view of this it was impossible to proceed against
 eriff stated that an action should be raised against Mrs
 w Stevenson, Holytown, and the party who was carrying
 nder that name there, but there had been a good deal of
 ack and forward with that business, and I am not satis-
 c Abrahams' traveller has clean hands in the matter.
 ams dismissed him towards the end of the year, and he
 ankerous person. Furthermore, Mr Abrahams weakened
 e by having two accounts in his books, one for Mrs
 ew Stevenson, and one for Mrs T. Verrechia, The
 rwell. Under the circumstances, I am not sure whether
 or Salvatore is the party against whom action should be
 the circumstances think that probably Mr Abrahams'
 is to raise an action against Bernhardt, his traveller,
 d the goods under false pretences. Of course, absolvi-
 nses was granted. I shall obtain a note of those and
 outlays, and let you have them in course. Bernhardt,
 was brought from Dundee, and as it turned out, would
 ear to have been brought five minutes' journey. There
 e been a certain amount of lax and loose trading on the
 rs Abrahams' traveller. I shall be glad to have any
 actions in the matter that may be given, and remain,—
 ally,
 W. WILSON.' "

ment alleged to have been made by the defender on 5th
 object of the first issue, was set forth in the record in the
 ms:—"The defender stated to Solomon Crivan, tobacco
 erchant, 13 Robson Street, Govanhill, Glasgow, that he
 e) had lost said case owing to the pursuer having given
 ce upon oath in said case, meaning, and intending to
 y, that the pursuer had been guilty of perjury." With
 second issue, it was averred that the letter in question
 d by the defender to Solomon Crivan, to a Mr Harris (in
 yment the pursuer was at the time), and to Mr Harris's

was tried before the Lord Ordinary (Dewar) and a jury
 ember 1911. The jury unanimously found for the pur-
 arded him damages upon both issues.

December 1911 the First Division granted a rule on the
 now cause why the verdict of the jury should not be set
 g contrary to the evidence.

der's objections to the verdict were based upon the facts
 ared from the notes of evidence, the words complained
 st issue were spoken in Yiddish; and that the innuendo
 placed upon the words of the letter in the second issue
 n spoken to by any of the witnesses. The evidence
 e latter point is reviewed by the Lord President in his

Mar. 19, 1912. Counsel were heard before the First Division (with
Bernhardt v. on 5th March 1912.
Abrahams.

Argued for the pursuer;—It was competent to prove which was uttered in a foreign language without putting the words actually used.¹ There was no suggestion that given on record and in the issue in this case were not a translation of those spoken by the defender. In any case, it was now to raise this question. Objection should have been made at trial, and a ruling asked that there was no evidence to go to this Court by a bill of exceptions.² (2) The jury were to say whether the letter would bear the innuendo put upon it, necessarily hearing evidence on the point.

Argued for the defender;—There was no exception to the rule that the actual words complained of as slanderous were set forth on record and in issue, and proved in the ordinary case of words uttered in a foreign language, their translation being treated as an innuendo, and similarly set forth and proved. It was still more important when, as here, the words were not in themselves, and had to be shown to bear yet another meaning. It was true that the Gaelic words complained of in the case of *son*⁴ were not put in issue, but they were set forth on record and appeared from the report that their omission from the issue was by consent. The present motion was competent in respect of words which appeared from the evidence that the words complained of were in issue and on record had not been spoken, and that it was an innuendo which had been put to the witnesses. This was sufficient evidence to warrant a verdict.⁵ The fact that the procedure followed in *Martin's* case² might have been open to the pursuer did not render incompetent the alternative procedure to which the pursuer was entitled to resort. (2) Where the statement complained of was published for all the world to read, it might not be necessary to call evidence to speak to its effect upon their minds, because the court could properly form an opinion on this subject as representing the general effect. But it was otherwise in the case where the alleged slander was contained in a private letter communicated to a limited number of individual persons. It was of the effect of the letter to the minds of these individuals that the pursuer complained, and he was to ask the jury that these individuals attributed to the letter the innuendo.

At advising on 19th March 1912,—

LORD PRESIDENT.—In this case two issues were sent before me. I shall deal with them separately. The first issue is: "Whether about 5th June 1910, and in the defender's warehouse in Gorbals, Glasgow, the defender falsely and calumniously stated that Crivan, tobacco and cigar merchant, 13 Robson Street, Govan, was a thief."

¹ *Anderson v. Hunter*, (1891) 18 R. 467.

² *Martin v. M'Lean*, (1844) 6 D. 981.

³ The Lord President referred to *Zenobio v. Axtell*, (1795) 6 D. 100.

⁴ 18 R. 467.

⁵ Counsel referred to *Friend v. Skelton*, (1855) 17 D. 548, as authority for the minimum of evidence required.

Mar. 19, 1912. the language used, were set forth in the record, whereas the
 Bernhardt v. Yiddish in this case are not; and, secondly, words in Gaelic
 Abrahams. averred and there being, I take it, no question as to the trans-
 Ld. President. issue was put in English of consent of both parties. Therefore
 does not form a precedent. And I can only say that I am still
 confirmed in my view by finding that the English practice is wrong
 in that matter, namely, that foreign words must be proved to be
 and that the English meaning has to be proved exactly as the
 is proved. That disposes of the case so far as rested upon the first
 issue.

Now, the second issue is whether, at a particular date and at a
 place, the defender exhibited to Solomon Crivan a certain letter
 whether the said letter is, in whole or in part, of and concerning the
 and falsely and calumniously represents that the pursuer, in his
 trust as the defender's traveller, had betrayed such trust, and
 honest servant to the defender?"

The fact that the letter was handed to Solomon Crivan was
 There is no question about that. The whole point, therefore,
 upon whether the innuendo was proved or not. Now, when the
 question is, as here, what may be called a more or less private com-
 munication—that is to say, not like an article in the newspapers which
 is published to all the world—I have never heard of an action for
 which it was sought to prove the innuendo without putting the
 to the persons who received the letter and upon whose mind it
 —if any damages were to be proved at all—the injurious and
 meaning of the letter must be held to have been operative. But
 come to the evidence in this case, we find that the innuendo is
 to the witnesses and never proved by the witnesses at all.

There are three places in which the matter is mentioned in the
 First of all, Solomon Crivan is asked about it. He says,—“I
 letter. I thought it was not a very nice one. I thought it looked
 Bernhardt had committed perjury.” Well, that would be good if
 the innuendo as tabled by the pursuer had been that the letter re-
 him as committing perjury. But that is not the innuendo tabled
 pursuer. The innuendo is that the letter “falsely and calumniously
 represents that the pursuer, in his position of trust as the defender's
 had betrayed such trust, and was a dishonest servant to the defe-
 very different kind of accusation from the accusation of having
 perjury in the witness-box.

Then, the next person who is asked about the letter is
 named Harris, to whom Solomon Crivan showed it, and he
 remember Crivan calling on me in the month of June while the
 was still with us. He said he had a letter in his pocket which
 like me to read. He said it was a letter in connection with a case
 had been raised by Bernhardt against Abrahams. When he asked
 that I told him I was not to have anything to do with it. My
 not told me of the letter. He pressed me to read it. He pulled
 out of his pocket, and I read a portion of it and handed it back.
 I did not want to go any further. I said, ‘That letter is of no
 to me.’ (Q.) Did you say anything to him about Bernhardt?

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(Q.) I
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11 v. 8

C. B.

Mar. 19, 1912. an innuendo in (as I say here) a case in which the slander never v
 Bernhardt v. three people at the most, without asking a single one of t
 Abrahams. whether, when they read the letter, they took the detrimental
 Ld. President. of it which the pursuer puts in the innuendo.

Accordingly, upon the whole matter, I think that the verdict
 issues cannot be supported on the evidence, and that there mu
 trial.

LORD KINNEAR, LORD JOHNSTON, LORD MACKENZIE, and L
 concurred.

THE COURT set aside the verdict and ordered a new

CLARK & MACDONALD, S.S.C.—MACKENZIE & FORTUNE, S.S.C.—

No. 106.

PETER SLAVIN, Pursuer.—*Munro, K.C.—A. M. Mac*
 TRAIN & TAYLOR, Defenders.—*Crabb Watt, K.C.—C. H.*

Mar. 20, 1912.

Slavin v.
 Train &
 Taylor.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58),
Assessment of compensation—Unsuccessful action of damages
ployer—Application for assessment of compensation—Time
application—Procedure to follow on application—Expenses of a

Held (after consultation with the Judges of the other D
 where a workman, who has been unsuccessful before a
 Court of Session in an action of damages for personal inju
 against his employer, desires to move the Court to assess c
 under the Workmen's Compensation Act, the motion mu
 before the verdict of the jury is applied, and if not so ma
 too late.

Observations (per the Lord President) on the character
 ceedings and the scope of the inquiry that will follow on
 of such a motion.

Circumstances in which held that a workman, who had
 ceesful in an action of damages for personal injuries
 employers, but had thereafter applied for, and been award
 action under sec. 1 (4) of the Workmen's Compensation
 entitled to the expense of obtaining the award of compensa

1ST DIVISION. ON 17th October 1910 an action was brought in the Court
 by Peter Slavin against Train & Taylor, builders and
 Rutherglen, in which the pursuer sought to recover dama
 sonal injuries sustained by him while in the employm
 defenders.

On 18th March 1911 the case was tried before the Lon
 and a jury, and a verdict was returned for the defenders.

On 2nd November 1911 the First Division refused a bi
 tions presented for the pursuer, and counsel for the def
 moved the Court to apply the verdict of the jury.

Counsel for the pursuer thereupon moved the Court,
 sec. 1 (4) of the Workmen's Compensation Act,* to assee

* The Workmen's Compensation Act, 1906 (6 Edw. VII. c
 sec. 1, subsec. (4):—"If, within the time hereinafter in the A
 taking proceedings, an action is brought to recover damages i
 of this Act for injury caused by any accident, and it is deter
 action that the injury is one for which the employer is not l

due to him under that Act in respect of the injuries sus-

enders objected to this motion, and argued;—It was in the Court alone that compensation due to an unsuccessful pursuer of damages could be assessed, and it was therefore incompetent under section 1, subsection (4), of the Act to convert an action of Session into an arbitration. This was apparent from the scope of the Act of Sederunt of 26th June 1907, which provided a code applicable to arbitrations in the Sheriff Court, but inapplicable to proceedings in the Court of Session. This was particularly from the provisions as to costs in section 10 and as to recording the award in section 11 (3), and the procedure for a stated case in section 17, and also from the absence of all machinery for such a remit as would be necessary in any case, the pursuer's motion was made too late: it should have been made when the jury returned their verdict. If the Court was competent, the Court should allow a proof, as was done in *McKenna v. United Collieries*.¹

For the pursuer;—Such a motion as this was not confined to Court proceedings, for there was no such limitation in the Act. Further, it had been timeously made. By subsection (4) of section 1 of the Act an opportunity was given to the pursuer in an action for damages for personal injury, as long as the action was in progress, of showing that he was entitled to compensation under the Act, and the present action was in dependence until the bill was disposed of and the verdict of the jury was applied. The pursuer's remedies under the Act were still open to him. Further, a pursuer who elected to claim compensation was not barred from any other remedy, and accordingly compensation could have been safely claimed at any earlier stage in the present case. A counter motion to the defenders' motion to apply the Act. The present motion was therefore timeous and competent. If the Court had power to deal with all procedure necessary for the assessment of compensation,² a remit should be made for that purpose. There was sufficient proof in the notes of evidence at the trial of a claimable compensation to be assessed, but if further evidence was required a proof should be allowed.³

On 24th November 1911, the opinion of the Court was delivered by the Lord President, Lord Kinnear, and Lord Cullen.

THE LORD PRESIDENT.—In this case we have consulted the other Division

and are of opinion that he would have been liable to pay compensation under the Act. If of this Act, the action shall be dismissed; but the Court in an action is tried shall, if the plaintiff so choose, proceed to assess compensation, but may deduct from such compensation all or part of which, in its judgment, have been caused by the plaintiff bringing the action instead of proceeding under this Act. . . ."
8 F. 969. The case of *McGovern v. Glasgow Coal Co.*, (1906) 11 F. 359, was also referred to.

McGovern v. New Grand (Clapham Junction), [1903] 1 K. B. 539.

McGovern v. Godfrey, [1899] 2 Q. B. 333.

McGovern v. Atlantic Transport Co., [1902] 1 K. B. 204.

McGovern v. United Collieries, 8 F. 969.

Mar. 20, 1912. and the judgment of the Court is that in such cases the motion
 Slavin v. ment of compensation under the Workmen's Compensation Act
 Train & made before the verdict is applied, and if not so made it will be
 Taylor. The motion when made will entitle the party making it to an in

Ld. President. whether, in the first place, in cases where this is doubtful, the
 question arose in the course of and out of the employment;
 second place, as to the amount of compensation due. It cannot be
 that the defender should come to the trial in a state of preparation
 the question of the amount due, because he does not know whether
 option of claiming compensation will be exercised by the pursuer
 event of the trial resulting in a verdict against him. According to
 motion is made in time, either the Lord Ordinary before whom he
 tried, or one of the Judges of the Division, must act in the same manner
 arbitrator, except that there would be no appeal from him by way of

Applying that to this case we shall depute to one of the Judges of the
 Division to deal with it, and as he will be sitting as a *quasi* arbitrator
 proceedings will be informal and will not be regulated by ordinary
 procedure, because the Judge will be master of the procedure.
 necessary, however, for the future regulation of such proceedings
 matter be dealt with by Act of Sederunt.

As to the question of expenses, they, as taxed, will be deducted from the
 amount of compensation, if any is found to be due.

The Court, without pronouncing any interlocutor, contented itself in this
 case to allow parties an opportunity of adjusting the amount of
 compensation payable to the pursuer.

The amount of compensation payable to the pursuer having been
 adjusted, a joint minute for the parties was lodged craving the Court
 to make an award of compensation in his favour "under the Act" and
 always of the amount of the defenders' account of expenses in this
 action in the Court of Session at the instance of the pursuer, and
 them, at the termination of which action the present application was
 made, as the same shall be taxed, and further to give a certificate for
 the compensation so awarded and of the Court's directions as to the
 deduction of expenses in accordance with the terms of the award,
 it being hereby reserved to the parties to make any application to the
 Court as to dealing with the expenses of and incident to the present
 application for assessment of compensation under the said Act.

On the joint minute coming before the First Division of the Court of
 Bills on 20th March 1911, the pursuer moved for an award of the
 the expenses incurred by him from and after his motion for an
 ment of compensation, and argued that the case of *M'Kenna v. Glasgow
 Collieries*,¹ in which such an award had been refused, was distinguish-
 able, in respect that in that case the application for assessment of
 compensation had not been opposed, while in this case it had been.

The defenders opposed the pursuer's motion for expenses.

THE COURT pronounced an interlocutor in the following terms:
 "The Lords, including the Lord President, who presided, do hereby

¹ 8 F. 969.

Dec. 5, 1911.

Scouller v.
Assessor for
Glasgow.

said entry and the valuation was adjusted between the Assessor and the appellant at £550 for that year. The Assessor entered the Roll for 1911-12 at £550, and the appellant again appealed and asked that it be entered at £491.

"3. At an adjourned meeting of the Committee held on 29th September, an appeal by the owner and occupier of certain other premises was heard. The appellant was put on oath, and asked by the Assessor to give a note of his weekly drawings in the premises. The agent for the appellant objected to the question on the grounds (1) that the appellant was not bound to answer the question, and that the Assessor was not entitled to ask such a question to be put by the Court to an appellant; and (2) that in the event the Assessor was not entitled to have the question put before the Court until he had disclosed the facts he proposed to produce in support of his production of a note of the drawings.

"The Committee, after hearing the said agent and the appellant, intimated that they considered it necessary for the disposal of the appeal that they should be put in possession of information relating to the drawings of the business, and they accordingly called on the appellant to supply the information required. He refused to supply the information, and the Committee dismissed the appeal.

"4. Thereon the appellant's agent asked that the other cases in which he appeared, including that of the appellant, be continued to get the necessary information if the Committee decide to give it, and the Committee agreed to continue the case on 29th September.

"5. When the case of the present appellant was called on 29th September, appellant gave evidence to the effect that the Finance Act, 1910, had increased his licence-duty by £207, and that he claimed a reduction of £104 from his rent on the ground thereof, that last year his assessed rental had been reduced by £104, and he now claimed the difference of £59.

"6. The appellant having stated, in answer to the question whether his drawings had decreased, the Assessor asked him for a note of his drawings for the last three years, which he refused to give.

"7. The Assessor himself gave evidence that a rate of 5s. 6d. per square foot on the floorage of the shop gave £517, and a rate of 5s. 6d. per square foot on the floorage of the cellar gave £39, 18s., or £556, 18s.; that the public-house at 3 Drury Street, which is adjacent to the appellant's premises, was let at £330; that the floorage of the shop at 3 Drury Street was 1105 square feet and the floorage of the cellar was 75 square feet, and that taking the same rate for the cellar as for the shop gave £24, 6s., and that it required a rate of 5s. 6d. and a floorage of 1105 square feet for the shop to make up £300, the balance of the rent. It was then proved whether the premises at 3 Drury Street were let for a year or for a period of years.

"8. The Valuation Committee, having heard the arguments of the parties and considered the whole case, dismissed the appeal.

In his answers the Assessor stated, *inter alia*;—"At the time of the consideration by the Burgh Valuation Committee of the appeal relating to the valuation of licensed premises occupied by the appellant, thereof the Assessor referred to the difficulty of fixing the value of such premises and the desirability, in a large city like Glasgow, of obtaining some principle on which to fix the yearly rent of such premises, and with a view to the adoption, if possible,

Dec. 5, 1911. know what his gross drawings are, we cannot tell whether there
 Seouller v. any such circumstance which might countervail the increased
 Assessor for think myself that the Assessor's demand is a fair one, and is fair
 Glasgow. 'I think the gross drawings afford a reasonable test. If they remain
 Ld. Johnston. were the presumption is (apart from any increase of working
 which is not suggested) that but for the increased duty the profits
 have remained pretty much the same, and it would be a reasonable
 presumption that the licence-duty had lowered the profits and the value of the
 premises, and that accordingly the valuation should be reduced. On
 the other hand, it was found that the drawings had risen substantially,
 it would be reasonable to conclude that the value of the premises had
 any rate, not fallen, and that there was no case for a reduction in
 valuation. I am accordingly of opinion that the Assessor's demand was
 reasonable and moderate; and that, as without compliance with it there was no
 before them but the presumption, now, as I have said, becoming
 weaker, the proper course for the Appeal Committee was to refuse
 on the appellant's declining to comply with the demand.

Seeing, however, that reference was made in argument, and has been
 made by the Assessor, to market value as a principle for valuation, I
 think it right to say something on that subject, because, in my opinion,
 the Assessor's attitude is there erroneous. He says that there is
 a desirability "of obtaining some principle on which to fix the yearly
 value of such premises; and with a view to the adoption, if possible,
 of some principle which would be fair and reasonable, the Assessor
 made an offer which he had made at the meeting of the Burgh Valuation
 Committee held in 1910—to take the rent actually paid by tenants on
 licensed premises immediately adjoining the premises under appeal,
 after ascertaining the area of such premises and the rate per square
 foot which such rental yielded, to apply such rate to the premises under
 appeal. That may be a very proper, and probably is the primary, step in
 the matter before the Finance Act was passed. I also think that it was
 a very proper course to take in years to come when a sufficient number of
 leases have been granted after the passing of the Act; but at the present
 time, when the Act has only just been passed, it affords no criterion.
 It is probably the case, the leases have all been entered into prior to
 the Act. But I wish to enter an emphatic protest against the idea, which I
 than suspect from his statement the Assessor holds, that the application of
 such an arithmetical rule of proportion is all that is required of him.
 There are many other considerations, and all that are applicable must be
 taken into account.

For these reasons, I think the appeal should be dismissed, and the
 valuation sustained.

LORD SALVESSEN.—I am of the same opinion, and I can state my reasons
 very shortly. Last year we held in the case of *Deards*¹ that if a
 new burden upon licensed premises you presumably affect the rental.

¹ 1911 S. C. 918.

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Dec. 5, 1911.

Moyes v.
Assessor for
Perth.Reed v.
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Perth.Robertson v.
Assessor for
Perth.

Ld. Johnston.

merely these particular subjects but the whole heritable subjects area. And what he gives us is his individual opinion of the value when the matter passes into the second stage, the Valuation Committee, just as much a Court of appeal as we are, and they must act in accordance with judicial methods. Now, there are certain things within the knowledge of any Appeal Court, whether it be this or a Valuation Committee, which the members of that Court are quite entitled to use. They are quite entitled to use that which is common knowledge, not of the individual but of those in the locality. I cannot express it better than in the words of Lord Low in *Craik's* case¹: "Upon matters of common knowledge, upon matters which may be called public matters, they are quite entitled to use their local knowledge to bear, these being matters upon which, in their official position they are likely to be informed." Some of the facts stated by the Valuation Committee are facts of this kind. But the facts stated with under the heads Nos. 7 and 8 are in quite a different position. The state: "7. There has been no change of circumstances in respect of the premises since 1905. 8. There is another public-house, 'The Perth Bar,' situated at 117 South Street, at no great distance from the appellant's premises, not so busy a part of the street, which is let to a tenant. The valuation in this public-house is not much greater than one-half of the appellant's, and the tenant pays an annual rent of £160." Now, for the Valuation Committee on, as they say, their own knowledge to make a valuation upon these statements is, I think, improper. In the first place, they do not know anything about the accommodation of the public-house, and they cannot know upon a personal visit of inspection. Nor could they know the value of the premises in 1905. But what is more, though they might assume the value of "The Perth Bar" by calling for the draft of the Valuation Committee, if the course of being adjusted, they could not possibly know the value of the tenancy. For them to use their own knowledge of such a statement to make them a criterion for adopting a certain valuation for the subjects without giving her agent the opportunity of correcting them if they were wrong, explaining if they did not know the whole facts, and taking into them considerations relating to the premises which they do not well not know, would be grossly unfair. But when they come to their conclusions, they go further, and introduce another comparison with a second public-house, about which they have said nothing in their statement of facts. And upon those two pieces of private knowledge they reach the conclusion that, notwithstanding the increased licence-duty under the Finance Act, the appellant's premises may be reasonably expected to be let at £120, and they refuse any reduction in respect of the licence-duty.

I am sorry that I cannot do otherwise than say that that is not the proper course for a Valuation Committee to take. They are quite right in taking admissions from parties, provided they really get such admissions. They must not take a statement by the Assessor and assume it to be admitted. But all other matters which are not public facts must be proved. And if there are such facts proved which are relevant and pertinent

¹ 1909 S. C. 658, at p. 662.

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and I am of opinion that the appellant is entitled to have D
 reduced to the extent for which she contends. If, as the M
 es, her premises have been undervalued since 1905, that fact A
 is established by evidence which it will be competent for the Assessor P
 to say, if he should desire to have the valuation now fixed R
 A
 P

ALLAN.—There can, I think, be no doubt that in disposing of an R
 Valuation Committee are to some extent justified in taking P
 of facts which are neither formally proved by evidence nor made
 of express admission, but of which they have personal know-
 I think it is only within narrow limits that they may legiti-
 mized in this way. The kinds of facts of which they may so take
 may perhaps fairly be described as being such as are matters of
 knowledge and of a non-controversial character. When it comes to
 fact, as to which there may be room for serious controversy, it
 seems that these should be made the subject of evidence in the
 express admission regarding them. In the particular matter of
 a valuation on the basis of a comparison with other premises,
 depends on a full and fair survey being made of the circum-
 stances of the premises so compared. A merely partial knowledge
 of circumstances may lead to a quite erroneous conclusion. No
 one can contend that a comparison based on rental and similarity of
 alone without advertent to any other possible factors would be
 a process of valuation by the method of comparison calls for a
 knowledge of the material facts, and may offer ample ground for controversy
 of facts. And in order to do a party justice, it is, I think, neces-
 sary that each party should be given an opportunity of taking a part in the process
 of valuation by comparison so as to secure in his interest that it shall be
 based on a full survey of the facts, so as to yield a satisfactory result.
 It cannot be so if the process of comparison is not done overtly, but
 on the backs of parties on the basis of untested information on the
 Valuation Committee. For such information may quite well be
 false, and if duly sifted may turn out to be misleading. Whether
 it is so in any particular case, the parties interested in the case
 should, I think, be fairly excluded from being heard on the matter.

COURT were of opinion that the determinations of the Com-
 mittee were wrong, and that each of the valuations appealed
 against should be reduced by half the amount of the increase
 in the licence-duty.

MR. PURVES, S.S.C.—CORNILLON, CRAIG, & THOMAS, S.S.C.—Agents.

No. 109.

Dec. 2, 1911.

Ferguson v.
Assessor for
Inverness-
shire.NEIL FERGUSON, Appellant.—*Chisholm, K.C.—Malcolm*
ASSESSOR FOR INVERNESS-SHIRE, Respondent.—*Constable,*
*Hon. Wm. Watson.**Valuation Acts—Procedure—Appeal—Competency—Entries in*
than yearly value.

While no appeal to the Valuation Appeal Court is competent to any entry in the Valuation-roll other than that of yearly value, the Court is not thereby debarred from incidentally deciding questions which may affect other entries in the Roll (such as the question whether an appellant is proprietor or tenant) where such questions require to be decided in order to reach the question of value.

Valuation Acts—Value—Croft sold by Congested Districts Board
ment by annual instalments—Method of valuation—Proprietor or

A crofter prior to 1905 held a croft from the proprietor of Glendale at a fair rent fixed by the Crofters' Commission. The Congested Districts Board purchased the estate and entered into an agreement with the crofter to sell him his holding at a price to be paid by annual instalments spread over fifty years, possession to be given immediately but a formal title to be granted only after the instalments had been paid up in full.

Held that from the date of the sale the crofter had become proprietor of the holding, and, accordingly, that it fell to be entered in the Valuation-roll at its true letting value and not at the rent which had been fixed for it as a crofter holding by the Crofters' Commission.

Lands Valua-
tion Appeal
Court.
Ld. Johnston.
Lord Salvesen.
Lord Cullen.

AT a meeting of the Valuation Committee of the County of Inverness, held at Portree on the 20th September 1911, Neil Ferguson, occupier of holding No. 12, township of Skinisdale, Skye, appealed against the following entry in the Valuation-roll for the year ending Whitsunday 1912:—

Case 291.

Description.	Situation.	Proprietor.	Tenant.	Occupier.	Feu-duty.
House, Land, and Post-Office.	12 Skinisdale.	Neil Ferguson.		Proprietor.	£ 10 10 0

The appellant craved that he should not be entered as proprietor but as crofter or yearly tenant, and that the yearly rent should be reduced to £3, 11s. 6d.

The Committee sustained the entry of the Assessor, and the request of Ferguson stated a case for appeal.

The case set forth:—"The appellant's agent produced a minute of sale between the Congested Districts (Scotland) Board and the appellant, dated 22nd and 31st May 1907, which is printed in appendix hereto and is held to form part of this case."

* The minute of sale was as follows:—

"Whereas the Board, as proprietors of the estate of Glendale, island of Skye, have arranged to sell their whole interest in the said

it is held to be proved that the appellant until 1905 was a Dec.
 under the Crofters' Holdings (Scotland) Act, 1886, holding
 then proprietor of the estate of Glendale, and that the ^{Ferg}
 Commission had fixed the fair rent of the subjects at ^{Asses}
 £1. 10s. 6d.; that in or about 1905 the Congested Districts Board ^{have}
 the estate of Glendale, of which the subjects in question ^{share}
 that the subjects had continued to be entered in the
 Roll thereafter down to 1910 at the valuation of £3, 11s. 6d.;
 dwelling-house was erected by the appellant on the holding
 1905; that the appellant had signed no other document than
 minute of sale, and that he held no other document than said
 sale; that the appellant had not yet paid the price due
 minute of sale, and had not received from the Board any
 or disposition of the subjects, and was not feudally
 infeft in said subjects; that there was no change of cir-

holders at present upon it, and to certain smallholders to whom
 allotted certain new holdings on the said estate, in the following
 way, by selling (1) to each smallholder his individual holding with
 interest, if any, in the common grazing of the township in
 situated, and its other pertinents; and (2) to the smallholders
 (with exceptions), as a body, the remainder of the estate of Glen-
 the moveable property upon it belonging to the Board, and the
 rights and all other pertinents of the said estate (hereinafter all
 as 'the Club property'): And whereas the second party is one
 smallholders above referred to, therefore it is hereby agreed
 the parties hereto as follows:—

The Board hereby agree to sell to the second party, and the second
 party agrees to purchase (first) the small holding in the township of
 in the said estate of Glendale, as presently occupied and pos-
 sessed by the second party . . . together with a one-half share in the
 pasture pertaining to the said township; together with an equal
 share in the islands . . . Eilean Dubh, Eilean Mor, and
 Eilean Dubh; and (second) one share in the Club property (which subjects
 second above agreed to be sold are hereinafter referred to as 'the
 Club property'), and that upon the following conditions:—

The price of the said subjects shall be One hundred and twenty-
 five pounds nineteen shillings and twopence, consisting of Sixty pounds
 nineteen shillings and twopence for the subjects first above agreed to be sold,
 and forty-four pounds two shillings and fourpence for the subjects
 second above agreed to be sold, which price of One hundred and twenty-
 five pounds nineteen shillings and twopence the second party binds him-
 self to pay to the Board by means of an annuity of Four pounds twelve
 shillings and sixpence per annum, which annuity is calculated to pay off
 the price with interest thereon, while unpaid, at the rate of 2½ per cent
 (being the rate of interest agreed on) in fifty years. The term
 of the annuity shall be held to be Whitsunday 1905, and all sums paid to the
 Board by the second party as rent for a period subsequent to that date
 shall be considered as payments to account of the annuity. The annuity
 shall be payable yearly at Whitsunday in each year, the first yearly payment
 shall be considered as having been due at Whitsunday 1906.

The Club property shall be held as the common property of
 the smallholders whose shares therein are sold, and shall be managed in accordance
 with the regulations and regulations to be framed by the Crofters' Commission, which
 regulations the second party shall be bound to obey and conform to.
 If differences arise between any of the owners of holdings on
 the estate of Glendale as to the boundaries of their holdings or their
 common pasture, or in any other way with regard to their

Dec. 9, 1911.

Ferguson v.
Assessor for
Inverness-
shire.

circumstances between 1905 and 1911, the subjects being in the same condition at both dates, and that the appellant had never been in his tenancy as a crofter under the Crofters' Holdings (Scotland) Act, 1886. . . .

"The Committee dismissed the appeal on the ground that the appellant is the proprietor of the subjects for the purposes of the Valuation Acts, and that the subjects should be entered at their letting value, and not at the fair rent fixed by the Crofters' Holdings Act, 1886, which no longer applies under the existing circumstances.

The case was heard on 7th December 1911.

Argued for the appellant;—The appellant was not the proprietor of the subjects. He was still, as he had hitherto been, a crofter, paying a fair rent, the only difference now being that he annuises a small sum over and above his rent by which ultimately he will become proprietor of the subjects. The minute of

rights and interests in the said estate of Glendale, it is hereby declared that these, except in so far as provision may be made for dealing with them, the said rules and regulations, shall be referred to the Congested Districts Board, or their successors in office, and the decision so obtained shall be final and binding, and not subject to review.

"Fourth. The Board will accept payment at any time of the price of the said subjects, but until the price shall have been paid to the Board, with interest thereon, while the subjects shall be subject to the following conditions:—

- (a) The annuity payable to the Board in respect of the said subjects shall be punctually paid on the day when due, and the Board shall have right to enforce payment by ordinary process of law, and if two years are due and unpaid, the Board shall be entitled to take possession of the said subjects as is provided in section (h) of the Act for the cases of contravening other conditions.

[Then followed (b), (c), and (d) obligations on the second party on the holding; to cultivate it properly; not to divide it, or part with his share of the Club property; to maintain the buildings, fences, &c.; and to pay the rate of annuisation.]

- (e) If the owner of the said subjects shall die while any price payable to the Board is unpaid (hereinafter called the "said period"), the heir succeeding him shall take the whole obligations of his predecessor, including any arrears of the payments due under this agreement.
- (f) If, on the death of the owner of the said subjects, his heirs desire to take up the succession, the said subjects shall be dealt with as provided in Article fifth hereof.
- (g) If the owner of the said subjects shall, during the said period, become notour bankrupt, or grant a trust-deed to his creditors, he shall be bound to vacate his holding within the term of Whitsunday or Martinmas occurring not more than one month after the date of posting of a registered letter in the hand of the secretary for the time being of the Board to such owner at his holding, calling upon him to do so; and the said subjects shall then be dealt with as provided in Article fifth hereof.
- (h) If the owner of the said subjects shall, during the said period, fail at any time to comply with any one or more of the conditions (b), (c), and (d) of this Article, the Board shall be entitled to call upon him to make good such failure by a re-annuisation.

Dec. 9, 1911.

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Assessor for
Inverness-
shire.

whereas the only question upon which an appeal could be was the question of value.¹ On a sound construction of the appellant was proprietor of the subjects,² and had ceased to paying rent. He was, *e.g.*, always spoken of as "owner," and dispute boundaries. He further fulfilled the definition of "contained in the Lands Valuation (Scotland) Act, 1854,³ being the person "in the actual receipt of the . . . pro land. That being so, the crofter rent was no criterion, and had to be fixed, as had been done, by the ordinary method tion. It was absurd to say that the house was an agricultur ment in the sense of section 4 of the Act of 1895,⁴ and, in that section only applied to tenants for twenty-one years o

At advising on 9th December 1911,—

LORD JOHNSTON.—It is objected to the competency of this involves this Court's correcting the register in regard to a matter that of value, in respect that the ground of the appeal was the lant should have been entered as tenant at the former rent of holding, and not as proprietor at a valued rental. It is true th unexplained reason, this Court is only empowered to enter against the determination of a Valuation Committee in regard t of value, and that no appeal lies against the determination of th in regard to any entry other than one of value (*British Linen* I cannot, however, accept it that, if in order to reach the questi value the Court is required to determine incidentally a quest tions which would lead to the alteration of the entry in the I details, the Court is debarred from entertaining such question absurd result that they could not in consequence deal effective question of value, even though they may have no power to ord to be corrected in the detail which they have thus had inciden sider. In this I think I am supported by the opinion of Lord the *British Linen Company* case,⁵ where he says that the matte to be submitted to the Court "must be one which consisted events, included, a question of value."

The appellant here maintains that the value of his holding entered at £3, 11s. 6d., being his former crofting rental, and sum of £7, 6s. 6d., which the Assessor has put upon it. Th this particular case is small. But it is, I understand, a test c have an important bearing upon Highland valuations.

It is true that the appellant was until 1905 a crofter, holding proprietor of the estate of Glendale at a fair rent, fixed by Commission, of £3, 11s. 6d. In 1905 the Congested Dis

¹ *British Linen Co. v. Assessor for Aberdeen*, (1906) 8 F. 508; *Same v. Assessor for Ayrshire*, (1895) 22 R. 596; *Sharp Parochial Board*, (1883) 10 R. 1163.

² See *Congested Districts (Scotland) Act*, 1897 (60 and 61 Vict. c. 53), secs. 4, 5, 6.

³ 17 and 18 Vict. cap. 91.

⁴ *Lands Valuation (Scotland) Amendment Act*, 1895 (58 & 59 Vict. cap. 41), sec. 4.

⁵ 8 F. 508.

⁶ 8 F., at p. 516.

No. 110.

JOHN PHILIP, Appellant.—*Chree—Keith.*

Dec. 13, 1911.

ASSESSOR FOR COUNTY OF ELGIN, Respondent.—*Hon. Wm.*Philip v.
Assessor for
Elginshire.*Valuation Acts—Subjects—Hotel and stables—Cumulo or sep-*
tion.

A property, owned and occupied by an hotel-keeper, consisting of a hotel situated in a main street and, behind the hotel, a stable-yard opening on to a side street. There was no communication between the stables and the hotel, but the two of the hotel opened into the stable-yard. Ordinary hiring in the stables in addition to business immediately connected with the hotel. The proprietor, in view of the method of charging for licensed premises introduced by the Finance (1909-1910) Act, sought to have the hotel and stables separately valued.

Held (diss. Lord Salvesen) that the hotel and stables were to be valued by the Assessor as a *unum quid*, and that the proprietor was entitled to have them separately valued.

Lands Valuation Appeal Court.
Ld. Johnston.
Lord Salvesen.
Lord Cullen.

AT a meeting of the Valuation Committee of the county of Elgin on 19th September 1911, John Philip, Strathspey, Grantown-on-Spey, appealed against the following entry in the Valuation-roll for the year ending Whitsunday 1912:—

Case 292.

Description and Situation of Subjects.		Proprietor.	Occupier.
Description.	Situation.		
Strathspey Hotel, Garden, and Stables.	70-72 High Street.	John Philip, Hotel-keeper.	Proprietor.

He craved that the above entry should be deleted from the Valuation-roll and the following entries inserted in place thereof:—

Description and Situation of Subjects.		Proprietor.	Occupier.
Description.	Situation.		
Hotel.	70 and 72 High Street.	John Philip, Hotel-keeper.	Proprietor.
Stables, Coach-houses, Harness-room, Hay and Corn Lofts, &c.	Spey Avenue.	Do.	Do.

The appellant, in making his crave, explained that he desired to have the value of the subjects entered in the Valuation-roll re-

Dec. 13, 1911. and stables, &c., were properly entered as one subject, and the appeal."

Philip v.
Assessor for
Elginshire.

The case was heard on 5th December 1911.

Argued for the appellant;—The stables and the hotel entered separately in the Valuation-roll, and ought to be valued, as they were distinct and separate subjects within the meaning of the Valuation Acts.¹ The hotel business and the stables were really separate; the stables were structurally separate from the hotel, with no internal communication, and the reason why the hotel and stables should not be separately valued is not out of the question to say that the stables were merely a "part" of the hotel in the sense of section 42 of the Lands Valuation (Scotland) Act, 1854. The undernoted cases were all dicta in favour of the appellant's contention.² *M'Jannet v. Assessor for Stirling*, (1882) 10 R. 32. The respondent, was not in point; it dealt with a valuation of adjuncts, which were in no way comparable with an hotel capable of separate occupation. The appellant had a special interest in obtaining a separate valuation, for, in view of the provisions of the Finance Act and of the fact that this was a hotel, it was important for him that the actual licensed premises of the hotel, should not be valued at more than £100. If the valuation were conceded, he was willing that the hotel should be valued at £100 and the stables at £16.

Argued for the respondent;—On the facts of this case it was contended that the hotel and stables were one "land and heritage," being merely a "pertinent" of the hotel.⁴ They were occupied in one occupation, with direct access from one to the other, and the businesses of the hotel and stables partly overlapped. The respondent was accordingly right in valuing the whole as one subject. The bank cases were also in favour of the respondent, separate valuation being granted only where there was no communication between the bank and the house, and accordingly the bank and the house were physically separate.

At advising on 13th December 1911,—

LORD JOHNSTON.—The separate valuation of hotel stables which hitherto has been of little or no material interest to the proprietor, is still of no interest to the proprietor, but has become of great interest to the occupant, whether proprietor or tenant, owing to the effect of the new licence-duty under the Finance (1909-10) Act, 1910. It is the interest of the occupant to have the hotel stables valued separately from the hotel, and this the appellant, who is proprietor and occupant, desires to effect.

But while it is proper to ascertain that there is an interest, I

¹ Cf. The Lands Valuation (Scotland) Act, 1854 (17 and 18 Vic. c. 91), secs. 1, 3, 6.

² *Barony Parochial Board v. Assessor for Dumbartonshire*, (1883) 11 R. 39; *Bank of Scotland v. Edinburgh Assessor*, (1890) 17 R. 83; *Bank of Scotland v. Edinburgh Assessor*, (1891) 18 R. 936; *Forbes Irvine v. Assessor for Aberdeenshire*, (1897) 24 R. 741.

³ *M'Jannet v. Assessor for Stirling*, (1882) 10 R. 32.

⁴ Lands Valuation (Scotland) Act, 1854 (17 and 18 Vic. c. 91), sec. 42.

consideration can in any way affect our judgment. That must be decided by the Lands Valuation Acts alone, whatever the consequences. ^{Philip v. Assessor of Elginshire}
 equitable or oppressive, the remedy therefor must be found in the Acts. In this I am only following the Court in the *Bank of Scotland v. James* (1854) 10 Cl. & F. 100.
 Ld. John

land and heritage to be valued under the Lands Valuation Acts, I think, on circumstances. Here the question is, Is it the stables regarded as one subject, or is it the hotel and the hotel regarded as two separate and independent subjects? The relation between the hotel and the stables, the one to the other, may vary in different cases, but in the present case, the hotel and its stables are one property and are contiguous, being "situated immediately behind and adjacent to the hotel." The hotel opens into the High Street of Grantown, so far as customers are concerned, and to the same effect the stable-yard opens on to Spey Avenue, which is a street at right angles to the High Street. "There is no communication between the hotel and the stables," but there is a communication by the back door of the hotel to the stable-yard." The precise description in the case is made quite definite by the plan produced at our request. Accordingly, I proceed on the basis that the two back doors of the hotel are in the stable-yard, and that the entrance to the hotel, for those who have right so to approach, whether they are customers or servants of the hotel, is from the Spey Avenue entrance, the stable-yard to one of these back doors of the hotel, and that there is ingress and egress between the hotel and the stable-yard for the purpose of the Act, about either. I was prepared to assume that customers, though they might sometimes use the back doors of the hotel, were not committing an impropriety in doing so. But, having regard to the appearance of one of these doors to the public bar, as disclosed by the plan, I am somewhat doubtful of this. One of the back doors of the hotel has the appearance of a regular access to the bar.

Of the facts which the case and the plan convey to me is that the relation of hotel and stables is much the same as that of many, many hotels and their stables in country towns.

On matters of law I cannot regard this hotel and stables as anything more than "land and heritage" in the sense of the Act, the hotel being the "building" and the stables the "pertinent" thereof (Valuation Act, 1854, section 42).

The hotel and stables are not internally connected, and though the stables are being let separately, yet if they are so let there must be a right of access through them to the back door of the hotel, and not only to the garden and bleaching-green beyond. But I do not think it right to speculate on what might be. I must regard the hotel and stables as they are in their present occupation. They are not like a bank and the bank offices—the one appropriated to the domestic use of the proprietor and his family, and the other to the business of the bank. The hotel is used for the business of the proprietor, and their use is so

present case this test is completely satisfied. It does not appear Dec. 13, 1
 the smallest consequence that the appellant works his hiring Philip v.
 the extent along with his hotel business. Even if he hired Assessor 1
 carriages exclusively to hotel visitors the test laid down by Elginshir
 would be equally satisfied. In the case there before the Lord Salv
 was the occupier of both the dwelling-house and the offices,
 house being occupied by one of their officials for bank pur-
 on the other hand, the only connection between the hiring
 on in the stables and the hotel is that the bus which the
 meet passengers at certain stations and the horses which
 accommodated in the stable premises. This bus, while it con-
 veyers and guests to and from the hotel, also conveys pas-
 sengers not go to the hotel. There is no necessity for the appellant
 to hire the business himself, for he could equally well make
 with a tenant by means of which he could get the same

was laid on the statement in the case that there is access
 door of the hotel to the stable-yard. That appears to me
 material in view of the decision in the case I have referred to,
 the other case¹ between the same parties, to which it was a
 there is an internal communication between two parts of pre-
 mises by the same owner, it has been held that they fall to be
in quid, but that is plainly because in their actual condition
 capable of being separately let. In the earlier case of the
 and¹ Lord Trayner dealt with the case of stables attached to
 He says²:—"The stables of a gentleman in town are as
 an appurtenance or accessory to his town residence as they are in the
 country house. They are not, however, valued along with the
 house, although situated in the adjoining street or mews. They
 are connected—as they were in the case of a country mansion or
 to make it impossible or difficult to let them separately."
 are precisely applicable to the circumstances disclosed here.
 I consider the opinions from which I have quoted to be
 sound, and the rule established is capable of very easy applica-
 tion. It would be absurd to make a distinction between stables situated
 in town and stables at some little distance from the hotel but con-
 nected by a telephone, and equally so to force a hotelkeeper, in order to
 avoid taxation, to sublet his stables. For these reasons I am very
 of opinion that the Valuation Committee were wrong; and that the
 stables should be separately entered in the Valuation-roll.

THE LORDS.—I concur with your Lordship in the chair.

It is a common adjunct of a country hotel. In the present case
 the stabling, and the garden ground behind the stabling form
 one property. There is communication between the different
 parts, particularly between the hotel and the stabling. The subjects
 are for occupation as one holding, and they are in point of fact

Dec. 13, 1911. so occupied by the proprietor for the purposes of his hotel
 Philip v. these circumstances it appears to me that they should be entered
 Assessor for Valuation-roll as a *unum quid*.
 Elginshire.

THE COURT were of opinion that the decision of the
 Committee was right.

JAMES PURVES, S.S.C.—CHARLES GEORGE, S.S.C.—Agents.

No. 111. ASSESSOR FOR DUMFRIESSHIRE, Appellant.—*Hon. Wm. M. Macdonald*
 Dec. 15, 1911. MRS KIRK AND OTHERS (Thomas Kirk's Trustees), Respondents.
Chree.

Assessor for Valuation Acts—Value—Lease—Bona fide lease—Consideration
 Dumfries- rent—Relationship of lessor and lessee—Conditions favourable
 shire v. Kirk's Trustees.

A deceased farmer's testamentary trustees (consisting of his widow who was the life-rentrix, and her two sons), let the farm as to which the subjects were entered in the roll at £235, which for many years had been entered in the roll at £175, to the sons at a rent of £175, without advertisement or attempt to get another tenant. The lease contained, *inter alia*, a clause by which the tenant renounced any claims competent to him at law under the Agricultural Holdings (Scotland) Act, 1908, and the law. The Assessor having entered the subjects at £235, the trustees contended that the entry should be £175—the actual rent.

The Court sustained the valuation of the Assessor, holding that the relationship of the parties (though not in itself conclusive) in conjunction with the other facts narrated, sufficient to show that the rent stipulated in the lease was not the true annual value of the subjects.

Lands Valuation Appeal Court. AT a meeting of the Valuation Committee of the County of Dumfries-shire, held at Dumfries on 13th September 1911, the trustees acting under the trust-disposition and settlement of Thomas Kirk, as proprietors, and Thomas Kirk junior, as tenants, appealed against an entry in the Valuation-roll for the year ending Whitsunday 1912, fixing the value of the farms of Williamsfield and Charlesfield at £230, and the shootings thereon at £5.
 Case 301.

They craved that the valuation should be reduced to the rent under a missive of let between the trustees and Kirk junior.

The Committee sustained the appeal and reduced the valuation as craved.

The Assessor obtained a stated case for appeal which was read *inter alia*:—"The following were the facts admitted or known to the knowledge of the County Valuation Committee:—

"1. The appeal to the Committee was at the instance of the proprietors and tenant of the farms of Williamsfield and Charlesfield in the parish of Holywood. The proprietors are the surviving widow (being also the widow* and two sons) of Thomas Kirk, the proprietor and occupier of these farms for some time prior to his death in 1909. The tenant is the elder son of the trustees of the said Thomas Kirk. At the date of the

* Under the trust-disposition and settlement the widow was entitled to the income of the estate during her lifetime.

Committee, having come to that conclusion and having rejected Dec
 e argument as to consideration other than rent, seem to have ^{Ass}
 selves precluded by decisions from giving its legitimate effect ^{Du}
 usion. I cannot see exactly upon what they were proceeding, ^{shi}
 nation of the decisions referred to I cannot see that they were ^{Tru}
 or anything else from the fact of the relationship of the land- ^{Ld.}
 nt than that the rent was quite possibly an inadequate rent, and,
 hat they should apply their minds to the circumstances and
 ither in the circumstances the rent was inadequate in this case.
 erefore, that the judgment of the Valuation Committee should be
 hat, as there was no evidence, there is no alternative for us in this
 cept for the current year the rent stated by the Assessor, which
 at which the premises were entered in the previous years.

MEMBER.—I am of the same opinion. Leaving out of view, as
 d to do, the findings with regard to the value of the subjects
 ve been derived from the personal knowledge of the Valuation
 I think this is a narrow case. Substantially, I regard it as a
 ther to her son because, while the trustees appeared as the
 mother was the person who had the true interest in the fixing
 Now, mere relationship is not sufficient to justify the Court
 ng the lease; but if there is evidence from which you can
 a sum mentioned in the lease is less than its fair value, then
 ot, in terms of the Valuation Act, "conditioned as the fair
 e" of the subjects, but proceeds on the favour and affection
 ssor, who in this case was the mother, had for her tenant.
 fact from which we can draw any inference with regard to the
 of these subjects is that, for thirteen years, the father, who was
 was assessed at £235 annually, and that this lease is for a sum
 a reduction of £60. If there had been evidence led by the
 here to the effect that they had tried to get a tenant, and had
 any offers of more than £175, I think that that would have
 a presumption that arises from this sudden fall in value and
 hip of the parties to the lease. But it is a matter of admission
 ve never advertised the subjects at all or sought to obtain any
 than the eldest son. That by itself would be sufficient for the
 he case; but even if this view were open to doubt I do not
 n leave out of view the circumstance that this lease is a yearly
 clauses of an unusual nature, and that these may have entered
 ection of fixing the rent, seeing that the tenant gave up any
 a he might otherwise have had under the Agricultural Hold-
 We cannot tell what the value of that renunciation may be.
 nformed that it is probably not enforceable, but the parties
 e must have thought that it had some value, and it is at all
 ing in honour upon the lessee whether it is binding upon him
 ot. Accordingly I think that was a consideration other than
 entitles us to disregard the lease, and, as we have no other
 r fixing the fair value, to revert to the old valuation at which
 had stood for thirteen years.

meetings which the Assessor had in 1910 with Mr Garden, De
 puty and agent of the Leith Wine, Spirit, and Beer Trade Ha
 n, who represented the majority of the licence-holders Ass
 burgh, including the present appellant, there were for the Lei
 furnished to the Assessor, at his request, returns of the
 turnover per permit-books, the beer turnover, also notes as to
 and annual drawings of various public-houses, the asses-
 sals of which were under consideration by the Assessor.
 sideration and discussion, Mr Garden and the Assessor
 t, after taking into account various elements, including
 extent of premises, and the character of the business, a fair
 rental and equitable principle of assessment would be
 y taking a certain fixed percentage of the annual turn-
 h shop. On this basis, accordingly, the Assessor adjusted
 arden a great number of assessed rentals of licensed pre-
 result being that (including additional outgoings in respect
 eased licence-duty) 7 per cent or thereby of the gross turn-
 fixed as the assessable rental in these cases. On the fore-
 s, in 1910-11 a number of the rents of licensed premises
 ced, and in one case increased. In other cases, including
 ant's, the fixing of the assessed rental was held over, in
 ation, as above explained, that some general principle of
 the rentals of public-houses might be laid down at the
 s Valuation Judges' Court.

Five public-house appeals decided by the Valuation Judges
 in which turnover was an element in the case, the resul-
 t, after making allowance for half the increased licence-
 duty, as shown by the tabular statement produced by the
 from 6 to 10 per cent of the gross turnover, from three
 five and a quarter weeks' average weekly drawings, and
 29½ per cent of the gross profit. The appellant's turn-
 over has been as follows:—

1900-1	.	.	2383	proof gallons.
1908-9	.	.	1778	do.
1909-10	.	.	1218	do.
1910-11	.	.	1367	do.

ant's turnover in beer amounted in 1900 to £1087, in
 1908-9, and in 1910 to £758, 12s. His total turnover in
 £4179, in 1909 £2983, and in 1910 £3058, equal in the
 rounded year to £58, 16s. per week. Under the Finance Act,
 the appellant's licence-duty has been increased from £21,
 £34, 5s. 9d. on the basis of an assessed rental of £80, and
 £40, 14s. 5d. on the assessed rental of £175 now fixed by the

average rate of profit in Leith from public-house busi-
 ness about 33½ per cent, equal to 6s. 8d. per £, of the gross turn-
 over, a considerable part of the appellant's business is a family
 business (that is, in liquor sold for consumption off the premises), the
 profit on his turnover is only 5s. 7½d. per £."

He further stated:—

Assessor, following out the principle of arriving at a fair
 rental by taking a percentage of the turnover, fixed the
 rental of the appellant's premises at £210, being 7 per cent
 turnover for the year 1910-11.

Magistrates having considered the proof, documents produced,

Dec. 15, 1911.
 Haggart v.
 Assessor for
 Leith.

and from their own knowledge, were of opinion that the valuation adopted by the Assessor was fair and equitable. They, in view of the fact that a considerable part of appellant's trade was consumed off the premises, and that consequently his valuation was below the average of public-houses in general, decided to reduce the Assessor's valuation appealed against by one-sixth, making the fair rent which they considered to be in the whole circumstances a fair rent for the appellant's premises, conditioned as the fair rent thereof without grassum or consideration other than rent.¹

The case was heard on 6th and 7th December 1911.

Argued for the appellant;—The business had decreased and, accordingly, the entry in the Roll should be correspondingly reduced. In any event the method by which the Assessor proceeded was wrong. The proper method of valuation was by comparison with other public-houses in the neighbourhood. If such comparison was impossible it was then, but then only, to have regard to volume of business and profits.² The fact of turnover or profits being made the criterion for valuation in the first place, that it involved an inquisition into the business books of the publican, and, in the second place, that a tax upon personal enterprise and industry, premises occupied by an active and well-doing publican being more highly rated than similar premises occupied by one who was less industrious and consequently less successful. In the present case there were no other houses in the neighbourhood with which the appellant's premises have been compared, and the Assessor should have followed the usual practice and produced evidence as to these.³

Argued for the respondent;—With the exception, perhaps, of the drawings were in the case of public-house premises the same method was used in valuation. The taking of a certain percentage on the profits was the best method of arriving at the rent which a tenant would give for the premises.⁴ At anyrate it could not be said that, in the particular circumstances of the present case, the Assessor's decision was an unreasonable one.

At advising on 15th December 1911,—

LORD SALVESEN.—The appellant in this case is the owner of a public-house in Leith, and he appeals against the determination of the Valuation Committee, who have fixed the fair rental of his premises at £175. For a number of years the same premises in the same position have been entered in the Valuation-roll at the sum of £150. The appellant claims that his valuation should be reduced to that of the premises he has, besides, led evidence to show that there has been a marked increase in his turnover during the past few years, and in addition there has been a considerable increase in the licence-duty which he has to pay. If the premises were fairly valued in 1905 at £80 there is no reason why they should be valued at £175 now.

¹ Noble v. Assessor for Leith, (1899) 1 F. 584.

² Dodds v. South Shields Union, [1895] 2 Q. B. 133. See also Cartwright v. Sculcoates Union, [1899] 1 Q. B. 667, aff. [1900] A. C. 150.

³ Hughes v. Assessor for Stirling, (1892) 19 R. 840, was also decided on this principle.

⁴ Cartwright v. Sculcoates Union, [1900] A. C. 150, at pp. 159; Oakbank Oil Co., Limited, v. Assessor for Midlothian, (1900) 1 F. 520.

the valuation, but very good grounds on which it might be Dec.

for the Assessor is that the premises have been very much ^{Hagg} ^{Asses} ^{Leith} in the past, and that he only discovered this when he ascer-
the appellant himself what were his annual drawings. The Lord.
ation has been admittedly made on the basis of these annual
The Assessor's original valuation was £210, which represents
a last year's drawings, or approximately three and a half times
drawings.

grounds of the appeal is that in September 1910 the valuation
ant's premises was settled by agreement between him and the
he former figure of £80. This arrangement, however, was, and
e, binding for one year, and at the time when it was made the
not the particulars with regard to the appellant's business on
as since proceeded. I attach no importance, therefore, to this
element.

ary way in which the assessable rental of a public-house in the
ation has been ascertained hitherto is by comparison with other
s in the neighbourhood which are let under *bona fide* leases.
ce of information as to the extent and character of the business
a particular public-house this is probably the only way open
or, but the application of this method must often be difficult,
cases I think it is likely to lead to very inequitable results.
ze of premises affords no safe criterion of the value of the busi-
ed within them, nor can the amount of custom be accurately
the situation of a particular public-house, although situation is
most important factor in the value of licensed premises. Two
al size situated at a short distance from each other in the same
may have a very unequal turnover, and yet this inequality may
n any degree to the personal qualities of the licence-holder, but
ons which are more or less occult. The Assessor here was of
the Valuation Committee have agreed with him, that, when he
information as to the drawings of a particular shop, these draw-
he very best basis upon which to estimate the rental which one
other a tenant would pay for the premises.

high authority in support of the Assessor's view. In the case
at,¹ Lord Macnaghten said: "It appears to me that the volume
one in a public-house, as apparent to the man in the street—if
uch an expression—is the very first thing that a tenant proposing
offer for such a house would take into consideration. . . .
rly one of the circumstances which would influence persons
out the rent of such a house as this." Lord Morris² expressed
ew; and added that "the best way of ascertaining what the
hich was going on would be the production of the books of
ant"; and the other Judges concurred. Now, in this case the
making his valuation had before him the actual volume of trade
allant was doing. It may very well be that he could not have

¹ A. C. 150, at p. 153.

² *Ibid.*, at p. 155.

Dec. 15, 1911. compelled him to have furnished the information ; but the appellant cannot
Haggart v. complain if the figures which he himself has furnished of his own free will
Assessor for should be used against him. His object in furnishing them no doubt was
Leith. to show that his business had diminished, and so to secure a reduction of
LordSalvesen. his assessed rental. He may be entitled to refuse similar information in
future ; and in a case where the Assessor has no information as to the actual
volume of business done in a particular house he may, as Lord Morris
expressed it,¹ be "obliged to forage about for the purpose of ascertaining in
the best way he can under those circumstances what the profits would be,"
as, for instance, by comparison with the actual lets of public-houses in the
district. But when he has actually been furnished with the tenant's turn-
over, and, as in this case, with the additional statement by the appellant as
to his gross profits, I cannot assent to the idea that he should leave out of
view what Lord Shand¹ terms "the element of all others which a tenant
might be expected to take into view in fixing the rent he ought to give for
the premises."

The particular percentage which it would be right to apply to an ascer-
tained turnover must, however, be justified on grounds which are consistent
with the Valuation Act. There is no reason *a priori* why 7 per cent of the
drawings of a public-house should be presumed to represent its fair rental ;
and it may well be that the percentage will vary in different localities.
But if in a particular burgh it were ascertained as matter of fact that
tenants for public-houses could always be obtained, apart from special
circumstances, at a rental which worked out at 7 per cent of the turnover,
that would go a long way towards solving the problem what a hypothetical
tenant would give in the case of a particular public-house. The peculiarity
of this case is that neither the appellant nor the Assessor had adduced any
evidence based upon actual lets of public-houses in Leith. What the
Assessor, however, proved was that, in the case of sixty publicans who
occupied their premises, he had assessed their rentals by agreement with
their agent on the same basis which he proposed to apply to the appellant.
It is not to be assumed that these sixty traders agreed to have their
premises assessed on a rental which they could not obtain if they were
compelled to let them ; and there is therefore a sufficiently large body of
evidence to the effect that the rental of an ordinary public-house in Leith
may fairly be taken as representing 7 per cent of the gross drawings. I do
not find that there is any evidence for the appellant which displaces the
prima facie case so established. He has indeed led evidence to the effect
that the ratio of profits which he makes in his particular business is less
than that which is made in public-houses as a whole, and the Valuation
Committee have made full allowance for this peculiarity ; but he has not led
any evidence of actual lets which work out at a less ratio and which, after
comparison of these premises with his own, as regards accommodation and
situation, show that he has been over-assessed. He has indeed nothing to
rely upon but the fact that the Assessor since 1900 has allowed his
premises to be entered in the Valuation-roll at the yearly value of £80, a
fact which is of very small importance when it is ascertained that this

¹ [1900] A. C. 150, at p. 156.

on was made in entire ignorance of the extent of the business which Dec
ne in them.

ve therefore come to the conclusion that there is no ground for Hag
ing the determination of the Valuation Committee. I desire to say Ass
er, that in reaching this conclusion I am not laying down any rule Leith
or, that in reaching this conclusion I am not laying down any rule Lord

any particular locality the rent of a public-house may be fixed on
nciple of taking 7 per cent of the turnover ; and it will be quite open
appellant to lead evidence next year to show that the sixty publicans
are willing to be assessed on that footing in Leith had entirely mis-
ended their true rights ; and that on comparison with actual *bona*
e it will be found that a tenant would not pay so large a rent. In
esent case we are presented with the alternatives of either accepting
uation of the Court below, or of reducing the hypothetical rent to
r no other reason than that that figure had been fixed by the Assessor
D. There are no materials on which we could fix any intermediate
I have no difficulty in preferring the former alternative, which has
the merit of being supported by *prima facie* evidence of a cogent
and also of placing the appellant on the same footing, *quoad* his
ntion to the public taxes, as sixty of his brother publicans in Leith.

CULLEN.—I concur.

JOHNSTON.—I am by no means satisfied that justice is being done
ppellant by the decision which we are about to pronounce, although
case as presented to us I agree with your Lordships that there is no
ive open except to affirm the determination of the Valuation Com-

I wish, however, to protest emphatically against the idea that we
ntenancing, far less fixing, a rule by which Assessors are in the
mply to ascertain the turnover of public-houses, and then fix their
on by taking 7 per cent or any other fixed percentage of that turn-
I know Assessors would be very glad to have such a rule, and I
t probable that this case has been presented with the object of
ng the Court's sanction to what might be read as such a rule ; but,
r agreeable such a course might be to Assessors, in my opinion it
ost improper one for them to take or for the Court to sanction.
e, though turnover, where it is known, may be in many cases a factor
valuation of a public-house, there are great differences between public-
even in the same town, and all of these different considerations
e weighed by the Assessor in fixing his valuation. There are the
other public-houses in the locality, the relative situation of the parti-
ouse as compared with that of others, its surroundings, its accommoda-
d condition, and generally all those matters which, in the experience
ical men, are known to affect the value of such premises. I am the
mpathic in my protest because I am averse to the idea of compelling
e-holder to adduce evidence of his turnover. If an idea got abroad
rnover was the only, or even a necessary, consideration to be taken
of by Assessors in fixing valuations, it would practically compel
ne to produce their business books, a proceeding which, although
tly countenanced in some quarters in England, has been generally

Dec. 15, 1911. recognised both in Scotland and England as inquisitorial and to be dis-
 Haggart v. countenanced. I think that to compel production of proof of turnover
 Assessor for might very well be an indirect compulsitor to production of business books,
 Leith. because I can imagine in many cases that the deductions attempted to be
 Ld. Johnston. drawn from turnover might be incapable of being rebutted except by an
 examination of the licensee's actual business books.

I must also add that I am doubtful whether a safe guide in this case can
 be found in the alleged agreement between sixty publicans in Leith and
 the Assessor, as we have no knowledge of the circumstances in or the
 footing on which it was made, or of its result as a satisfactory basis for
 valuation.

With this protest I concur in disposing of the present appeal as your
 Lordships propose.

THE COURT were of opinion that the determination of the
 Valuation Committee was right.

GARDEN & ROBERTSON, S.S.C.—R. H. MILLER, S.S.C.—Agents.

No. 113. EDINBURGH AND LEITH CORPORATIONS GAS COMMISSIONERS.—
Constable, K.C.—J. D. Millar.
 Feb. 3, 1912. ASSESSOR FOR EDINBURGH.—*Cooper, K.C.—W. T. Watson.*
 Edinburgh and Leith Gas Valuation Acts—Value—Statutory gas-works—Non-profit-earning under-
 Commis- taking—Revenue principle—Deductions—Feu-duties—Landlords' taxes.
 sioners v. Held that, in valuing on the "revenue principle" a gas-works under-
 Edinburgh. taking carried on by statutory commissioners under a prohibition
 Assessor for against making profit, although the whole expenses of management
 Edinburgh. fell to be deducted, feu-duties and landlords' taxes could not be
 deducted.
Edinburgh and Leith Gas Commissioners v. Assessor for Edinburgh,
 1909 S. C. 664, distinguished.

Lands Valua- AT a Court of the Magistrates of the city of Edinburgh held on 22nd
 tion Appeal. September 1911 to dispose of appeals against valuations made by the
 Court. Burgh Assessor for the year ending Whitsunday 1912, the Edinburgh
 Ld. Johnston. and Leith Corporations Gas Commissioners, incorporated and acting
 Lord Salvesen. under the Edinburgh and Leith Corporations Gas Acts, 1888 to
 Lord Cullen. 1908, appealed against an entry in the Valuation-roll fixing the
 yearly rent or value of the gas undertaking of which they were
 Case 304. proprietors at £102,820.

They craved that the figures £94,982 should be substituted for the
 figures £102,820.

The Committee having dismissed the appeal, the appellants obtained
 a stated case, which set forth, *inter alia* :—"The following facts were
 admitted or held by the Committee to be proved or within the know-
 ledge of the Committee :—

"1. The Edinburgh and Leith Corporations Gas Commissioners are
 a statutory body constituted by the Edinburgh and Leith Corporations
 Gas Act, 1888 (51 and 52 Vict. cap. 129), for the purposes of
 manufacturing and supplying gas within the limits of supply
 authorised by the Act. The appellants act under the said Act of
 1888, and certain Acts explaining and amending the same, which
 are known as the Edinburgh and Leith Corporations Gas Acts, 1888

The present limits of supply include the city of Edinburgh, ^{Ed} burgh of Leith, and certain districts of the county of Midlothian. ^{an} The undertaking of the appellants is situated partly in the city of ^{Ed} burgh, partly in the burgh of Leith, and partly in the county of ^{Co} Midlothian. In consequence of the restrictions imposed by the said ^{Ed} burgh Corporation, the undertaking is a non-profit-earning one.—(*Edinburgh and Leith Corporations Gas Commissioners v. The Edinburgh Assessor*.¹) The method which has been adopted from the commencement of the undertaking in 1888 for arriving at the valuation of the whole undertaking in the said three areas is as follows:—The valuation of the whole undertaking is made up on the revenue principle, by deducting from the total revenue for the immediately preceding year (1) the amount of the expenditure for the same period, on certain items; (2) an allowance in respect of tenants' floating capital, and (3) an allowance in respect of the value of tenants' fixtures. The result is treated as the value of the whole undertaking. This valuation is then allocated among the city of Edinburgh, burgh of Leith, and the county of Midlothian, in proportion to the amount of the capital cost of the works of the undertaking in the respective areas.

In the year 1908 a question arose between the appellants and the Assessors of the said three areas as to whether the whole expenses of management of the undertaking fell to be allowed as a deduction in making up the valuation of the whole undertaking, or only so much of such expenses of management as represented the amount falling to be borne by the tenants of the undertaking. The question was formed, *inter alia*, the subject of an appeal to His Majesty's Bench, who, on 12th March 1909, decided that the whole expenses of management fell to be allowed as a deduction.—(*Edinburgh and Leith Corporations Gas Commissioners v. The Edinburgh Assessor*.¹)

The appellants now claim as a deduction in making up the valuation of the whole undertaking the amount of the annual feu-duties payable by the landlords' proportion of rates and taxes paid by them in respect of the undertaking. The amount of the feu-duties paid in respect of the whole undertaking during the year ending 15th May 1908 was £259, 18s. 9d., and the amount of the landlords' proportion of rates and taxes paid during said year was £7819, 16s. 7d. Until the present year, the amount of the feu-duties and landlords' proportion of rates and taxes paid by the appellants have not been allowed as a deduction by the Assessor or claimed by the appellants as deductions.

In arriving at his valuation of the appellants' subjects the Assessor has for the first time deducted two items specified in the grounds of appeal, viz., voluntary superannuation allowances, amounting to £1007, 18s. 7d., and Parliamentary expenses, amounting to £12, 2d. The remaining items specified therein have been deducted by the Assessor in accordance with his usual practice. The allowances deducted by him in respect of tenants' floating capital and of the value of tenants' chattels, amount to £14,102, 9s." The Committee were of opinion "that they were bound by the decision in the case of *City Parish of Glasgow v. Assessor of Railways* ², which is to the effect that the landlords' proportion of rates and taxes does not form a proper deduction in arriving at the valuation on the revenue principle of such an undertaking as

Feb. 3, 1912. that of the appellants, and that feu-duties are governed by the same principle."

Edinburgh
and Leith Gas
Commissioners v.
Assessor for
Edinburgh.

The case was heard (along with a similar appeal with regard to the valuation of the portion of the gas-works situated in the burgh of Leith) on 8th December 1911.

Argued for the appellants;—The Gas Commissioners, being debarred by statute from earning profits, were entitled, in a valuation on the "revenue principle," to a deduction from the gross revenue of the undertaking of the whole expenditure properly chargeable against revenue without distinction between landlords' and tenants' expenditure. The rule as to deductions had been stated in the widest possible way in *Edinburgh and Leith Gas Commissioners v. Assessor for Edinburgh*,¹ and clearly included feu-duties and landlords' taxes.

Argued for the respondent;—The matter was definitely settled adversely to the appellants by *Edinburgh and Leith Gas Commissioners v. Assessor for Edinburgh*.¹ The principle there recognised was that "cost of management, working charges, cost of maintenance, and repairs necessary in order to command that revenue" were to be deducted. Feu-duties and landlords' taxes did not fall under any of these categories.²

At advising on 3rd February 1912,—

LORD SALVESEN.—In this case the Assessor has followed the method of valuation of the appellants' undertaking sanctioned by a series of prior decisions. Two objections are taken to his valuation, the first being that he ought to have allowed a deduction of the feu-duties paid by the Commissioners in respect of land belonging to them, and the second that he should have deducted the landlord's taxes. These deductions are claimed as the legitimate result of certain prior decisions, the last of which was obtained at the instance of the same appellants in 1909, and is reported in the Session Cases of that year at page 664. In that case Lord Mackenzie, who gave the leading judgment, said, after dealing with the prior cases: "the principle that was adopted was this, that the actual revenue must be taken, under deduction of the cost of management, working charges, cost of maintenance, and repairs necessary in order to command that revenue." Under none of these heads do the deductions now claimed fall; but it was contended that the same principle which permitted deduction of administrative charges and the like, which in the ordinary case fall upon the landlord, also required that all charges which had been disbursed in order to earn the revenue must equally be deducted. I agree with Lord Low that it is difficult to find a logical basis for the view that expenditure which in ordinary practice would fall upon the landlord should be deducted from the hypothetical rent. But in the case of a profit-earning concern it would be legitimate to take into account in fixing such a rent the amount which the

¹ 1909 S. C. 664.

² The following cases were also referred to in the course of the arguments:—*City Parish of Glasgow v. Assessor of Railways and Canals*, (1885) 24 S. L. R. 3; *Caledonian Canal Commissioners v. Assessor of Railways and Canals*, (1886) 24 S. L. R. 80; *Local Authority of Dalbeattie v. Assessor for Kirkcudbright*, (1882) 10 R. 23; *Magistrates of Glasgow, &c.*, (1884) 12 R. 3.

tenant would require by way of tenant's profits; and as these have been Feb. 3, 1912. disallowed in the case of statutory undertakings where neither landlord nor tenant is entitled to make a profit by carrying on the undertaking, it was and Leith Gas perhaps only equitable that there should be some set-off in the way of Edinburgh Commissioners v. deducting from the valuation expenses which would ordinarily fall on the Assessor for Edinburgh. landlord. In none of the previous cases, however, has it been suggested Lord Salvesen. that such matters as feu-duties which fall to be paid out of rent, or taxes which fall to be paid upon a rent after it has been ascertained, can be taken into account in order to reduce the valuation. The fact that there has been a departure from the logical basis of valuation, now so well established that it is undesirable to go back upon it, is no ground for carrying the illogicality any further; and it is to be noted that in one of the prior cases, which was decided by Lord Trayner as Lord Ordinary on the Bills, he declined to allow a deduction in respect of rates and taxes, holding that what was imposed on, and might be directly recoverable from, the landlord could not be said to be tenant's expenditure. If the matter had been open I should have preferred to fix the hypothetical rent of an undertaking such as that of the appellants' on the ordinary footing, and without regard to the circumstance which led the Court to sanction a departure from this method, viz., that there is a statutory prohibition against profit-earning. But it is more important to adhere to a rule which is once established, and which on the whole is equitable in its results, than to establish a new rule even though it may be rested on a more logical basis. I am therefore of opinion that we should adhere to the Assessor's valuation, affirmed, as it has been, by the Court below.

LORD CULLEN.—I concur.

LORD JOHNSTON.—I concur.

THE COURT were of opinion that the determination of the Magistrates was right.

JAMES M'G. JACK, S.S.C.—ANDREW M'DOUGALL, Solicitor—Agents.

THE PARISH COUNCIL OF THE CITY OF EDINBURGH, Complainers
(Appellants).—*D.-F. Dickson—Kemp.*

No. 114.

THE LORD PROVOST, MAGISTRATES, AND COUNCIL OF THE CITY OF
EDINBURGH, Respondents.—*Cooper, K.C.—W. T. Watson.*

Feb. 3, 1912.

Valuation Acts—Value—Cemetery owned by public authority for discharge of statutory duty—Subjects not in fact yielding profit—Burial Grounds (Scotland) Act, 1855 (18 and 19 Vict. cap. 68). Edinburgh Parish Council v. Edinburgh Magistrates.

A cemetery was owned and carried on by the magistrates of a city in fulfilment of a statutory duty imposed by the Burial Grounds (Scotland) Act, 1855. Under statute they had power to sell lairs and to receive fees in respect of interments, but the expenditure on the cemetery, as a rule, exceeded the income.

Held that the cemetery had an annual lettable value in respect that the possession of it enabled the magistrates to discharge a statutory duty, and accordingly that it fell to be entered in the Roll at that value and not at a merely nominal figure.

Feb. 8, 1912. *Valuation Acts—Subjects—Cumulo or separate valuation—Cemetery with superintendent's house and greenhouse—Assessment—Exemption of burial ground from assessments and rates—Rating Exemptions (Scotland) Act, 1874 (37 and 38 Vict. cap. 20), sec. 1.*
 Edinburgh Parish Council v. Edinburgh Magistrates.

A house and greenhouse were situated within a cemetery, the only access being by the cemetery gate. The house was the residence and office of the superintendent, and the greenhouse was used for storing and forcing plants bedded out in the cemetery.

Held that the cemetery, the house, and the greenhouse, all fell to be entered in the Valuation-roll as a *unum quid*.

Observations on the bearing of this decision upon the question whether the houses fell under the statutory exemption from assessments and rates conferred on burial grounds by the Rating Exemptions (Scotland) Act, 1874, sec. 1.

Lands Valuation Appeal Court. *AT a Court of the Burgh Valuation Committee of the city of Edinburgh, held on 25th September 1911, the Parish Council of the city of Edinburgh appealed against the following entry in the Roll for the year ending Whitsunday 1912:—*
 Lord Johnston.
 Lord Salvesen.
 Lord Cullen.

Case 309.

Description.	Situation.	Proprietor.	Tenant.	Occupier.	Yearly Rent or Value.
Cemetery House and Office.	Portobello Cemetery.	Lord Provost, Magistrates, and Council of the City of Edinburgh, <i>per</i> Robert Paton, Treasurer of Police, 10 Royal Exchange.		Proprietors.	£1

They craved that there should be three separate entries, viz., the cemetery at the value of £40; the house and a waiting-room at the value of £24; and a greenhouse at the value of £6.

The Committee having dismissed the appeal, the appellants obtained a stated case, which set forth that the following facts were admitted or held by the Committee to be proved, or within the knowledge of the Committee:—

"1. The subjects in question consist of the ground at Easter Duddingston, extending to 4·23 acres, known as Portobello Cemetery, and the house and greenhouse erected within the said cemetery.

"2. The said cemetery was provided in 1876 in terms of the Burial Grounds (Scotland) Act, 1855, as a burial ground for the statutory parish of Portobello, by the Magistrates and Town-Council of the burgh of Portobello, acting as the Parochial Board for the said statutory parish.

"3. The cemetery originally consisted of an area of 3·97 acres, acquired by the said Magistrates and Town-Council from the Benhar Coal Company, Limited, at a price of £2977, 10s., and subject to an annual feu-duty of 2s. 6d. . . . In 1896 the said Magistrates and Town-Council added to the said cemetery an area of ·260 of an acre, acquired by them from Sir James Miller of Manderston, Bart., at a price of £50. . . . The said feu-contract restricts the use to be

made of the ground feued to that of a cemetery provided under the Burial Grounds Act. The said feu-contract further provides, *inter alia*:—(1) That all feuars and residents on the estates of Duddingston and Brunstane belonging to the Benhar Coal Company, Limited, and parties in their employment in the neighbourhood and their families, should have equal right of burial with residents within the burgh of Portobello at the rate charged at the time of application; and (2) that the feuars should erect an ornamental entrance lodge, with gateway and gates, and plant-houses, and maintain the same in good order and repair, and plant the said cemetery ground with suitable shrubs and trees, and maintain the said ground in an ornate manner in all time coming. The said disposition, *inter alia*, contains a condition restricting the use to be made of the ground sold to an addition to Portobello Cemetery, and stipulates that the said ground shall be subject to the same conditions as if it had been acquired compulsorily under the Burial Grounds (Scotland) Acts.

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"4. The city of Edinburgh was extended in 1896 to include the burgh of Portobello. In virtue of the provisions of the Edinburgh Extension Act, 1896, the said cemetery was transferred to the respondents, and is vested in and administered by them subject to the same conditions and restrictions as the Magistrates and Town-Council of Portobello were under in regard thereto. The said cemetery was not within the area added to the city of Edinburgh by the said Edinburgh Extension Act, 1896, but remained within the territory of the county of Midlothian until 1900, when, in virtue of the provisions of the Edinburgh Corporation Act, 1900, the boundary of the said city of Edinburgh was extended so as to include the said cemetery.

"5. During the four years from Whitsunday 1907 to Whitsunday 1911, the expenditure upon the said cemetery has exceeded the income derived therefrom by the sum of £83, 11s. 7d. There has been an excess of expenditure over income in each of these four years, with the exception of the year to Whitsunday 1911, in which there was a surplus of income over expenditure of £6, 18s. 8d. The said cemetery and the buildings thereon appear in the books of the city of Edinburgh for the year 1910-11 as of the capital value of £8500.

"6. The house in question is occupied rent free by the superintendent of the said cemetery, and is situated within the boundaries of the cemetery. The only access to the house from the public road is by the cemetery gate. The house consists partly of one storey and partly of two storeys, and contains a sitting-room, bedroom, kitchen, scullery, and conveniences on the ground floor, and two bedrooms on the upper floor. The superintendent of the cemetery uses the sitting-room partly as an office for the conduct of the business of the cemetery, and the business books and records kept by him are stored in safes placed within the said house. The business of the cemetery is done at all hours of the day and until late in the evening, and the superintendent or some member of his household requires to be constantly in attendance at the house for business purposes. The only lavatory accommodation within the cemetery consists of the conveniences within the house, which the public are allowed to use on application. The respondents, during the years from Whitsunday 1907 to Whitsunday 1911 inclusive, have made annual payments in respect of the said house as follows:—(1) Domestic water rates on a rent of £24; and (2) drainage assessment paid to the County Council of Midlothian on a rent of £30. That for the year 1910-11 poor and

Feb. 3, 1912. school rates on a rental of £1 have been levied and paid for the said subjects.

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"7. The greenhouse referred to in the complaint is also situated within the cemetery, and the only access to it from the public road is through the gate and part of the cemetery. The greenhouse is utilised for storing and forcing plants used in the summer for bedding out in the plots and lairs of the cemetery. . . .

"10. During the years from 1902 to 1905 the subjects appeared in the Valuation-roll as two separate entries, viz.:—(1) The ground of the said cemetery at the yearly rent or value of £40; and (2) the said house, a waiting-room, and greenhouse at the yearly rent or value of £30. During the years from 1905 to 1909 the subjects appeared in the Valuation-roll as three separate entries, viz.:—(1) The ground of the cemetery at the yearly rent or value of £40; (2) the said house and waiting-room at the yearly rent or value of £24; and (3) the said greenhouse at the yearly rent or value of £6. In making up the Valuation-roll for the year to Whitsunday 1910, the Assessor made one entry for the subjects, and entered them at the nominal rent of £1. The basis upon which he arrived at this method of entering the subjects was that the house and greenhouse were necessary for the proper conduct of the cemetery, and that as no profit could be or has in fact been made out of the undertaking, no tenant would give more than a nominal rent for the subjects. That the superintendent of the Portobello Cemetery and the sexton of the New Calton Burying-Ground have for several years back been entered in the Valuation-roll, not as tenants, but as inhabitant-occupiers not rated thereon, all in terms of the Representation of the People Act, 48 Victoria, chapter 3, sections 3 and 9."

The Committee were of opinion:—

"1. That the said house and greenhouse could not, in their actual state, be let separately from the said cemetery, and that, therefore, the whole subjects in question fell to be treated as a *unum quid*, and entered in the Valuation-roll as one subject.

"2. That, in any event, as the said house and greenhouse are necessary for the proper conduct of the said cemetery, and are held and used as adjuncts thereof, the whole subjects in question fell to be treated as a *unum quid*, and to be entered in the Valuation-roll as one subject.

"3. That an important element to be taken into consideration in arriving at the value of the subjects in question is the revenue derived from and the expenditure necessarily incurred in connection with the subjects. (*Vide The Craigton Cemetery Company v. The Assessor for Lower Ward of Lanark*, (1889) 16 R. 802; and *The Aberdeen Cemetery Company, Limited, v. The Assessor for Aberdeen*, (1891) 18 R. 936.)

"4. That, in arriving at a valuation of the subjects in question, there should be taken into account the conditions and restrictions affecting the same.

"5. That the cost of maintaining the said subjects was in excess of the revenue which, in view of the conditions and restrictions affecting the subjects, could be obtained therefrom.

"6. That, in the whole circumstances, no tenant would give any rent for the said subjects, and that, therefore, the nominal sum of £1 represented the maximum rent at which the subjects could be let in their present condition."

The case was heard on 12th December 1911.

Feb. 3, 1912.

Argued for the appellants;—(1) The subjects should be entered not at a merely nominal value but at their annual lettable value. The proprietors were entitled to charge for lairs, and were not debarred from making profits; and the mere fact that no profit was actually being made was immaterial in a case where, as here, the owners of the cemetery were under a statutory obligation to provide a cemetery. The occupancy was a valuable one to them although they made no profit, because it enabled them to perform a statutory duty. They might thus be regarded as hypothetical tenants.¹ The undernoted cases² were quite different, being cases of commercial ventures, or profit-making concerns, in which a percentage on profits might well be regarded as the best test of value. It might also be noted that all restrictions on the sale of lairs in the cemetery had now been removed by section 1 of the Burial Grounds (Scotland) Amendment Act, 1886.³ (2) The house and greenhouse were separate subjects capable of separate occupation, and should be separately valued.⁴ This was a matter of importance, seeing that burial grounds were exempted from rates under section 1 of the Rating Exemptions (Scotland) Act, 1874,⁵ and the effect of treating the cemetery and houses as a *unum quid* might be to exempt the latter from rates.

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Argued for the respondents;—(1) The land was completely sterilised for profit-making purposes by being turned into a cemetery, more thoroughly even than if it had been a public park. The cemetery was not a source of revenue, and no one would give a rent for it.⁶ (2) The subjects should be valued as a *unum quid*, being all parts of one undertaking.⁷ The Court was concerned only with the question of valuation, and no questions of statutory exemption could be taken into consideration.

At advising on 3rd February 1912,—

LORD CULLEN.—The subjects in question in this case are a cemetery at Easter Duddingston extending to 4·23 acres, known as Portobello Cemetery, and a superintendent's house and greenhouse both situated within the cemetery.

Prior to the City of Edinburgh Extension Act of 1896, the subjects were vested in the Magistrates and Town-Council of Portobello, acting as

¹ See *Local Authority of Dalbeattie v. Assessor for Kirkcudbright*, (1882) 10 R. 23.

² *Craigton Cemetery Co., Limited, v. Assessor for Lower Ward of Lanarkshire*, (1889) 16 R. 802; *Aberdeen Cemetery Co., Limited, v. Assessor for Aberdeen*, (1891) 18 R. 936.

³ 49 and 50 Vict. cap. 21.

⁴ *Glasgow Association for the Relief of Incurables v. Assessor for Dumbarshire*, 1907 S. C. 769.

⁵ The Rating Exemptions (Scotland) Act, 1874 (37 and 38 Vict. cap. 20), enacts, sec. 1 :—"No assessment or rate under any general or local Act of Parliament for any county, burgh, parochial, or other local purpose whatsoever, shall be assessed or levied upon . . . any ground exclusively appropriated as burial ground. . . ."

⁶ See *Craigton Cemetery Co., Limited, v. Assessor for Lower Ward of Lanarkshire*, 16 R. 802, Lord Fraser, at p. 804.

⁷ *M'Jannet v. Assessor for Stirling*, (1882) 10 R. 32; *Bank of Scotland v. Assessor for Edinburgh*, (1890) 17 R. 839, (1891) 18 R. 936.

Feb. 3, 1912. the Parochial Board of the statutory parish of Portobello, by whom the cemetery had been provided, in terms of the Burial Grounds (Scotland) Act, Edinburgh 1855, as a burial ground for that parish. In virtue of the provisions of Parish Council v. Edinburgh Magistrates. the said Act of 1896, the cemetery was transferred to the respondents, and it is vested in and administered by them, subject to the same conditions and restrictions as applied to it while vested in the Magistrates and Town-Council of Portobello.

Lord Cullen.

The cemetery was thus originally provided, and is now held and carried on, by the respondents, in fulfilment of a statutory duty to make provision for the burial of the dead within the parish. In the case of such cemeteries the Act of 1855 (section 18) enacted that it should be lawful for a parochial board to sell the exclusive right of burial in such parts of any burial ground provided by the board as might, with the sanction of the Sheriff, be appropriated to that purpose, and also the right of constructing any chapel, vault, &c., provided always that such exclusive rights should not extend in all to a space greater than one-half of such burial ground. The proviso just mentioned was repealed by 49 and 50 Vict. cap. 21. Section 24 of the 1855 Act gives to the Parochial Board, subject to the approval of the Sheriff, right to fix and receive fees in respect of interments; and section 26 enacts that the expenses of carrying the Act into execution, in so far as the sums received for exclusive right of burial and fees in respect of interments might be insufficient, should be raised by way of assessment.

The present case does not contain any information as to the extent to which the ground included in the cemetery may have been, with the sanction of the Sheriff, appropriated for exercise of the power of selling exclusive rights of burial under section 18 of the Act of 1855, or how far the needs of the parish have permitted of the respondents exercising that power. It is stated, however, that over the four years from Whitsunday 1907 to Whitsunday 1911 the expenditure upon the cemetery has exceeded the income derived therefrom by the sum of £83, 11s. 7d., but that in the last of these years there was a small surplus.

The history of the valuation of the subjects, so far as disclosed in the case, stands as follows:—From 1902 to 1905 the ground of the cemetery was entered at £40, and the superintendent's house, a waiting-room, and the greenhouse were entered together at £30. From 1905 to 1909 there were three entries: of the ground at £40, of the house and waiting-room at £24, and of the greenhouse at £6. In 1910 the Assessor made a new departure by entering the whole subjects as a *unum quid* at a nominal rent of £1. This entry has been repeated in the Roll for the present year, and is the subject of the present complaint at the instance of the Parish Council of the city of Edinburgh.

Two questions are raised in the appeal: (1) Whether the subjects fall to be treated as having an annual lettable value, and to be entered in the Roll at that value? (2) Whether, if so, the ground, the superintendent's house, and the greenhouse should be valued as a *unum quid*, or should be treated as three separate lettable subjects, and valued accordingly?

The case for the respondents, in support of the entry of the subjects at a nominal value only, is that in view of the conditions and restrictions under which they hold them, and the absence of profit, the subjects are incapable

of being let; that is to say, that, apart from the respondents themselves, Feb. 3, 1912.
there could be no valuable occupation of the subjects, and no one would
lease and pay a rent for them. As in the hands of the respondents them-
selves, the subjects, they say, fall to be valued on the basis of profits like
a cemetery owned by a private commercial company.

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Lord Cullen.

Now the cemetery is vested in and administered by the respondents for the purpose of enabling them to discharge a statutory duty. They may augment the revenue derivable from it, if circumstances permit, by exercising the powers given by section 18 of the Act of 1855 already referred to. But none the less they occupy the subjects only because of their statutory duty and for the purpose of enabling them to fulfil it. That an occupation of this character is a valuable one to the public body which occupies has been decided in a number of authoritative cases relating to subjects of different kinds owned and occupied by public bodies, where no profit could be made and where the subjects could not be let to anyone else as tenant. The *ratio* is that the public body may, in such cases, be regarded as a hypothetical tenant. The occupancy is a valuable one to them although they may make no profit, because it enables them to discharge their statutory function. Regarded as the hypothetical tenant, they might be conceived as willing to pay rent for the occupancy of subjects which they require for their statutory purposes, if these subjects were owned by somebody else. Following this view, I am of opinion that the subjects now in question fall to be regarded as having an annual lettable value, and to be entered in the Roll at that value. If this be so, it is, I think, common ground that the total lettable value should be taken at £70, being the figure at which the subjects were entered in the Roll between 1902 and 1909.

Etio that this is so, the question, however, remains whether the proper method of valuation is to treat the subjects as a *unum quid* and enter them at a *cumulo* valuation of £70, or whether that figure should be split up and apportioned among (1) the cemetery ground, (2) the superintendent's house, and (3) the greenhouse. The interest of the parties in this question, as stated at the discussion, arises from the fact that under the Act 37 and 38 Vict. cap. 20 an exemption from rating is given in respect of, *inter alia*, "any ground exclusively appropriated as burial ground." It is not within our province as a Court constituted only for the purposes of the Lands Valuation Acts to consider what may be the proper construction of this enactment, and how the exemption which it provides may be affected if the ground of the cemetery, the house, and the greenhouse are entered in the Roll and valued as a *unum quid*. We are limited to the function of determining disputed questions of value according to proper principles of valuation. Now, the facts stated in the case relating to the house and the greenhouse which the complainers desire to have valued separately are as follows. The house is situated within the cemetery and is occupied by the superintendent. The only access to it is by the cemetery gate. The superintendent uses it partly as an office for the conduct of the cemetery business, which is done at all hours of the day, and the superintendent or someone representing him requires to be constantly in attendance for business purposes. The house contains lavatory accommodation, which the public are allowed to use on application. The greenhouse is also situated

Feb. 3, 1912. within the cemetery, the only access to it being through the cemetery gate. The case states that it "is utilised for storing and forcing plants used in the summer for bedding out in the plots and lairs of the cemetery." On these facts, it appears to me that the cemetery ground, the house, and the greenhouse fall to be valued as a *unum quid*. They are the subject of an undivided occupation by the respondents as one going concern, and are suited only for such occupation. Suggestions are made in the evidence as to how the house might be altered so as to give it a direct access from the street. We must, however, take the subjects in their actual state; and, on the facts stated in the case, it appears to me that the house and the greenhouse are mere adjuncts of the cemetery used for carrying on the cemetery business, and that they are not capable, in a reasonable and practical sense, of being separately let. This, indeed, has been expressly found by the Valuation Committee.

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Following these views, I am of opinion that the appeal, so far as it relates to the entry of the subjects at a merely nominal value, should be sustained, and that they should be entered in the Roll as a *unum quid* at the value of £70.

LORD SALVESEN.—I concur in the opinion just read by Lord Cullen. I desire, however, to add that our decision does not preclude the appellants from assessing the city of Edinburgh in respect of the houses which form part of the cemetery undertaking if they are otherwise entitled to do so. All that we have decided is that for the purposes of the Valuation-roll the subjects must be regarded and entered as a *unum quid*.

LORD JOHNSTON.—I concur in Lord Cullen's opinion, which I have read.

THE COURT were of opinion that the decision of the Magistrates was wrong, and that the subjects should be entered together at a value of £70.

R. ADDISON SMITH & Co., W.S.—SIR THOMAS HUNTER, W.S.—Agents.

No. 115. UNITED COLLIERIES, LIMITED, Appellants.—*Fleming, K.C.*—*Hon. W. Watson.*
Feb. 3, 1912. ASSESSOR FOR LANARKSHIRE, Respondent.—*Constable, K.C.*—*Dunbar.*

United
Collieries,
Limited, v.
Assessor for
Lanarkshire.

UNITED COLLIERIES, LIMITED, Appellants.—*Fleming, K.C.*—*Hon. W. Watson.*

ASSESSOR FOR LINLITHGOWSHIRE, Respondent.—*C. H. Brown.*

United
Collieries,
Limited, v.
Assessor for
Linlithgow-
shire.

Valuation Acts—Value—Mineral lease—Mineral field situated in two valuation districts—Apportionment of value as between the two districts.

In an appeal against the valuation of a mineral field, situated partly in one valuation district and partly in another, which was let on a lease providing for a fixed rent with the alternative of royalties,—

Held that the equitable rule for apportioning the valuation between the two districts was as follows:—(1) *Where the minerals were not being worked*:—On the basis of the fixed rent, apportioned according to the surface area of the minerals in each district. (2) *Where the minerals were being worked*:—On the basis of the royalties actually earned, apportioned according to the amount earned from the minerals

won in each district, with the addition of any sum by which the fixed rent might exceed the total royalties, that sum being apportioned according to surface area.

Edinburgh Collieries Company, Limited, v. Assessor for Musselburgh, (1906) 8 F. 484, commented on and distinguished.

United Collieries, Limited, v. Assessor for Lanarkshire.

Lanarkshire Case.

At a meeting of the Lands Valuation Committee for the Middle Ward of the county of Lanark, held at Hamilton upon 28th September 1911, The United Collieries, Limited, appealed against the following entry in the Valuation-roll for the county of Lanark for the year ending Whitsunday 1912:—

United Collieries, Limited, v. Assessor for Linlithgowshire.

PARISH OF SHOTTS.

Description and Situation of Subjects.	Proprietor.	Tenant.	Occupier.	Yearly Rent or Value.
Minerals, Blackrigg & Southrigg.	Lieut.-Col. John C. C. Halkett of Cramond and Harthill, <i>per</i> Mackenzie, Innes, & Logan, 25 Melville Street, Edinburgh.	United Collieries, Limited, 109 Hope Street, Glasgow.	Same.	£2258

Lands Valuation Appeal Court.
Ld. Johnston.
Lord Salvesen.
Lord Cullen.

Cases 302, 303.

They craved that the figures £698, 9s. 4d. should be substituted for the figures £2258.

The Committee having sustained the valuation of the Assessor and dismissed the appeal, the appellants obtained a stated case which set forth that the Committee found the following facts to be either proved or admitted by the parties:—

"1. The appellants are lessees of the Harthill mineral field, lying partly in the parish of Torphichen and county of Linlithgow and partly in the parish of Shotts and county of Lanark, under a lease of thirty-one years from Martinmas 1901, granted by Lieutenant-Colonel John Cornelius Craigie Halkett of Cramond and Harthill, in favour of John Nimmo & Son, Limited, dated 10th and 19th March 1902, and recorded in the General Register of Sasines on 9th January 1907, of the tenant's part of which lease the appellants are now in right.

"2. The fixed rent payable under the said lease is £2500, and provision is also made therein for payment of lordships on the minerals worked, as an alternative to the said fixed rent, in the option of the landlord. If the minerals worked in any year are less than would be necessary to yield lordships equal in amount to the fixed rent, the tenants have right to work free of lordship during the immediately succeeding year minerals sufficient to make up the deficiency.

"3. The practice of the Assessors in the county of Lanark in ascertaining the value of the minerals from year to year in the past has been to take the actual amount of fixed rent or lordships paid by the tenants for the immediately preceding year as the *cumulo* value of the subjects. This practice was followed by the Assessor in the present year, and acquiesced in by the appellants.

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United
Collieries,
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Assessor for
Lanarkshire.

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Collieries,
Limited, v.
Assessor for
Linlithgow-
shire.

"In fixing the valuation of the portion of the subjects in the county of Lanark, the Assessors in the past have apportioned the fixed rent paid by the appellants between the two parishes in proportion to the actual amount of lordships which would be payable under the said lease in respect of the minerals worked in each parish respectively during the immediately preceding year. The *cumulo* valuations of the subjects in the two parishes as fixed by the respective Assessors in the past have not in any year exceeded the amount paid by the tenants under the lease as fixed rent or lordships.

"4. Until a recent date the whole of the minerals actually worked by the appellants were in the parish of Shotts, and during this period, in accordance with the practice above referred to, the fixed rent of £2500 paid by the appellants was treated as entirely applicable to the portion of the subjects leased lying in the parish of Shotts, and no part of the same was allocated to the parish of Torphichen, in the county of Linlithgow. The appellants were entered in the Valuation-rolls of the two counties accordingly.

"5. The appellants recently commenced to work the minerals in the portion of the subjects leased lying in the parish of Torphichen, and these minerals now represent much the larger part of the output from the whole subjects.

"6. According to the practice heretofore followed in valuing these subjects, the appellants would in these circumstances fall to be entered in the Valuation-rolls of the two counties for the proportions of the fixed rent actually paid by them corresponding to the lordships applicable to the minerals worked in each parish respectively. The Assessor for the county of Lanark, however, has this year valued the portion of the subjects leased by the appellants lying in the parish of Shotts, not according to the method referred to, but according to the method explained by him and hereinafter stated.

"7. The acreage of the surface of the subjects is 233 acres in the parish of Torphichen and 2172 acres in the parish of Shotts. Upon the basis of an apportionment according to surface area, the fixed rent of £2500 paid by the appellants for the whole subjects would fall to be allocated to the two parishes in the following proportions, viz.—parish of Torphichen, £242, and parish of Shotts, £2258, and the latter sum is the valuation placed by the Assessor for Lanarkshire upon the subjects leased by the appellants in the parish of Shotts for the current year.

"8. The Assessor for the county of Linlithgow valued the portion of the subjects in the parish of Torphichen upon the basis of the lordships payable upon the quantities of minerals worked in each parish respectively.

"9. The quantity of minerals worked in the two parishes respectively during the year 1910-11 would have yielded the following lordships:—

(1) Minerals in the parish of Torphichen,	£1797 19 3
(2) Minerals in the parish of Shotts,	616 11 5

making a total of £2414 10 8
or £85, 9s. 4d. less than the fixed rent of £2500 paid.

"10. The present appellants appealed to the Valuation Committee of the County Council of Linlithgow against the valuation of the Assessor, but the said Committee supported the Assessor's view, and held that the sum at which the minerals leased to the appellants in

the parish of Torphichen were let was £1797, 19s. 3d. These Feb. 3, 1912.
minerals have accordingly been entered in the Valuation-roll of the
county of Linlithgow at that amount."

The case further stated :—"The Committee, having considered the facts and arguments submitted to them, and the decision and opinions in the *Musselburgh* case¹ as reported, were of opinion that the principle applied in the *Musselburgh* case¹ and affirmed by the Lands Valuation Judges on appeal was applicable to the circumstances of the present case and should be applied, and, accordingly, sustained the valuation of the Assessor and dismissed the appeal."

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Linlithgowshire Case.

At a meeting of the Lands Valuation Committee for the County of Linlithgow, held at Linlithgow on 18th September 1911, The United Collieries, Limited, appealed against the following entry in the Valuation-roll of the county for the year ending Whitsunday 1912 :—

PARISH OF TORPHICHEN.

Description of Subjects.	Proprietor.	Tenants.	Occupier.	Yearly Rent or Value.
Minerals, Westcraigs.	Halkett, Lieut.-Colonel John Cornelius Craigie, per Mackenzie, Innes, & Logan, W.S., 25 Melville Street, Edinburgh.	United Collieries, Limited.	Tenants.	£1600

They craved that for the figures £1600 there should be substituted the figures £242.

The County Council of the county of Linlithgow and the Parish Council of the parish of Torphichen also appealed against the entry, and craved that for the figures £1600 there should be substituted the figures £1797, 19s. 3d.

The Valuation Committee found that the minerals referred to might reasonably be expected to let and were in actual fact let for the sum of £1797, 19s. 3d., and sustained the appeal of the County Council of Linlithgow and the Parish Council of the parish of Torphichen, and dismissed the appeal of The United Collieries, Limited.

The United Collieries, Limited, obtained a stated case on appeal.

The facts set forth in the case as admitted or proved were to the same effect as those already quoted from the Lanark case.

The two appeals were heard together on 14th December 1911.

Argued for the Assessor for Lanarkshire;—The correct principle of valuation was to apportion the total rent between the two counties in proportion to the surface acreage of the minerals. That was the method authoritatively sanctioned in analogous circumstances in *Edinburgh Collieries Company, Limited, v. Assessor for Musselburgh*.¹

¹ (1906) 8 F. 484.

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It was also supported by the undernoted cases,¹ and was the principle most readily applicable to every variety of circumstance.

Argued for the Assessor for Linlithgowshire;—The *Musselburgh* case² did not rule the present case, being clearly distinguishable. In that case there was no competition between two assessing areas as here. The real point in that case was whether, there having been no workings beneath the area within the burgh of Musselburgh, any entry at all fell to be made in the Valuation-roll of the burgh. The proper method of valuation was according to the actual output of coal from the area under each county. If the lordships from the whole area exceeded the fixed rent there was nothing to be done except to allocate to each county the lordships derived from its minerals; but if, as here, the fixed rent was in excess of the lordships, the amount by which the rent exceeded the lordships fell to be added to the actual lordships derived from each county in proportion to the amount of these lordships. It should not be forgotten that a mineral rent was not a rent in the proper sense of the word, but rather a purchase price.³

At advising on 3rd February 1912,—

LORD JOHNSTON.—The United Collieries, Limited, are tenants of Colonel Craigie Halkett, under a lease for thirty-one years from Martinmas 1901, of the minerals in his Harthill estate, at a fixed rent of £2500, with alternative lordships. It so happens that the Harthill mineral field is situated in two parishes and two counties, viz., 2172 acres in the parish of Shotts, and county of Lanark, and 233 acres in the parish of Torphichen and county of Linlithgow, and not unnaturally a question has arisen as to the apportionment of the valuation of the minerals in the two valuation areas.

Assessors have adopted a very reasonable rule in dealing with mineral valuations, viz., of taking the actual amount of fixed rent or lordships paid for one year as the value of the subjects for the ensuing year. But it seems obvious that something more is necessary, where the area subject to lease lies on both sides of a parish, and still more of a county, boundary.

It so happens that the workings at Harthill commenced at the Shotts end of the estate, and during the early period of the lease the whole coal raised came from Shotts, and there were no workings in Torphichen. But in 1910-11 the workings crossed the boundary, and though there was some working in Shotts, the major portion of the coal raised came from Torphichen. On the output of 1910-11 the valuation for 1911-12 fell, according to the practice above explained, to be adjusted. It is also the fact that so far, including the year 1910-11, the royalties have fallen short, though only to a small extent, of the fixed rent, and that therefore the fixed rent has been paid to Colonel Craigie Halkett.

In these circumstances the method adopted by the Assessors, following a

¹ *Blantyre Parochial Board v. Assessor for Lanarkshire*, (1883) 10 R. 773; *Dundee Water Commissioners v. Dundee Road Trustees, &c.*, (1883) 11 R. 390; *Ayr Harbour Trustees v. Assessor for Ayr*, (1894) 21 R. 807; *Edinburgh and Leith Gas Commissioners v. Assessor for Edinburgh*, 1909 S. C. 664.

² 8 F. 484.

³ *Dixon's Trustees v. Church's Trustees*, (1894) 21 R. 441, Lord Trayner, at p. 451.

pretty general, though not apparently universal, practice, has hitherto been Feb. 3, 1912.
 to apportion the rent paid according to the minerals raised, or, in other words, the royalties earned, in their respective districts. Accordingly, down to 1910-11, Shotts and Lanarkshire got the benefit of the whole rent paid, and the valuation in Torphichen and Linlithgowshire was entered at nil. But for 1911-12 the Assessor for Lanarkshire, acting, we are informed, under instructions applicable not merely to this subject, but to his whole district, and intended to introduce uniformity, has altered his method without the consent of the Assessor for Linlithgowshire, pleading that he is bound thereto by a certain decision in this Court in the *Musselburgh* case,¹ and has apportioned the rent according to the surface area of the field let, taking thus to Shotts and Lanarkshire nearly nine-tenths of the rent, whereas, on the basis of output, he could only have entered about three-tenths. The Assessor for Linlithgowshire, has, on the other hand, adhered to the old arrangement, and has apportioned the rent, taking as the share of Torphichen and Linlithgowshire the proportion effeiring to the output, viz., about seven-tenths, leaving three-tenths for Shotts and Lanarkshire; and the result to The United Collieries thus is, that on a rent of £2500 they are valued in Lanarkshire at £2258, and in Linlithgowshire at £1797, or at a total of £4055, whereas their actual rent paid is only £2500.

This is clearly an injustice for which there is no warrant in the Act, as it would lead to gross over-assessment, inasmuch as assessment follows valuation. The practice which has been adhered to throughout the current lease down to the current year would almost justify the conclusion that for this particular mineral field there had been an implied agreement for dividing the rental come to between the two districts at the commencement of the lease, and adhered to, or homologated, after the judgment in the *Musselburgh* case¹ was made public, not merely by the two Assessors, but by the party having the real pecuniary interest, viz., The United Collieries, Limited, the appellants here; which implied agreement must be held to be the rule for valuation during the remaining currency of the present lease. But I do not think it satisfactory that we should found our judgment on this consideration, as an assessor is theoretically only an executive officer, and has no power to bind the various interests concerned in his valuation; and still more as it is stated that the judgment in the *Musselburgh* case¹ has unsettled practice throughout the country, without laying down a comprehensive rule. I can well understand that that is the case, for the judgment studiously avoids considering the other contingencies which may occur, and confines attention to one side of the one contingency which was before the Court. I am afraid, therefore, that as the circumstances of the present case differ from those in the *Musselburgh* case,¹ it is necessary to reconsider that judgment with a view to fixing a rule which will be applicable in the circumstances of the present case, and in doing so I do not think that we can stop short of fixing a rule of general application.

In the *Musselburgh* case¹ the minerals let were situated partly in the parish of Inveresk and county of Midlothian and partly in the burgh of Musselburgh, and the fixed rent was paid, as it exceeded the royalties, but

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the other circumstances were different. The whole workings for the year in question were in the parish of Inveresk and county of Midlothian, and none at all in the burgh of Musselburgh. But the burgh Assessor was upheld in placing a share of the fixed rent, proportional to the area of the mineral field, on the subject so far as in Musselburgh, regardless of the fact that the lessees were valued on output in the county, and that in course of time the circumstances would change and the minerals in the county be exhausted, the workings being confined to the burgh of Musselburgh. The learned Judges who took part in the judgment held that as matters stood the Valuation Act left them no option but to sustain the entry in the Roll made by the burgh Assessor, disregarded the situation left untouched by the appeal in the parish of Inveresk and county of Midlothian, and declined to consider other and different cases which were not before them, or to attempt to lay down equitable rules for application to these cases, if and when they arose. Seeing that the rule adopted was not even assumed by the Court in the *Musselburgh* case¹ to be comprehensive, I feel that we are bound to reconsider it now that we have other circumstances before us, in order that we may see whether it will apply to these circumstances, or whether it interferes with the adoption of a rule which will do justice in these circumstances. If it can properly be made comprehensive, it has the merit of simplicity. If it cannot, it appears to me to introduce a most embarrassing factor into mineral valuations in general.

There are, then, including that which occurred in the *Musselburgh* case,¹ five contingencies which may arise where a mineral field under lease crosses the boundary of a valuation district, there being an area of minerals on either side of the boundary line.

First. No minerals may be worked during the year of assessment in either area.

Second. Minerals may be worked in one area and none in the other (whether the workings have not yet reached that other, or it is exhausted), and the fixed rent exceed the royalties.

Third. Minerals may be worked in one area and none in the other, and the royalties exceed the fixed rent.

Fourth. Minerals may be worked in both areas, and the fixed rent exceed the royalties.

Fifth. Minerals may be worked in both areas and the royalties exceed the fixed rent.

It is evident that the rule of the *Musselburgh* case¹ does not, at least at first sight, suit all these cases, and particularly the third and fifth. And therefore I think it convenient at once to consider the proposition that the Valuation Act leaves no option but to sustain a division of fixed rent in the proportion of surface area. For I have difficulty in seeing why, if it compels the division of fixed rent, it should not equally compel a division of royalties in the same proportion, or why, if the rule of the *Musselburgh* case¹ has been applied for years because the royalties have been, it may be, a few pounds only, below the fixed rent, a sudden change, producing an alteration in the incidence of taxation, should be brought about by the fact

¹ 8 F. 484.

that the royalties have for any year risen, it may be, only a few pounds above the fixed rent.

I do not wish to urge too much the view, though it is accurate, that a lease of minerals partakes much more of the nature of a sale than of a lease, though this fact enters deeply into the consideration of the present question. The lease of the minerals or of certain minerals beneath a particular surface area is not a grant of the user of anything *salva rei substantia*; it is the grant of a right to work, win, and carry away a part of the *solum* within that area. Now, a seam of minerals throughout any given area, at least such an area as is likely to be leased, is never uniform. It varies in thickness, and therefore in value, from acre to acre. It runs out in one direction, leaving nothing to be worked. It is broken up by faults here and faults there, rendering sections of the area workable to less or even no profit, although the workings must be carried through. And in another direction it is workable to the maximum of profit. Consequently a division of the rental or of the lordships proportional to surface area, though it might be easy and convenient, would rarely, if ever, give to any portion of the mineral field a valuation corresponding with the real value of the minerals within it. It would not, therefore, be at all equitable. Is there, then, anything in the Valuation Act of 1854¹ which obliges one to adopt it?

Turning to the Act, it is found that by section 42 the expression "lands and heritages" is defined to include, *inter alia*, "coalworks" with their fixed machinery, provided that no mine shall be assessed unless it has been worked during some part of the year to which such assessment applies. Section 6, which regulates the estimation of yearly rent or value, commences by stating that, "In estimating the yearly value of lands and heritages under this Act, the same shall be taken to be the rent at which, one year with another, such lands and heritages might in their actual state be reasonably expected to let from year to year." The proviso in the interpretation clause above referred to renders this part of section 6 inapplicable to mines or minerals which are not actually being worked. But section 6 proceeds,— "Where such lands or heritages are *bona fide* let for a yearly rent conditioned as the fair annual value thereof, . . . such rent shall" (provided the lease in a case of minerals is for not more than thirty-one years) "be deemed and taken to be the yearly rent or value of such lands and heritages in terms of this Act." The proviso in the interpretation clause above referred to would at first sight appear to clash with this enactment, and except from valuation minerals leased for a fixed rent but not at present worked. But I think that where a fixed rent is stipulated, the minerals must be held by implication to be worked in the sense of the interpretation clause. This part of section 6 therefore applies to minerals let whether they are being worked or not, provided there is, as is usual, a fixed rent stipulated, as well as an alternative of royalties. In any view this part of the section applies to the present case. Now, though it may be very simply applied in the case where the area, the minerals in which are leased, is wholly within one valuation district, it affords no assistance to the apportionment of the rent or value where this area lies

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¹ 17 and 18 Vict. cap. 91.

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within two or more valuation districts; and I find nothing in the terms of the section which compels or leaves no option other than a division of the gross rental between such districts in proportion to the surface area. It fixes the gross valuation, but it says nothing about, and did not contemplate, apportionment. But one thing that it does make clear is that the *cumulo* valuation of the minerals in such separate areas can never exceed the gross rental derived from the lease of such minerals within the whole area let. It is necessary, therefore, in working the Act, according to its clear intention, in supplement of its provisions for valuing particular lands and heritages, to find some equitable rule (for I think it is putting it too high to call it principle) for the division of such rent or value where the circumstances require it; and I think that such equitable rule may most properly be derived from the consideration to which I have already adverted of what a lease of minerals really is.

So proceeding: In the first contingency which I have enumerated, inasmuch as the minerals are unworked in both areas there is nothing to resort to but a division in proportion to surface area, for the minerals are as yet unproved, and in the meantime, unless there is to be no apportionment at all, they can only be assumed to be uniform. As soon as they commence to be worked there is room for the application of a more equitable rule, viz., that each area respectively should get the benefit of the minerals actually extracted therefrom, reckoned at the amount of royalties produced, the division by surface area only being resorted to so far as the royalties fall short of the fixed rent for apportionment of any balance.

Thus, in the second contingency enumerated, the royalties earned in the area worked should be attributed to the district in which that area lies, but as they do not, *ex hypothesi*, exhaust the fixed rent, the balance of fixed rent in excess of the lordships should, applying the consideration which dictated a determination in the first contingency, be divided between the two districts in proportion to surface area.

In the third contingency enumerated, the whole royalties will fall simply to be attributed to the district in which the area is situated from which they have been earned.

In the fourth contingency enumerated, the royalties earned will fall to be divided between the two districts in proportion to the output from the area respectively worked in each, and the balance of fixed rent in excess of the royalties will fall to be divided in proportion to the surface area.

In the fifth contingency enumerated, the royalties will fall simply to be divided in proportion to the output respectively in the two areas.

In this way, taking a lease of minerals, year in year out, an equitable division for valuation purposes will be made, as nearly as may be in the circumstances, of the return from the minerals in the area leased during the gross currency of the lease, for it will be, as nearly as the course of working under the lease allows, a division according to the output of minerals extracted from each respective area. Justice will be done to the two districts respectively and no injustice to the mineowner, for he will never be called on in any year to submit to assessment on more than his actual year's rent or value.

If this rule be adopted, as I propose to your Lordships it should be, it may be applied at once in the present case, without substantial disturbance

of any present arrangement in which parties interested have acquiesced, for Feb. 8, 1912. it differs very little from the rule which has hitherto been applied. If there be any cases in which its application to current leases would cause a disturbance of a method of division which may be held to have been impliedly agreed upon as the rule of division for the particular subject and lease, so as to cause injustice, these may possibly have to be separately considered. But the above is what I should propose to your Lordships as an equitable and general rule, which should be adopted by assessors for the future, in cases in which they have to deal with mineral fields extending into more than one valuation district.

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LORD SALVESEN.—The appellants in these two cases are lessees of a mineral field lying partly in the county of Linlithgow and partly in the county of Lanark. The fixed rent is £2500 per annum; or, in the option of the landlord, royalties upon the minerals actually worked. The area of the mineral field let under the lease extends to 2172 acres in the county of Lanark, and 233 acres in the county of Linlithgow. While the appeals are at the instance of the tenants, the true controversy is between the Assessors of Lanark and Linlithgow; and raises a question as to the apportionment of the fixed rent between them. The Valuation Committee of Lanark have held that the rent falls to be apportioned between the two counties according to the extent of the surface area within each. The Valuation Committee of Linlithgow, on the other hand, have come to the conclusion that the rent must be apportioned according to the royalties payable on minerals actually worked. There is, therefore, a sharp conflict with regard to the principle of apportionment.

The appellants have possessed, under the mineral lease in question, for eight or nine years. During that period, with the exception of the last year, the whole of the minerals actually worked by the appellants have been in Lanark; and the Assessor of that county, in accordance with the practice which was then in vogue, claimed that the fixed rent paid by the appellants must be treated as entirely applicable to the minerals lying within that county. This claim was acquiesced in by the Assessor of Linlithgow; and no part of the fixed rent has hitherto been allocated to that county. The position last year was reversed, for the amount of lordships payable on minerals worked under the lease within Linlithgow came to £1797, 19s. 3d., whereas that for the minerals taken from the Lanark area was only £616, 11s. 5d. The Assessor of Lanark now claims that the apportionment of the fixed rent should be made on the basis of acreage, and on this he has been sustained by his Valuation Committee. This claim rests on a decision of this Court in *The Edinburgh Collieries Company, Limited, v. The Assessor for Musselburgh*.¹ That decision was pronounced on 7th February 1906; but it has been ignored by the Assessor for Lanark until the present year.

The method of apportionment, according to acreage, is probably the only one which is available where there have been no workings under the mineral lease. In the absence of information on the subject it may then be assumed that the minerals beneath the two areas embraced in the lease

¹ 8 F. 484.

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are similar in quantity, and that the *cumulo* rent is paid upon that assumption ; but where the whole output has come from below lands in one county, and the lordships on that output equal or exceed the fixed rent, there seems no reason, *a priori*, why the county from beneath which no minerals have been extracted should share in the lordships paid for the removal of coal situated in an adjoining county. It would rather seem that there is no necessity to have recourse to a presumption which must rule when no information exists as to the character of the mineral strata. The mere surface extent of lands may have no relation to the quantity or value of the minerals below, even when the same seam underlies two adjoining areas situated in different counties. In one area the seam may be much thinner than in the other ; or there may be faults which render it unprofitable to work the coal in part or in whole, while the coal beneath the other may be all workable to profit. Further, a time must arrive when the whole coal under the one area has been exhausted ; and yet, if the Assessor of Lanark is right, the county in which that area was situated would still participate in the lordships derived wholly from coal in the adjoining county, according to the proportion that the surface area bore to the whole area leased.

Had the matter, therefore, come before us for decision for the first time, I should have had no hesitation in holding that the true principle of apportionment must have relation to the actual coal abstracted during the particular year. But the *Musselburgh* case¹ undoubtedly raised exactly the same question ; and it was there held by Lord Low and Lord Dundas, who constituted the Valuation Appeal Court at the time, that although there had been no workings beneath the area which was within the burgh of Musselburgh, the fixed rent fell to be apportioned, to the extent of £215 out of £500, to the burgh. That decision is entitled to the utmost respect, and, if it had professed to fix a principle of apportionment applicable to all leases of minerals situated in two different counties, ought not to be reconsidered without the fullest deliberation. Lord Low, however, in his opinion expressly leaves open the question whether, when the minerals in the county had been worked out, the unworked minerals within the burgh would then fall to be valued solely for the benefit of the burgh ; and Lord Dundas said that he was not prepared to attempt to lay down equitable rules for application to cases which had not arisen. Both Judges seem to have thought that the real question was whether an entry fell to be made in the Valuation-roll of the burgh of Musselburgh at all, and not to have applied their minds to the question of value. Moreover, in that case there was no competition between two assessing areas as there is here, so that the question of apportionment did not arise sharply for determination. There is this further distinction in fact, that the working under the lease had been confined to the one area, whereas, in the present case, there has been working beneath both areas ; although I cannot say I lay any stress upon that distinction.

From a practical point of view, the method applied in the *Musselburgh* case¹ undoubtedly commends itself by its simplicity ; and where nothing has to be apportioned but a fixed rent, this can be effected by a simple

¹ 8 F. 484.

arithmetical sum, without reference to the actual workings which have taken place. On the other hand, it is notorious that in most colliery leases, as in the one in question, while there is a fixed rent stipulated, the lord has the option to exact a lordship upon every ton of output, and generally finds it to his interest to do so. Where the lordships are in excess of the fixed rent, it is the duty of the Assessor to enter this amount as the annual value of the subject, and not the fixed rent, which may be more or less nominal. In the ordinary case, therefore, it is the duty of the Assessor to ascertain what the actual output has been, and he can, no doubt, get the information either from the landlord or the tenant, or from both. That there can be no practical difficulty in following this method is plain from the statement in the case that this method has been followed in both counties until the present year, and no doubt would have been continued but for the decision in the *Musselburgh* case,¹ which was thought to establish a new method as the only legal method. It may therefore be presumed that the balance of opinion was in favour of the older method of apportionment, and that it was, on the whole, as convenient as that which was substituted. In my opinion it is also more equitable as between two land areas; and as no extensive practice has, so far as we know, followed upon the new method, it is desirable that it should be re-established as the legal method of apportionment.

There remains to consider a small specialty in the present case. It has been ascertained that the total amount of the lordships on the coal worked below both areas is less than the fixed rent, there being a difference of £85, 9s. 4d. The question is, How does this sum fall to be apportioned? The Assessor for Linlithgow maintains that it should be apportioned according to the lordships on the coal abstracted respectively from the two areas. I am inclined to think that here it is fairer and more in accordance with principle to resort to apportionment according to surface area, just as where the minerals have not been worked at all. There is no presumption that, if more coal had been taken out, the larger part of it would have been taken from below the area situated in Linlithgow. A presumption must always yield to actual facts; but, so long as it is not so displaced, it appears to me better to apply it throughout. I am therefore of opinion that the Valuation-rolls should be corrected by substituting for the sum £1600, in the entry applicable to the county of Linlithgow, the sum of £1797, 19s. 3d. plus, approximately, one-tenth of the £85, 9s. 4d.; and that in the Valuation-roll of the county of Lanark the difference between the fixed rent and the sum of these two figures should be substituted for the entry of £2258.

LORD CULLEN concurred.

THE COURT were of opinion that the determinations of both Valuation Committees were wrong, and that in the Lanarkshire case the valuation should be £693, 15s. 2d., and in the Linlithgowshire case £1806, 4s. 10d.

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TODS, MURRAY, & JAMIESON, W.S.—Agents.

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No. 116. PARISH COUNCIL OF THE CITY OF EDINBURGH, Complainers and
 Appellants.—*D.-F. Dickson—Kemp.*
 Feb. 3, 1912. PROVOST, MAGISTRATES, AND COUNCILLORS OF THE BURGH OF LEITH,
 Respondents.—*Morison, K.C.—Lippe.*
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 of Leith. *Valuation Acts—Value—Public park—Land leased by burgh authorities
 for golf course—Lands yielding no profit.*

The magistrates of a burgh, acting under statutory powers, obtained a forty years' lease of a piece of ground at a rent of £523, and laid out and maintained the ground as a golf course for the use of the inhabitants of the burgh. They levied charges for playing golf thereon, but these did not cover the cost of upkeep.

Held that the subjects fell to be entered in the Valuation-roll at their fair annual value, and not at a merely nominal figure.

Opinion that the magistrates and not the general public were the "occupiers."

Lands Valua- AT a Court of the Magistrates of the city of Edinburgh held on 25th
 tion Appeal September 1911 to dispose of appeals and complaints against valua-
 Court. tions made by the Burgh Assessor for the year ending Whitsunday
 Ld. Johnston. 1912, the Parish Council of the city of Edinburgh complained of the
 Lord Salvesen. following entry in the Valuation-roll:—
 Lord Cullen.

Case 308.

Description.	Situation.	Proprietor.	Tenant.	Occupier.	Yearly Rent or Value.
Ground.	Craigentinny.	Provost, Magistrates, and Councillors of the Burgh of Leith, as Local Authority under the Public Parks (Scotland) Act, 1878.	The Public.	Same.	£1

They proposed that the following entry should be substituted:—

Description.	Situation.	Proprietor.	Tenant.	Occupier.	Yearly Rent or Value.
Golf Course and Pavilion.	Craigentinny.	Provost, Magistrates, and Councillors of the Burgh of Leith, per John Russell, Town Hall, Leith, Chamberlain.		Proprietors.	£600

The Magistrates having dismissed the complaint and sustained the entry proposed by the Assessor, the Parish Council obtained a stated case for appeal, which set forth:—

"The following facts were admitted or held by the Committee to be proved, or within the knowledge of the Committee:—

"1. The subjects in question, consisting of an area of ground extending to 42.62 acres or thereby, part of the estate of Craigen-tinny [for which Sydney Richardson Christie-Miller was commissioner], are known as the burgh of Leith public park and golf course, and lie within the boundaries of the city of Edinburgh. The subjects are leased by the Provost, Magistrates, and Councillors of the burgh of Leith as after mentioned for the purpose of a public park and golf course, in terms of the Public Parks (Scotland) Act, 1878, and the Leith Burgh Order Confirmation Act, 1904. . . . *

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* The Leith Burgh Order, 1904, as confirmed by the Leith Burgh Order Confirmation Act, 1904, provides, *inter alia* :—

"12. From and after the commencement of this Order it shall not be lawful to play football or golf, or to kick, hit, strike, or propel as in either of these games any ball or other similar thing in or over Leith Links.

"15. (1) Subject to the provisions of the section of this Order, of which the marginal note is 'Prohibition of football and golf on Leith Links,' the Town-Council may from time to time set apart, enclose, and adapt any reasonable portion or portions of the parks, recreation grounds, or open spaces belonging to them or under their control (in this section referred to as 'the parks'), for cricket, tennis, bowls, skittles, quoits, and other games, pleasure walks, and children's playgrounds, the riding, driving, and exercise of horses, for cycling, and for music and other entertainments, and any ponds or ornamental waters thereon, for skating, curling, sailing of boats or model yachts, or any reasonable portion or portions of the parks for any form of recreation and amusement.

"(2) The Town-Council may acquire, enclose, and adapt any ground, whether within or beyond the burgh, suitable for such purposes, construct thereon, or in the parks, any ponds or ornamental waters, provide apparatus, appliances, and equipment for the purposes aforesaid, and music, concerts, and entertainments, and may from time to time erect and maintain pavilions, bandstands, waiting-rooms, refreshment-rooms, stores, shelters, baths, lavatories, and other buildings for the convenience of players or the general public, and appoint officers, servants, and attendants for taking charge thereof.

"(4) The Town-Council, or their lessees, may demand and take reasonable charges for admission to or the use of any reasonable portion or portions of the parks set apart for any of the purposes before mentioned, and for admission to or the use of pavilions, waiting-rooms, refreshment-rooms, stores, shelters, baths, lavatories, and other conveniences, and for the use of apparatus, appliances, and equipment. . . .

"(6) The Town-Council may defray the cost of anything done by them under this section out of the assessment provided by the Public Parks (Scotland) Act, 1878, or any other assessment leviable within the burgh, applicable to all or any of the purposes aforesaid, provided that the Dock Commissioners shall be exempt from any assessment under and for the purposes of this section.

"(7) The provisions of this section shall have effect within the burgh in place of those of section 44 of the Burgh Police (Scotland) Act, 1903. . . ."

Section 4 of the Leith Burgh Order, 1907, as confirmed by the Leith Burgh Order Confirmation Act, 1907, provides :—

"Subsection (1) of section 15 (games, &c., in parks) of the Leith Burgh Order, 1904, may, if the Town-Council so determine, be read in its application to the playing of the games of football and golf on the lands at Craigen-tinny leased by the Town-Council for use as a golf course as if the words 'any reasonable portion or portions of' were omitted therefrom."

Section 3 of the Leith Burgh Order, 1904, and section 2 of the Leith Burgh Order, 1907, provide, *inter alia*, that the expression "The Burgh"

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"4. By minute of lease, dated 25th February and 5th March 1907, the said Sydney Richardson Christie-Miller, for himself and as Commissioner foresaid, let the subjects in question to the respondents, as the Local Authority for the said burgh, under the Public Parks (Scotland) Act, 1878, for a period of forty years from the term of Whitsunday 1907, subject to a break in favour of the respondents at the term of Whitsunday 1927. The rent payable by the respondents under the lease is as follows:—(1) For the two years from Whitsunday 1907 to Whitsunday 1909 the sum of £350 per annum; (2) for the eighteen years from Whitsunday 1909 to Whitsunday 1927 the sum of £532, 15s.; and (3) for the twenty years from Whitsunday 1927 to Whitsunday 1947 the sum of £639, 6s. per annum.

"5. The said lease contains the following provisions:—(1) That the ground is let to the respondents for the purposes of a public park and golf course in terms of the Public Parks (Scotland) Act, 1878, and the Leith Burgh Order Confirmation Act, 1904, and any Act or Acts amending the same, and shall not be used by the respondents for any other purpose; (2) that, within three years from Whitsunday 1907, the respondents shall form on the ground a proper golf course, of not less than 9 holes, with appropriate putting greens, teeing grounds, and bunkers, and maintain the same during the currency of the lease; (3) that the respondents shall not allow any public meeting or entertainment to be held, or any games other than golf to be played, on the ground, or permit the ground to be used for any purpose which may prove a nuisance, but they shall be entitled to appropriate to games other than golf a specified part of the ground not exceeding 2 acres in extent; (4) that no buildings shall be erected on the ground other than a golf-house, shelter, tool-house, and such other buildings as may be required in connection with the use of the ground as a public park and golf course; (5) that the respondents shall, subject to the approval of the lessors, make bye-laws and regulations for the proper use of the ground, and duly enforce the same, which bye-laws shall, *inter alia*, provide that golf balls played into adjoining ground are to be held as lost, and shall prohibit players from searching for the same and from climbing over the fences and walls; (6) that the respondents shall, within six months of the term of Whitsunday 1907, enclose the ground (so far as not done at the commencement of the lease) with an unclimbable iron fence, and maintain the boundary walls and fences during the currency of the lease; and (7) that no person other than the lessees' own proper officers shall remain on the ground between one hour after sunset and one hour before sunrise, except such persons as may be required in connection with the grazing of the subjects let.

"6. The subjects in question are now open to and frequented by the public as a public park and recreation ground. The respondents have formed on the said subjects a golf course, and allow the public to use the same, subject to rules made by the respondents in terms of said lease. No charges are made to the public for admission to the said subjects, but persons are charged sums at the rates specified in Table No. 4 appended hereto for the right to play the game of

as used in the said Orders shall mean the burgh of Leith within the boundaries for the purposes of the Burgh Police (Scotland) Acts, 1892 to 1903, and that the expression "The Town-Council" shall mean the Provost, Magistrates, and Councillors of the burgh acting in any capacity.

golf on the subjects. The expenditure incurred in connection with the subjects has in each year since 1907 much exceeded the total revenue obtained from the subjects. . . .

"The complainers contended that, on the question of valuation, the case of *The Parish Council of Edinburgh, &c., v. The Assessor for Edinburgh, &c.*, 1910 S. C. 823, is not applicable to the present case; that 'The Public' should be deleted from the entry in the Roll, and the respondents entered as the occupiers of the subjects in question; that, in regard to the yearly rent or value of the said subjects, the same should be arrived at by taking the rent payable under the lease and adding thereto the same sum which the Assessor did in fixing his valuation of the subjects for the year 1909-10 in respect of tenants' improvements; and, in any event, that the subjects in their actual state are of the yearly rent or value of at least £600.

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"The respondents maintained that, as the subjects were held on lease for more than twenty-one years, they were to be deemed to be the owners thereof in terms of section 6 of the Lands Valuation Act, 1854, and, as the subjects were appropriated to the use of the public for the purposes of exercise and recreation, the respondents were correctly entered in the Valuation-roll as owners, and the public as the tenants and occupiers of the same; and that in regard to the yearly rent or value of the subjects, they fell to be valued on the footing that they were so appropriated, and subject to the restrictions affecting the same; that on this basis, and keeping in view that the cost of maintaining the subjects for the use of the public is in excess of the revenue which could be obtained therefrom, the nominal sum of £1 represented the maximum rent at which the subjects would be let in their present condition.

"The Committee, having heard the evidence and the arguments for the parties and considered the whole case, were of opinion:—

"1. That the said lease of the subjects being for a period exceeding twenty-one years, the respondents, the Provost, Magistrates, and Councillors of the burgh of Leith, fell to be deemed and taken to be the owners of the subjects, and to be entered in the Valuation-roll as such.

"2. That the subjects being appropriated to the use of the public for the purposes of exercise and recreation, the public were correctly entered in the Roll as the tenants and occupiers thereof.

"3. That since 1907 the expenses of maintenance have in each year exceeded the revenue obtained from the subjects.

"4. That the said lease being for a period exceeding twenty-one years, the Committee were not bound by the rent stipulated for in the lease.

"5. That the subjects being appropriated as aforesaid fall to be valued on that footing, and subject to the restrictions and conditions affecting the same; and that on this basis a nominal sum represented the maximum rent at which the subjects could be let in their present condition."

The case was heard on 13th December 1911. The Court, without hearing argument for the appellants, called upon the respondents, by whom the undernoted authorities were cited.¹

¹ *Lambeth Overseers v. London County Council*, [1897] A. C. 625; *Parish Councils of Glasgow and Govan v. Assessor for Glasgow*, 1910 S. C. 823; *Parish Councils of Glasgow and Govan v. Assessor for Glasgow*, 1911 S. C. 988.

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At advising on 3rd February 1912,—

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LORD JOHNSTON.—In 1907 the Magistrates of Leith obtained a lease from the estate of Craigentenny of forty-two acres of land, outside the boundary of their burgh and in the parish of Edinburgh, for the space of forty years at a gradually increasing rent. That rent for the year in question is £532, 15s., and as a condition of the lease the Magistrates have had to expend considerable sums, which have materially increased the value of the occupation. The purpose of the lease was to form a golf course for the public of Leith, in substitution for Leith Links, which, under the Leith Provisional Order, 1904, are now closed to such games.

As the lease is for forty years, the Magistrates are properly entered as proprietors in terms of the Valuation Act, 1854.¹ Their powers to acquire the ground are derived from The Public Parks (Scotland) Act, 1878,² and their own Provisional Orders of 1904 and 1907. The Act of 1878 empowers them to lease as well as to purchase. If magistrates desire to acquire land for the purpose of the Act they may do so by voluntary transaction; if they require to acquire compulsorily, they may obtain a Provisional Order under a special code provided by the Act. And the Act empowers them to assess for its purpose and to borrow. One of the special conditions of this lease is that the land is to be used for no other purpose than that of a golf links. And the Act gives power to the Magistrates to make charges for the privilege of using the links; which powers have been exercised, but the charges made do not produce enough to meet the rent and cost of upkeep.

The Valuation Committee have sustained an entry of the Magistrates of Leith as proprietors, which is correct, and of the public as tenants and occupants, which, in my opinion, is incorrect, and have sustained a nominal valuation, on the assumption that the case is governed by the decision of this Court in the case of the *Parish Council of Edinburgh v. The Assessor of Edinburgh*.³

The Parish Council of Edinburgh have appealed. The proprietors of the land, who are now receiving a rent of £532, 15s., not unnaturally make common cause with the Magistrates of Leith, as the result of the Committee's judgment is to let them go scot free in the matter of local taxation.

I do not think that it is necessary for me to do more than refer to your Lordships' judgment in the *Glasgow General Parks* case,⁴ and to say that the present case shows to what an extravagant result the decision on which the Committee have based their determination is capable, and logically capable, of being pushed.

I propose therefore to your Lordships that the valuation of £600, at which the subjects stood for the year 1910, be reverted to.

LORD SALVESSEN.—I agree. I have already incidentally expressed my opinion as to this case in my opinion in the *Glasgow General Parks* case.⁴

¹ 17 and 18 Vict. cap. 91.

² 1910 S. C. 823.

³ 41 and 42 Vict. cap. 8.

⁴ *Infra*, p. 818.

LORD CULLEN.—The subjects in question in this case, known as the Leith Public Park and Golf Course, are let by the proprietor of the land to the respondents, the Leith Corporation, under the lease mentioned in the case, which is for forty years with a break at 1927. They are expressly let only for the purpose of a public park and golf course, in terms of the Public Parks (Scotland) Act, 1878, and are used as such by the inhabitants of Leith. The respondents have laid out a golf course, and they levy charges from players, but no charge is made for admission to the park. The regulation and control of the subjects is in the hands of the respondents, who maintain them and attend to the general management of them.

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As the lease is for a period exceeding twenty-one years, the respondents have been entered in the Roll as proprietors. The "public" are entered as the "occupiers." The annual value is entered at the merely nominal sum of £1, by way of expressing the view of the Assessor and the Valuation Committee that for the purposes of the Valuation-roll the subjects fall to be regarded as having no annual value.

We are not empowered to alter the entry in the "occupiers" column. It appears to me, however, that the occupiers of the subjects are none of the individual inhabitants who, less or more, and from time to time, use the parks without occupying, nor all of them together; but the occupiers are the respondents, who are the tenants, and who occupy the subjects in order to discharge their functions of controlling and managing them so that they may be duly available for use by such of the inhabitants as choose to use them.

As regards the valuation, I am clearly of opinion that the entry of the subjects at a nominal value or at no value is wrong. The subjects are let by the owner to the Corporation at a large rent. Had the duration of the lease not exceeded twenty-one years, the rent payable under it would have fallen to be entered in the Roll as the annual value in terms of section 6 of the Act of 1854. As, however, the lease is for forty years, the respondents are, under that section, deemed to be proprietors, and the yearly rent or value falls to be ascertained irrespective of the amount of rent payable under the lease. On this footing the figure of £600 proposed by the appellants was not challenged by the respondents in their argument before us. I am therefore of opinion that the determination of the Valuation Committee should be altered, and that the subjects should be entered in the Roll at the annual value of £600.

THE COURT were of opinion that the determination of the Magistrates was wrong, and that the subjects should be entered in the Roll at £600.

R. ADDISON SMITH & Co., W.S.—R. H. MILLER & Co., S.S.C.—Agents.

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Corporation.PARISH COUNCIL OF THE PARISH OF GLASGOW, Complainers
(Appellants).—*Murray, K.C.—Hon. W. Watson.*ASSESSOR FOR GLASGOW, Respondent.—*Clyde, K.C.—H. P. Macmillan.*PARISH COUNCIL OF THE PARISH OF GLASGOW, Complainers
(Appellants).—*Murray, K.C.—Hon. W. Watson.*
THE MAGISTRATES AND CORPORATION OF GLASGOW, Complainers
(Respondents).—*Clyde, K.C.—H. P. Macmillan.*
ASSESSOR FOR LANARKSHIRE, Respondent.—*Dunbar.**Valuation Acts—Value—Public parks—Parks owned and regulated by Corporation under statutory powers—Lands yielding no profit—Hypothetical tenant.*

The Corporation of Glasgow were empowered by certain statutes to lay out and maintain on lands already acquired, or to be acquired, by them under the statutes, parks for the use of the public of Glasgow. The statutes, which contained no express dedication of the lands to the use of the public generally or of the public of Glasgow in particular, empowered the Corporation to make rules and bye-laws regulating the use of the parks, and also to sell, feu, or lease such portions as they considered unnecessary for the purposes of the Acts. The income derived from the exercise of the latter power was however negligible, and the parks were maintained at a heavy annual cost to the Corporation.

Held that parks, both within and without the limits of the city, owned and maintained by the Corporation in terms of these statutes and yielding no profit, fell to be entered in the Valuation-roll, not at a merely nominal figure, but at the rent which a hypothetical tenant might be expected to give for them in their actual condition, irrespective of any limitations on their use in the hands of their present proprietors.

Opinion that the proper entry in the Valuation-roll under the head "Occupier" was "The Corporation" and not "The Public."

Parish Council of Edinburgh v. Assessor for Edinburgh, and Parish Councils of Glasgow and Govan v. Assessor for Glasgow, 1910 S. C. 823, overruled.

Lambeth Overseers v. London County Council, [1897] A. C. 625, distinguished.

Valuation Acts—Subjects—Cumulo or separate valuations—Houses and offices situated in and used in connection with public park.

Held that houses and offices situated in and used by the officials of a public park belonging to the Corporation of Glasgow did not fall to be separately entered and valued in the Valuation-roll, but that the park, houses, and offices fell to be treated as a *unum quid*.

Parish Councils of Glasgow and Govan v. Assessor for Glasgow, 1911 S. C. 988, followed.

I.—General Parks Case.

Lands Valua-
tion Appeal
Court.Ld. Johnston.
Lord Salvesen.
Lord Cullen.Cases 306,
307.

AT a Court of the Magistrates of the city and royal burgh of Glasgow, held on the 30th day of September 1911, to dispose of complaints and appeals against valuations made by the Burgh Assessor for the year ending Whitsunday 1912, the Parish Council of the parish of Glasgow complained under section 13 of the Lands Valuation (Scotland) Act, 1854, and section 6 of the Valuation of Lands (Scotland) Amendment Act, 1879, against the following entry in the Roll:—

PARISH OF GLASGOW.

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Description.	Situation.	Proprietors.	Tenant.	Occupier.	Yearly Rent or Value.	Glasgow Parish Council v. Assessor for Glasgow.
Public Park, Buildings, &c.	Alexandra Park.	The Corporation of the City of Glasgow (Parks Department).	None.	The Public.	£1	Glasgow Parish Council v. Glasgow Corporation.
Public Park, Buildings, &c.	Glasgow Green.	do.	do.	do.	£1	
Public Park, Buildings, &c.	Kelvingrove Park.	do.	do.	do.	£1	
Public Park, Buildings, &c.	Firhill Road (Ruchill Park).	do.	do.	do.	£1	
Public Park, Buildings, &c.	Balgray Hill (Springburn Park).	do.	do.	do.	£1	
Recreation Ground.	Argyle Street (Bunhouse Recreation Ground).	do.	do.	do.	£1	

They craved that the entry in the Roll should be altered by substituting in the "Occupier" column for the words "The Public," the words "The Corporation of the City of Glasgow (Parks Department)" and by substituting in the "Yearly Rent or Value" column, opposite the names of each of the parks, for the figures £1 the following figures, viz., Alexandra Park, £60; Glasgow Green, £420; Kelvingrove Park, £250; Firhill Road (Ruchill Park), £150; Balgray Hill (Springburn Park), £150; Argyle Street (Bunhouse Recreation Ground), £60.

The Magistrates having dismissed the appeal, the appellants obtained a stated case, which set forth that the following facts were admitted or held by the Magistrates to be proved:—

"1. The first Act of Parliament obtained by the Corporation authorising them to lay out and maintain public parks, gardens, recreation grounds, and open spaces in and adjacent to the city, was the Glasgow Public Parks Act, 1859 (22 and 23 Vict. cap. xvii.). This Act, however, was repealed and superseded by the Glasgow Public Parks Act, 1878 (41 and 42 Vict. cap. lx.); and it is under the authority of the last-mentioned Act and subsequent Acts altering or amending the same (hereinafter referred to as 'the Parks Acts') that the Corporation have acquired, provided, laid out, hold, and maintain, *inter alia*, the public parks and recreation ground to which this case relates.

"2. Of the parks and recreation ground dealt with in this case, all except Glasgow Green have been entered in the Valuation-roll at the nominal value of £1 each since the year 1909-10. Glasgow Green has been entered at the same nominal annual value of £1 since 1900-1.

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“ 3. The parks and recreation ground in question are all open to, and used by, the public for the purposes of recreation and exercise, subject to the bye-laws and rules made by the Corporation in terms of the Acts of Parliament relating thereto and to the provisions of the said Acts, except in so far as members of the public are excluded by the Corporation from certain portions thereof, which are used either by the Corporation themselves for the accommodation of their servants employed in connection therewith, or for purposes in connection with the upkeep of the grounds, or by tenants or licencees of the Corporation as after mentioned.

“ 4. In the case of several of the said parks certain fields therein are let for grazing during the period from 1st April till 30th November in each year, from which fields the public are excluded during these periods. The extent of ground so let is small in proportion to the total area.

“ 5. In 1888 and again in 1901 the Corporation gave, free of rent, a portion of the Kelvingrove Park as a site for the Glasgow International Exhibitions held in each of these years. A portion of the Glasgow Green was also given, free of charge, for the Highland and Agricultural Society's Show, held in Glasgow in July 1897. The Corporation also gave, free of charge, a portion of the Kelvingrove Park for the Scottish Exhibition of National History, Art, and Industry, held in Glasgow in the current year. The public are excluded from the portions of park so used by the Corporation's licencees. As regards Kelvingrove Park, which extends in all to $87\frac{1}{2}$ acres, about 67 lie in the parish of Glasgow, and about $20\frac{1}{2}$ in the parish of Govan. The area enclosed in the portion granted to the said Exhibition for the current year, Whitsunday 1911 to Whitsunday 1912, amounts to 47 acres, of which 41 acres lie in the parish of Glasgow, but since October 1911 certain portions of the area occupied by the Exhibition are being given back to park uses as the buildings therein are removed and the grounds restored.

“ 6. A portion of the Bunhouse Recreation Ground, extending to 3666 square yards, has been let on lease by the Corporation for the erection thereon of a roller-skating rink, for three years from Whitsunday 1909, at a rent of £500 per annum. This portion of the Bunhouse ground, however, and also any part of, or pertinent within, any of the other parks referred to in this case which is let on lease by the Corporation from year to year, is separately entered in the Valuation-roll for the said year from Whitsunday 1911 to Whitsunday 1912 at the actual rent received therefor, except fields let for periods of less than three months for grazing purposes, and no appeal or complaint is made by the complainers against the valuation of the portions so let. The remainder of the Bunhouse ground is fenced in and laid off for various games, such as football and cricket, for which no charge is made.

“ 7. For the purpose of increasing the means of recreation, exercise, and enjoyment in the said parks there have been provided in (1) the Glasgow Green, three gymnasias for children, and four public bowling-greens; (2) the Kelvingrove Park, four public bowling-greens; (3) the Alexandra Park, two public bowling-greens, a nine-hole golf course, a swimming-pond, and a model yacht pond; (4) the Springburn Park, two public bowling-greens, and a model yacht pond; and (5) the Ruchill Park, two public bowling-greens. In each of the parks a bandstand has been erected for the musical performances

which take place therein during the summer months. Certain small charges are made for the use of the said bowling-greens (including bowls), golf course, and swimming-pond before referred to, and also for the use of the chairs available for, and the programmes supplied to, the public at the said musical performances. In every case, however, the amount of the ordinary expenditure on the said parks (excluding interest on capital and payments to sinking fund) is greatly in excess of the amount of the revenue obtained from the grazing rents and the charges referred to. . . .

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"8. No parts of the lands originally purchased or acquired and actually laid out and used by the Corporation for parks purposes have in virtue of the powers conferred on them by the said Act of 1878, particularly section 35 thereof, and by the Glasgow Corporation Act, 1892, particularly section 9 thereof, been sold or feued, or reserved by the Corporation for either of these objects, except such portions of the said lands as are situated on the margin of, or adjacent to, but beyond, the boundaries of the portions of the said lands now enclosed as parks. The annual revenue derived from such portions of the lands outwith the boundaries of the said parks as have been feued out has been applied *pro tanto* towards the expenditure incurred in the maintenance of the said parks, and the prices or purchase moneys received in respect of such portions of the said lands as have been sold have been applied towards the extinction of the capital moneys borrowed by the Corporation for parks purposes.

"9. On receipt, under section 12 of the Lands Valuation (Scotland) Act, 1854, in each year by the complainers from the Town-clerk of the Corporation of Glasgow, the county clerks, and others, of the Valuation-rolls made up by them respectively, the complainers forthwith made up a Parish Assessment-roll or Book under section 40 of the Poor-Law (Scotland) Amendment Act, 1845, which Roll or Book contains a Roll of the persons in the parish liable in payment of the poor-rates, and also contains entries of the sums to be levied from each of such persons under the deductions provided for by section 37 of the said Act. The Roll so made up is the rule for levying the assessment for the relief of the poor and for the school rate for the year then current throughout both the burghal and landward portions of the complainers' parish; and it is provided by section 34 of the said Act that the sum necessary to be imposed by assessment for these purposes shall be assessed and levied one-half upon the owners and the other half upon the tenants or occupants of all lands and heritages within the parish rateably according to the value of such lands and heritages.

"10. By section 25 of the said Act of 1878 the Corporation are authorised, for the purposes thereof, to assess and levy upon and from the occupiers of all heritages situated within the city, of a rental or annual value of £4 and upwards, an annual assessment not exceeding 2d. per £ on the rental or annual value of such heritages. By subsequent Acts amending the said Act of 1878 this assessment has been increased to 4½d. per £ on the rental or annual value of all such heritages. The assessment imposed and levied by the Corporation for the purposes aforesaid during each of the five years up till 31st May 1911 has averaged about 3·7d. per £.

"11. No change in the character, area, or uses permitted of the said respective parks and recreation ground has occurred for years, and particularly no change has taken place since the case of the parks

Feb. 8, 1912. was before the Lands Valuation Appeal Court in 1910 and 1911, except as before mentioned in this case."

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The case further stated :—

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"The Valuation Committee having heard the arguments for the parties, and considered the whole case, were of opinion on the facts admitted or held to be proved, and those contained in the appendices, and on the terms of the Parks Acts, that in view of the decision in the case of the *Parish Councils of Glasgow and Govan v. Assessor for Glasgow*, 1910 S. C., p. 823, the valuations placed upon the said parks and recreation ground by the Assessor were right. The Valuation Committee were also of opinion, as in 1909, that the Corporation's legal ownership of the said parks and recreation ground was a bare trusteeship for the public, and that therefore 'the public' and not 'the Corporation' were the beneficial occupiers of the same.

"The Valuation Committee accordingly sustained the Assessor's valuations of the said parks and recreation ground, and the entry in the said Roll of 'the public' as the occupiers of the same, and dismissed the complaint.

"The complainers expressed their dissatisfaction with the determination of the Magistrates, and craved a case for the opinion of His Majesty's Judges, which was granted so far as regards the Assessor's valuations. The Magistrates, however, held on the authority of *The British Linen Company v. The Assessor for Aberdeen*, (1906) 8 F. 508, that their determination as to the persons to be entered as occupiers of the said parks was final, and they accordingly refused to state a case for the opinion of His Majesty's Judges against that determination."

II.—Tollcross Park Case.

At a meeting of the Lands Valuation Committee of the Lower Ward of the county of Lanark, held at Glasgow, on 15th September 1911, the Parish Council of the parish of Glasgow complained, under section 13 of the Lands Valuation (Scotland) Act, 1854, and section 6 of the Valuation of Lands (Scotland) Amendment Act, 1879, against the following entry of the Assessor in the County Valuation-roll for the year ending Whitsunday 1912 :—

Description and Situation of Subject.	Proprietor.	Occupier.	Yearly Rent or Value.
Land used as Park, Winter Garden, Greenhouses, and Waiting-rooms. (Tollcross Park.)	Glasgow Corporation (Parks Department), <i>per</i> James Nicol, City Chamberlain, Glasgow.	Proprietor.	£1

They craved that for the value there entered there should be substituted the value of £150.

The Lord Provost, Magistrates, and Council of Glasgow appealed against the following entries in the Roll :—

Description and Situation of Subject.				Inhabitant Occupier not rated.		Yearly Rent or Value.
Description.	Situation.			48 Vict. cap. 3, secs. 8 and 9.	Annual Value of dwelling-house (Local Government (Scotland) Act, 1889).	
House	Tollcross Park	Glasgow Corporation (Parks Department), per James Nicol, City Chamberlain, Glasgow	Proprietors	David A. Shaw, attendant Thomas Rennie, curator Empty Empty William Forsyth, ranger William Crichton, forester John Copeland, carter William Jameson, gardener David Ginges, gardener David Wilson, head gardener William Aspey, gardener	£ 10 25 10 10 12 12 10 10 8 14 10	£ 10 25 10 10 12 12 10 10 8 14 10

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and craved that the entries should be treated as being included in the nominal valuation of £1 for Tollcross Park.

The Assessor intimated that he had agreed with the Corporation that the entries appealed against by them were, under recent decisions of the Lands Valuation Judges to be treated as adjuncts to the park and included in the nominal valuation of £1, and that the entry in the "Occupier" column should be "The Public" and not "Proprietors," and asked the Committee to interpose authority to the deletion of the entries from the "Yearly Rent or Value" column, and the entry in the "Inhabitant Occupier not rated" column of the same amounts as the value of the respective subjects, and also to the insertion of "The Public" in the "Occupier" column. The Committee, in these circumstances, permitted the complainers, the Glasgow Parish Council, to complain against the valuation of the whole subjects as so amended, and against the entry of "The Public" in the "Occupier" column.

The decision of the Committee was in the following terms:—"Dismiss the complaint of the Glasgow Parish Council: Sustain the appeal of the Corporation of Glasgow *quoad* the entry of the Tollcross Park and adjuncts as one subject: Find that the value of the park and adjuncts is nil, and that the value of the houses for the 'Inhabitant Occupier not rated' column is nil: *Quoad ultra* dismiss the appeal."

At the request of the complainers the Parish Council of the parish of Glasgow, the Committee stated a case for appeal.

The case set forth that the following facts were admitted or held by the Committee to be proved:—

"1. The Glasgow Parks Act, 1859 (22 and 23 Vict. cap. xvii.), authorised the Corporation of Glasgow to lay out and maintain public parks, gardens, recreation grounds, and open spaces, in and adjacent to the city. This Act, however, was repealed and superseded by the Glasgow Public Parks Act, 1878 (41 and 42 Vict. cap. lx.), and it is under the authority of the last-mentioned Act and subsequent Acts altering or amending the same (hereinafter referred to as 'the Parks Acts') that

Feb. 3, 1912. the Corporation have acquired, provided, laid out, and maintained the Glasgow Public Parks, with the art galleries and museums and collections of art, natural history, and science therein, and also public bowling-greens, bowlhouses or pavilions, waiting-rooms, dwelling-houses for park employees, and other buildings thereon. . . .

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"3. In 1897 the Corporation of the city of Glasgow, acting in the execution of the Glasgow Parks Acts, acquired, out of the moneys raised in terms of those Acts, the mansion-house and grounds of Tollcross House, extending to 82.55 acres, at the price of £28,894, 5s. The conveyance was in favour of 'The Corporation of the city of Glasgow, acting in the execution of the Glasgow Corporation Parks Acts, 1878 to 1896.' The conveyance contained the following conditions:—'The Corporation shall not feu any portion of the lands and others hereinbefore disposed or erect tenements of dwelling-houses or dwelling-houses and shops thereon, excepting such as may be required for their purposes in connection with the public park to be formed on part of said lands till the lapse of twenty years from the date of entry (Whitsunday 1897) under these presents.'

"In 1900 an additional area of 3 roods 29.68 poles was acquired for forming an approach to the park, and the title was taken in favour of 'the Corporation of the city of Glasgow, acting in the execution of the Glasgow Corporation Parks Acts, 1878 to 1899.' In the same year an area extending to 2886 square yards was acquired by excambion in exchange for a similar area from the proprietors of the Carntyne estate. The whole area belonging to the Corporation has been enclosed within the boundary fence of the park.

"4. Considerable expenditure has been incurred in the erection of waiting-rooms and lodges, park improvements, &c., and the total capital expenditure at the close of the last financial year of the Corporation amounted to £41,713, 1s. 1d. This, however, included expenditure on alterations to the mansion-house, now occupied as Tollcross Museum and separately entered in the Valuation-roll, amounting to £2239, 13s. 8d., the value of the park proper being entered in the Corporation accounts at £39,473, 7s. 5d.

"The park is situated outwith the boundaries of the city of Glasgow and wholly in the landward portion of the parish of Glasgow and county of Lanark. The ordinary revenue of the park for the year 1910-1911 amounted to £228, 18s. 3d., and the ordinary expenditure to £1561, 12s. 8d., showing a debit balance of £1332, 14s. 5d. . . .

"The Corporation have incurred an expenditure of £1286, 6s. 8d. in forming and equipping two public bowling-greens in connection with the park, which were opened to the public on 23rd May 1910. This expenditure is being met out of revenue during the period of five years from the date when it was incurred, the last payment being in the year ending 31st May 1915. The revenue from the public bowling-greens for the period from 23rd May 1910 to 31st May 1911 amounted to £118, 3s. 4d., and the expenditure, exclusive of rent, interest, and sinking fund, for the same period to £102, 7s. 6d.

"5. The park and recreation ground in question are open to and used by the public for the purposes of recreation and exercise, subject to the bye-laws and rules made by the Corporation in terms of the Acts of Parliament relating thereto and to the provisions of said Acts, except in so far as members of the public are excluded by the Corporation from certain portions thereof which are used either by the Corporation themselves for the accommodation of their servants

employed in connection therewith or by their goods and property, and for purposes in connection with the upkeep of the grounds, or by tenants or licencees of the Corporation as after mentioned, or the tenants of the Corporation.

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"6. In the case of several of the Corporation's parks, certain fields therein are let for grazing during the period from 1st April till 30th November in each year, from which fields the public are excluded. Part of Tollcross Park, consisting of two fields extending to 22 acres, was let for the year ending 30th November 1911 at a rent of £91 to the Burgh of Glasgow Distress Committee in connection with providing employment for the unemployed. Subsequent to that date no part of the park has been let.

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"7. [Paragraphs 7, 8, and 9 were in similar terms to paragraphs 5, 8, and 10 of the General Parks case.]

"10. Prior to the acquisition by the Corporation of the mansion-house and grounds of Tollcross the Local Authorities levied rates thereon on the full value thereof as entered in the Valuation-roll.

"Beyond the statutory provisions quoted in Appendix I.* and the excerpts from the Corporation's titles quoted in Article 3 hereof, there are no provisions in the Parks Acts nor in the title in favour of the Corporation which expressly preclude them from selling this park, though under the Parks Acts they must apply the proceeds of any sale to the purposes of the Parks Acts, and there are no provisions either in the Parks Acts or in the Corporation's title to this park expressly conferring upon the ratepayers or inhabitants of the city of Glasgow or the general public an inalienable right to the subjects for the purpose of using the same as a public park.

"11. The poor-law assessment in Scotland is levied upon and is payable one-half by owners and one-half by occupiers.

"12. [Paragraph 12 was in similar terms to paragraph 9 of the General Parks case.]

* Sec. 35 of the Glasgow Public Parks Act, 1878 (which was quoted in Appendix I.), enacts:—"It shall be lawful for the Lord Provost, Magistrates, and Council to sell, lease, feu, or convey, in consideration of a price paid down, or of a yearly rent, feu-duty, ground-annual, or other annual payment, such portions of the lands and buildings (except the churchyards, cemeteries, or places of sepulture before mentioned), acquired or held, or which may be acquired or held, by them for the purposes of the Act of 1859, or of this Act, as they shall consider not to be required for the purposes of this Act, and under such conditions as they may think expedient, consistently with the terms and conditions of the feu-rights or other rights and titles to the portions of the said lands and buildings already sold, or which may hereafter be sold or disposed of, and also to sell or dispose of the feu-duties or ground-annuals, derivable therefrom; and such feu-duties or ground-annuals, and the prices to be obtained on the sale of any portion of the said lands and buildings, or of such feu-duties or ground-annuals, shall be applied in the discharge and extinction of the purchase moneys of the said lands, buildings, and collections of natural history, science, and art, and the interest thereon, or the sums to be borrowed as aforesaid: Provided that it shall be lawful for the Magistrates and Council, and they are hereby authorised, if they think fit, to agree and bind themselves and their successors in office not to sell or feu for building the portion of the said Kelvingrove Park opposite to the lands of Kelvinbank and the Royal Terrace, consisting of five acres or thereby, or any part thereof."

Feb. 3, 1912. The cases were heard together on 13th and 14th December 1911. It was agreed that, if the determinations of the Committees fell to be reversed, the valuations craved by the appellants were fair and should be inserted in the Rolls.

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Argued for the appellants the Parish Council of Glasgow;—The appellants asked the Court to overrule the former decision in *Parish Councils of Glasgow and Govan v. Assessor for Glasgow*.¹ It was perfectly competent for the Court to do this, and there were precedents.² The entries in the Roll under the heading “occupier” and “yearly value” were both wrong. With regard to the former, it was clearly wrong to say that the “public” were the occupiers. The “occupiers” were the owners, the Corporation, who occupied the parks through their servants and also by means of the various properties and effects belonging to the Corporation which were situated in the parks. The public in no sense “occupied” the parks, but merely used them under the direction and control of the Corporation. With regard to “yearly value,” the duty of the Assessor and Committee was to fix the real yearly value of all lands and heritages whatsoever, without taking into account any questions of rating or exemption from rating. This had been done down to 1910, and all property had been entered in the Roll at its real value, except apparently the Parish Churches.³ There was no exemption whatever in the case of public bodies holding lands for limited purposes, and the fact that no profit was made by the undertaking was immaterial, valuable occupation and not profit being the true test. All this had been settled in Scotland by a series of decisions, of which the earlier⁴ dealt with rating and exemption therefrom, the later⁵ with valuation and exemption from the Valuation-roll. A complete innovation had been introduced in 1910 by *Parish Councils of Glasgow and Govan v. Assessor for Glasgow*,¹ which decided that the Glasgow parks fell to be entered in the Roll at a merely nominal value. That decision had been arrived at solely on the authority of certain decisions of the English Courts, of which the most important were *Lambeth Overseers v. London County Council*⁶ and *Hare v. Overseers of Putney*.⁷ English cases were of little or no authority on questions of valuation in Scotland; the whole systems of the two countries in matters of valuation, rating, and assessment being quite different. The two English cases were cases on rating and not valuation, which in itself made them of little or no importance. Further, in applying these cases the following points of difference had been lost sight of:—(a) Burghs in Scotland took lands on lease as well as purchased lands for public parks,

¹ 1910 S. C. 823.

² *E.g.*, *Heritors of the Parish of New Monkland*, (1872) 11 Macph. 986, reversed by *Heritors of Kingoldrum and Heritors of Kirriemuir*, (1877) 4 R. 1149.

³ *Heritors of Kingoldrum and Heritors of Kirriemuir*, (1877) 4 R. 1149.

⁴ *Magistrates of Glasgow v. Miller*, (1857) 20 D. 290; *Clyde Navigation Trustees v. Adamson*, (1865) 3 Macph. (H. L.) 100; *Leith Harbour Commissioners v. Miles*, (1866) 4 Macph. (H. L.) 14; *Greig v. University of Edinburgh*, (1868) 6 Macph. (H. L.) 97. See also *Jones v. Mersey Docks Board*, (1865) 11 H. L. C. 443, 3 Macph. (H. L.) 102.

⁵ *The University and College of Glasgow*, (1870) 11 Macph. 982, 43 Scot. Jur. 181; *Ferrier v. Assessor for Edinburgh*, (1892) 19 R. 1074.

⁶ [1895] 2 Q. B. 511, [1896] 2 Q. B. 25, [1897] A. C. 625.

⁷ (1881) 7 Q. B. D. 223.

under both general and local Acts of Parliament and under common law powers, and some burgh or county council might be a hypothetical tenant; (b) In Scotland local rates were paid by both owner and occupier, and not as in England by occupiers alone and, while an occupier might escape assessment on the ground of no rateable occupancy, it did not follow that an owner would; (c) The lands laid off as public parks in Glasgow were not dedicated by statute to public use in perpetuity as in the two English cases, but might be sold, leased, or feued according to the pleasure of the Corporation. Further, in both of these cases one of the main grounds of judgment had been that the party sought to be rated was not the occupier of the park for rating purposes, a point quite inapplicable to the present case. It had also been suggested that there could be no hypothetical tenant for these parks, because the Corporation of Glasgow had no statutory power to take parks on lease, but that argument had been rejected by Lord Herschell in *London County Council v. Churchwardens, &c., of Erith*.¹

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Argued for the Assessor for Glasgow and the Corporation of Glasgow;—The question raised in the present case was identical with that decided adversely to the contentions of the appellants in *Parish Councils of Glasgow and Govan v. Assessor for Glasgow*.² There had been no change of circumstances since that decision. If not incompetent it was at least contrary to the policy and practice of the Court to reverse a decision given so recently and after such full consideration.³ It was not disputed by the respondents that the parks must be entered in the Valuation-roll⁴; it was not argued that they might not be rateable; the question was what was their "yearly value," and the answer of the respondents was that it was nil, as there was no rent at which one year with another these subjects could, in their actual state, be let from year to year. They were unlettable, and no tenant would give any rent for them. This was due to the fact that they had been put *extra commerciam*, and dedicated to the public by the Legislature. It was quite immaterial that under the Acts the Corporation had certain powers of leasing, feuing, and also full powers of regulation and control.⁵ These facts did not affect the circumstance that the parks were impliedly, if not expressly, perpetually dedicated to the public. Even a temporary dedication while it lasted would be sufficient. The case was ruled by the case which had been followed in this Court in 1910, viz., *Lambeth Overseers v. London County Council*.⁶ The fact that that case was concerned with a question of rateability was clearly before the Court in 1910,⁷ but did not, in the opinion of the Court, detract from the authority of the decision. For although the ultimate question there was, Were the subjects rateable? the answer to that question depended wholly upon whether the subjects were or were not valuable, which was the precise

¹ [1893] A. C. 562, at p. 595.

² 1910 S. C. 823.

³ *North British and Mercantile Insurance Co. v. Assessor for Edinburgh*, 1910 S. C. 814.

⁴ See *Carnegie Dunfermline Trustees v. Dunfermline Assessor*, 1909 S. C. 678.

⁵ *Liverpool Corporation v. West Derby Assessment Committee*, [1908] 2 K. B. 647.

⁶ [1895] 2 Q. B. 511, [1896] 2 Q. B. 25, [1897] A. C. 625.

⁷ 1910 S. C., at pp. 831-2.

Feb. 3, 1912. question at issue in the present case. The parks in fact were in much the same position *qua* the Valuation-roll as public sewers. Glasgow Parish Council Sewers were not separately entered in the Roll, because they were v. Assessor for Glasgow. incidentally entered with the houses which they served and whose value they increased. It was the same with the parks. If there were no parks the houses in these districts would have been entered Glasgow Parish Council at a lower figure.¹
v. Glasgow Corporation. The Assessor for Lanarkshire was represented by counsel, but did not submit any argument.

At advising on 3rd February 1912,—

General Parks Case.

LORD JOHNSTON.—There are before the Court four cases, viz., (1) the Glasgow General Parks case; (2) the Lanarkshire Tollcross Park case; (3) the Leith Golf Course case²; and (4) the Dundee Main Sewer case,³ which are all more or less related, and which present different phases of the general question whether lands and heritages vested in municipal corporations and commissioners are under certain circumstances to escape valuation. I put the question in this way because I want to make very clear at the outset that what this Court is concerned with is valuation only. I do not think that it has any business to regard the question of rateability, or to allow the question of rating to affect its view of its duty as regards valuation. At the same time, I am quite aware that in Scotland rating or taxation, at least local taxation, follows valuation. Nevertheless, I hold that the duty, which is imposed on us by the statute, is one of valuing without reference to rateability. If we place a valuation upon that which is not rateable, the remedy lies in other hands than ours, and the question of rateability will be determined by the competent Court, which this is not. If, on the other hand, we were to put a nominal value on a subject because we considered that it was not rateable, we should, I think, not only be going beyond our province, but we should be precluding the question of rateability being determined by the proper Court. Accordingly, I propose to your Lordships to consider the questions which these cases raise strictly from the point of view of the Valuation of Lands Acts under which we sit.

I have said this much in preface because of the fact that the main question upon which these cases turn, and which has been the subject of close and exhaustive argument before us, was considered and disposed of by this Court, between some at least of the same parties, so recently as March 1910, in the cases of the Parish Councils of Edinburgh and of Glasgow and Govan against the Assessors of their respective districts, reported in 1910 S. C. 823, and was decided adversely to the opinion which, in common with your Lordships, I have come to hold. This fact has given me great anxiety in the consideration of the present cases, not merely because I have the highest respect for the opinion of the learned Judges who then com-

¹ *The following cases were also cited*:—North British Railway Co. v. Greig, (1866) 4 Macph. 645; M'Isaac v. Mackenzie, (1869) 7 Macph. 598; Blyth Hall Trustees v. Assessor for Fifeshire, (1883) 10 R. 659; Abercromby v. Badenoch, 1909, 2 S. L. T. 114.

² Reported *supra* p. 812.

³ Reported *infra* p. 848.

posed this Court, but because it requires very weighty reasons to induce any Court to disturb the continuity of its own precedents. The considerations which weigh with me in overcoming the repugnance which I have to reconsider my predecessors' judgment are these: first, that their judgment appears to me to approach the question too much from the point of view of rateability, rather than that of valuability, and that, consequently, the result of their determination is indirectly to withdraw the question of rateability from the legitimate tribunal by deciding it as the road to valuability; second, that, from the constitution of this Court, there is no appeal, and that, in consequence of the decision in the former case being in favour of a nominal valuation, there has been no opportunity of bringing the question of rateability under review by any process known to our practice; and thirdly, that the principle upon which our predecessors proceeded cannot stop where they left it, but has already embarrassed us in cases which have come before us since its date, and will, I am persuaded, be pressed to a still further application. For these reasons I consider it not only our right, but our duty, to reconsider the question at issue.

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I should add, before going on to the circumstances of the present case, that in this or any other similar case, were the valuation area and the rating area the same, the question at issue would be merely academic. But where, as here, this is not so, the question may be substantial, though the amount involved can never be very great. The practical importance of the question arises from the fact that, taking the parochial rates as an example, the valuation area is confined to the municipality, while the rating area extends to the parish, part of which is burghal and part of which is landward. Hence if any portion of the burghal area escapes valuation, *pro tanto* an increased burden may be thrown on the landward area, and the incidence of local taxation be disturbed.

It will be convenient to confine attention in the first place to the Glasgow General Parks case. Following the judgment to which I have above referred, the various public parks in Glasgow have, since its date, been entered in the Valuation-roll at a nominal value. In order to determine whether this valuation is in accordance with the provisions of the Valuation Acts, it is, I think, necessary to ascertain, somewhat precisely, what the history of these parks is.

There exists a general Act bearing on the subject, applicable exclusively to Scotland, the Public Parks Act, 1878. But, as in most things municipal, the city of Glasgow has taken no advantage of the general legislation on this subject, but has obtained special legislation on its own behalf. And it is with these special local Acts that, in dealing with the Glasgow parks, we are alone concerned. The first of these Acts, the Glasgow Public Parks Act, 1859, has indeed been repealed. It is necessary, however, to consider the circumstances in which it was passed, and its enactments, as it affects Kelvingrove Park which is, and also Queen's Park which is not, before us in the present case. Before it was passed the municipality of Glasgow had already acquired by voluntary transaction, without any statutory authority, and presumably out of the common good of the city, the main portion of the Kelvingrove Park and a considerable area of ground adjoining, and, as the preamble of the Act

Feb. 3, 1912. states, had so acquired it for the purposes of promoting the health and recreation of the inhabitants of the city. It is necessary to emphasise this
 Glasgow —and it applies not merely to the Kelvingrove Park, but to all the other
 Parish Council — parks now belonging to the city—because the use of the term “public” as
 v. Assessor for applied to municipal parks is liable to misconstruction, and has, I think,
 Glasgow. already tended to mislead. The parks are not public in the proper sense
 Glasgow of that term ; they are merely public in relation to the local public.
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Having so acquired Kelvingrove Park and adjoining ground, no doubt
 Ld. Johnston. with the ultimate purpose of creating a park in the interest of the health and recreation of the inhabitants, the municipality had really in effect made a speculation in land. They had acquired a good deal more ground than they required for the park, with, I imagine, the object at once of controlling the extension of the city in that neighbourhood in the interest of the amenity of the park, and of realising a profit to diminish the cost of the land required for the park. They had already disposed by sale or feu of portions of their acquisition, and had so in part recouped themselves for their purchase, and they apparently had the prospect of disposing of more. In these circumstances it is not to be readily assumed that the intention of the Legislature or the result of legislation regarding the balance of the land retained and appropriated for park purposes was that it should be thereby reduced to a nominal value, and so be virtually relieved of local taxation. What the Act did was not to authorise the municipality to acquire land for a park, but merely to lay a limited assessment upon the occupiers of all heritages within the city above £4 rental, to enable them to defray the expense of laying out, maintaining, and improving, *inter alia*, this park which they had already acquired. It also empowered the Magistrates to borrow without prejudice, and in addition, to the existing bonds and dispositions in security with which they had already burdened the subjects, a sum not exceeding £30,000, and, subject to providing a sinking fund, to grant mortgages and assignments both of the parks and of the assessment. But then, in section 12, there is a most important power conferred on, or rather continued to them, as they had already been so dealing with the land which they had acquired, viz., to dispose by sale, lease, or feu, of “such portions of the said parks as they shall consider desirable, and under such conditions as they may think expedient, consistently”—not, let it be noted, with the use of the land or any part of it for park purposes, but—“with the terms and conditions of the feu rights or other rights and titles to the portions of the said parks already sold, or which may hereafter be sold or disposed of, and also to sell or dispose of the feu-duties or ground-annuals derivable therefrom,” subject to their applying the proceeds of such disposal in the discharge and extinction of the original purchase moneys and the interest on the sums borrowed and to be borrowed as aforesaid. The remainder of the Act is concerned with the conservancy of the parks and the making and enforcing of bye-laws for their regulation.

The next statute dealing with parks relates to the Alexandra Park. By a single section (section 24) of the Glasgow Improvements Act, 1866, which otherwise is almost entirely concerned with street improvements, power was conferred on the Town-Council, who were appointed trustees for executing and carrying into effect the provisions and purposes of the Act, to acquire

by agreement ground for a public park or playground in any neighbour- Feb. 3, 1912.
 hood convenient for the inhabitants of the north-eastern district of the city ^{Glasgow}
 —again expressly marking the local character of the public to be benefited ^{Parish Council}
 —and to expend to that end out of the Improvement Assessment authorised ^{v. Assessor for}
 by the Act, a sum not exceeding £40,000. But (section 25) the trustees ^{Glasgow}
 were authorised to appropriate such a portion as they might think fit of the ^{Parish Council}
 ground to be acquired by them for the purposes of said public park for ^{v. Glasgow}
 building ground. On acquiring such ground the trustees were directed to ^{Corporation.}
 convey it to the Magistrates and Council acting under the above-mentioned ^{Ld. Johnston.}
 Act of 1859, and the portions of ground disposed of and the moneys derived
 therefrom were to be deemed to fall, and to be dealt with as falling, under
 the operation of the said Act of 1859. The park acquired under this statute
 is the present Alexandra Park.

So stood things until 1878, when the two Acts of 1859 and 1866
 were superseded by the Glasgow Public Parks Act, 1878, passed in
 the same year as the general Parks Act. That Act (section 5) trans-
 ferred and assigned to and vested in the Lord Provost, Magistrates, and
 Town-Council of Glasgow, all parks, &c., already vested in the Magis-
 trates and Council as trustees under the Act of 1859, or under sections
 24 and 25 of the Act of 1866, and all powers, rights, and privileges
 conferred on or vested in the Magistrates and Council by these Acts.
 Then (section 15) it authorised the Town-Council to lay out, maintain,
 improve, and extend the public parks in or adjacent to the city known
 respectively as the Kelvingrove Park, the Queen's Park (which, as I have
 said, was also covered by the Act of 1859, but for some reason is not em-
 braced in the present case), and the Alexandra Park, and also the Glasgow
 Green (which was part of the common good of the city), and the public
 parks which might be thereafter acquired by them under this Act. At the
 same time the Town-Council (section 17) were empowered to acquire com-
 pulsorily certain scheduled lands to be devoted to the purposes of the Act.
 There is nothing in the statute to indicate whether these were for park pur-
 poses, though presumably they were so to some extent. But I understand
 these powers have not been exercised, at least for park purposes. And
 they were also empowered (section 21), in addition to the lands authorised
 to be taken compulsorily, to purchase and otherwise acquire in addition
 any lands, not exceeding in extent 200 acres altogether, which they might
 think expedient for any of the park purposes of the Act. For the
 purposes of the Act (section 25) a limited power of assessment was con-
 ferred on the Town-Council, in substitution for that which they formerly
 had under the Act of 1859, and also (sections 27 to 30) an extended
 power to borrow for "defraying the cost of acquiring the lands to be taken
 for the purposes of this Act, and for carrying into effect the purposes of this
 Act." The assessments levied and all feu-duties, rents, and other revenues
 to be received were to be applied (section 34) in defraying the expense of
 laying out, improving, maintaining, and extending the said public parks,
 &c., and in paying the interest on the prices or purchase moneys thereof,
 and of the sums borrowed under the Act of 1859, or which might be bor-
 rowed under the Act of 1878 itself, with a provision as in the Act of 1859
 for a sinking fund. Then (section 35) a similar power, in almost identical

Feb. 3, 1912. terms with that contained in the Act of 1859, was conferred on the Town-Council to dispose by sale, lease, or feu of such portions of the land acquired or held, or to be acquired or held, for the purposes of the Act of 1859 or of the Act of 1878, as they should consider not to be required for the purposes of the Act of 1878. The remainder of the Act consists of provisions for the conservancy of the parks, and for the enacting and enforcing of bye-laws for the regulation of their use.

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The local Act of 1878 still remains the principal Public Parks Act of the city of Glasgow. Subsequent enactments on the same subject, to be found embedded in general municipal Acts, are dependent on it. Thus the City of Glasgow Act, 1891 (section 37), provides for carrying out the acquisition, "as a public park, botanic gardens, and place of recreation for the use of the inhabitants of the city," of the Royal Botanic Institution's Garden, a project already contemplated in the Act of 1878, and at the same time (section 49) repeats in very general terms a power to provide and maintain such public parks, pleasure or recreation grounds as may from time to time be deemed necessary for the city and royal burgh, and to acquire by agreement any lands necessary for that purpose. Also the Glasgow Corporation Act of 1892 (sections 7-10) gives power to lay out the portion of the lands of Ruchill, which had already been acquired, as and for a public park to be called Ruchill Park, as if it had been specifically mentioned in the Act of 1878. Further, the Glasgow Corporation and Police Act, 1895, empowered the Corporation to set apart any portions of the parks for special forms of amusement, and to let any portions of the parks for such purposes, they or their lessees being entitled to make reasonable charges for the use of the ground so set apart. And lastly, the General Powers Act of 1896 (section 18) extended the borrowing powers of the Act of 1878 for the purpose of carrying out the powers conferred on the Corporation by the Parks Acts.

I have thus analysed the statutory provisions under which the Corporation of Glasgow have acted and are acting in relation to the city's parks in order to ascertain definitely, as it is maintained that it should affect our decision, how far the Corporation, or the parks vested in them, are laid under statutory restriction. And I find that all that these statutory enactments amount to is the conferring upon the Corporation a power to acquire land by agreement (the one instance of compulsory power being given was either not taken advantage of or does not affect any of the parks embraced in the case), and a power to lay out and maintain, on the land already acquired privately or acquired under the Acts, parks for the recreation of the Glasgow public, that is, the inhabitants of the city; to borrow money to meet the price of lands purchased for this purpose, and to assess to a limited extent for the cost of such laying out and maintaining, and for the interest of the money so borrowed and for a sinking fund. But these enactments were not accompanied by any statutory dedication of the parks to public use, even of a local public. They were accompanied by absolute freedom to the Corporation to deal with the land, whether acquired before or under the Acts, at their discretion, and to dispose of it in a mercantile sense. The only dedication to the public use of the parks must be spelt out of the determination of the Corporation to stay their hand in trafficking in

land, and to lay out in each case a definite residue for a park. I do not propose to consider the effect of such determinate devotion of a definite portion of ground for park purposes. It may have tied the hands of the Corporation once for all, and it may not. The actings of the Corporation in some instances are hardly consistent with their accepting the situation that their hands are now tied. But I am prepared to assume that they could not now divert by way of permanent disposal any part of the existing parks to other than the purposes of local public parks. At best the statutes give to the Corporation the discretionary power to devote to such purposes such part only, as in their discretion they think proper, of the lands they have acquired or are authorised to acquire. But the enactments referred to confer very ample power to exclude even the local public in favour of bodies or individuals paying for the exclusive privilege.

It is worth while, I think, at this point to compare the situation thus created in Glasgow with that of Brockwell Park, Lambeth, as we were hard pressed by the Corporation's counsel to accept the decision in the *Lambeth* case¹ as conclusive in the present. Here is the clause in the London County Council's (General Powers) Act, 1890 (53 and 54 Vict. cap. ccxliii.), section 4: "The Council may purchase and take by agreement certain lands in the parish of Lambeth in the county of London known as Brockwell Park, as shown on the plan of Brockwell Park, and when the Council shall have acquired the same they shall hold the same and every part thereof as a park, and shall lay out, maintain, and preserve the same and every part thereof as a park for the perpetual use thereof by the public for exercise and recreation, and may from time to time exercise all necessary powers for the maintenance and preservation of the same as a park: Provided that the Council may, if they think fit, enclose the said lands or any part thereof with a view to the better or more effectual preservation thereof for public use, and retain, or remove, alter, enlarge, or adapt any buildings thereon for any purpose which they may think conducive to the public benefit." That this creates, and was intended to create, something very different from the statutory situation which arises in Glasgow, is, I think, beyond doubt. I am not prepared to say that the distinction is necessary to justify this Court in declining to accept the decision in the *Lambeth* case¹ as conclusive of the present. But the distinction exists.

The actings of the Corporation with regard to the lands acquired appear to have been very much what one would have expected from the above narrative of the Corporation's statutory powers. Lands under the powers conferred by the Act and otherwise have been acquired. Parks and recreation grounds have been laid out and enclosed. Lands acquired have been disposed of by sale or feu. But the lands once laid out and enclosed for park purposes have not been encroached upon for the purpose of sale or feu. The prices received on disposal have been attributed to writing down the prime cost—the feu-duties and other annual returns to reduction of the cost of upkeep. It is not very clearly stated, but I gather from Appendix No. I that the net cost to the Corporation of the ground presently enclosed as

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¹ [1897] A. C. 625.

Feb. 8, 1912. parks is about £280,000, irrespective of the cost of enclosing and laying it out. So far, then, what is park and what is a municipal speculation in land depends on no act of the Legislature, but on the discretion of the Magistrates, and the exercise of this discretion, it is now maintained, is to result in withdrawing from valuation land the capital value of which, it must be accepted,

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is certainly not less than £280,000.

Having so enclosed and laid out their parks, these have been open to and used by the local public for purposes of recreation and exercise. But this has been subject to rules and regulations enacted by bye-laws and otherwise, which affect the times during which, and the areas over which, such use and enjoyment has been allowed to extend. The gates are closed when the Corporation choose. Areas are withdrawn from use when and as the Corporation determine. Other areas are restricted in their use, and a payment attached to the privilege. Certain areas are regularly withdrawn during eight months in the year and let for grazing. Other areas have been withdrawn more casually, and exclusive licence given for the holding of exhibitions. Another area has been withdrawn and let on a three years' lease for the substantial sum of £500 a year, for the purpose of a skating rink. Other areas have been withdrawn and formed into bowling-greens and golf links, for admission to which a small charge is made. It is perfectly immaterial, in my opinion, that in the case of such lets a separate return is made and a separate valuation assessed. And it is equally immaterial that the rents other than the said £500 a year are small, and do little to reduce the cost of maintenance of the parks as public pleasure-grounds. It may be accepted that the cost of such maintenance has been greatly in excess of any returns to the Corporation, and that the interest on capital outlay and the cost of conservancy and maintenance as public parks of the areas enclosed require a substantial sum to be raised by assessment under the powers of the Parks Acts from the inhabitants of Glasgow.

The Assessor has valued each separate park or recreation ground at the nominal sum of £1, holding them of no value for the purposes of the Valuation Acts. The Valuation Committee have affirmed this determination, and standing the judgment in the case¹ determined in 1910 already referred to they had, I think, no alternative. But they take a further step to get the Corporation off the Valuation-roll as occupiers. Holding "that the Corporation's legal ownership of the said parks and recreation grounds was a bare trusteeship for the public, and that, therefore, the public and not the Corporation were the beneficial occupiers of the same," they sustained the entry in the Valuation-roll in the case of each park of "tenant" "none," and of "occupier" the "public." And as regards these entries, on the authority of the *British Linen Bank* case,² they held their determination final, and have refused a case on appeal.

We have already in *Ferguson v. Assessor for Inverness*³ held that if, in order to reach the question of yearly value, the Court is required to determine incidentally a question which would lead to the alteration of an entry

¹ 1910 S. C. 823.

² *British Linen Co. v. Assessor for Aberdeen*, (1906) 8 F. 508.

³ *Supra*, p. 768.

in the Roll in other details, the Court is not debarred from entertaining such question. It is true we have no power, except by consent, to order the Roll for the year to be corrected, but, if consent to the alteration in accordance with our opinion is refused, there is another remedy.

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This question of occupancy goes deeply into the question of valuation, and accordingly I am of opinion that we must entertain it, but before considering it, it is, I think, incumbent on me to examine the judgment of our predecessors in 1910, for on it that of the Appeal Committee directly proceeds. But I find much difficulty in regarding that judgment as an independent determination, so much does it proceed upon and adopt the judgment in the *Lambeth* case.¹

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The result of the judgment in 1910 was that whereas hitherto public parks had been regarded in Scotland as subjects for which a hypothetical tenant might be obtained, and had been entered in the Valuation-roll at such rent as the hypothetical tenant might reasonably be expected to give for them, for the future they are to be regarded as subjects for which no hypothetical tenant could be found who would give any but a nominal rent—that is, in fact, for which no hypothetical tenant could be found at all. And why? So far as I can ascertain, simply because in the *Lambeth* case¹ the House of Lords had determined that, where the County Council of London, who were charged with no duty of providing public parks, were by statute empowered to acquire a particular park and to lay out and maintain it in perpetuity for the use of the public for exercise and recreation, and had so acquired it and laid it out, and where the expenses of maintenance exceeded any revenue from licences to supply refreshments, or from grazing rent, the County Council were not rateable to the poor as occupiers, and that because there was no rateable value, in respect that the park was appropriated to the use of the public, and the expenses of maintenance exceeded any revenue which, subject to such appropriation, the subjects could yield. This judgment in the *Lambeth* case¹ was held, if not to be directly binding on this Court, to be directly applicable to the case then before the Valuation Judges,—which was, as regards the Glasgow parks, the same as is now before us here,—and its authority was accepted and applied. I should add that our predecessors were further impressed by the fact that it was followed, and in some sense extended, by the Court of Appeal in the *Liverpool Corporation* case,² by Judges for whose opinion we must have, in common with our predecessors, the utmost respect.

I cannot, however, accept the judgment in the *Lambeth* case¹ as binding on this Court. It is not a judgment of the House of Lords sitting in a Scots appeal, nor is it a judgment on the statute which we are administering. It is a judgment on a rating not a valuation statute, and in England rating is apparently on occupiers only. But it would be presumption on my part to attempt to examine, far less to criticise it, particularly when I find Lord Halsbury, L.C., saying “that the nature of the occupation here is such that there can be no rateable occupation in the sense in which those words are explained by many cases which it is not now necessary to refer to.” I am not acquainted with these cases, and I am not called upon to determine what

¹ [1897] A. C. 625.

² [1908] 2 K. B. 647.

Feb. 8, 1912. is rateable occupation in the sense in which it has been defined by them, and is, I assume, accepted in England. What alone I think we are bound to do is to consider the conclusions to which two years ago our predecessors came in the matter of valuation, admittedly following the judgment in the *Lambeth* case,¹ and to determine whether they can be sustained in this Court. There is undoubtedly no subject in the law of England in which so much conflict of decision can be found as in the law of rating. Lord Blackburn, in *Jones v. Mersey Dock Commissioners*,² did well-recognised service in reducing the law to consistency as at that date. But one cannot rise from the perusal of the decisions since that judgment without feeling that these services are again to some extent required. And I therefore think that there would be the greatest danger of miscarriage if, in a Scots question of valuation, this Court should base its judgment on any particular decision in England on the subject of occupancy rating.

The conclusion to which I have come in the present case is :—

First. That the occupation of the Glasgow parks is that of the Corporation, who are the proprietors, and not that of the public, either general or local.

Second. That that occupation is valuable though not profitable.

Third. That being valuable it is the duty of the Valuation Authority to value it; and

Fourth. That it is no part of the duty of such Authority or of this Court to consider whether it is rateable.

I think at this point it is well to advert to two Scots statutes, the Poor-Law Act of 1845 and the Valuation Act of 1854.

The Poor-Law Act, 1845 (8 and 9 Vict. cap. 83), as amended by the Act of 1861 (24 and 25 Vict. cap. 37), provides (section 34) that where the method of raising funds by assessment for relief of the poor is adopted, such assessment shall be imposed one-half upon the owners and one-half upon the tenants or occupants of all lands and heritages in the parish, "rateably according to the annual value of such lands and heritages." I believe that there were prior to 1845 other general assessing Acts distributing rates between owner and occupier, and there certainly have been many since, though the proportion has not always been half and half. But as an illustration of what sort of assessment the Valuation Act was passed to provide machinery for, it is sufficient to take the Poor-Law Act of 1845. The annual value was to be estimated as directed in section 37 of that Act. An assessment-roll was (section 38) to be made up by the rating authority. The roll was to be the rule of assessment (section 40), "provided also that nothing herein contained shall preclude any person, who considers himself aggrieved by such assessment, from his remedy by law, in the like form and on the same ground," as was competent to any person at the date of the Act, who considered himself aggrieved by assessment, under the statutes then in force for relief of the poor.

Now, the Valuation Act, 1854, was passed to put an end to rating authorities having to provide their own valuations. Its preamble sets forth that it is "expedient that one uniform valuation be established of lands

¹ [1897] A. C. 625.

² 3 Macph. (H. L.) 102.

and heritages in Scotland, according to which all public assessments levied Feb. 3, 1912. able or that may be levied according to the real rent of such lands and heritages may be assessed and collected." Accordingly provision is made for the preparation and settling of such Valuation-roll independently of all questions of rating. In such Roll the Valuation Authority is required (section 1) to enter the yearly rent or value for the time of each heritable subject "and the names and designations of the proprietors or reputed proprietors, and, where there are tenants or occupiers, of the tenants and of the occupiers thereof respectively." In estimating the yearly value of lands and heritages under this Act, the same (section 6) "shall be taken to be the rent at which, one year with another, such lands and heritages might in their actual state be reasonably expected to let from year to year, . . . and where such lands and heritages are *bona fide* let for a yearly rent conditioned as the fair annual value thereof, without grassum or consideration other than the rent, such rent shall be deemed and taken to be the yearly rent or value of such lands and heritages in terms of this Act." Then assuming such valuation to have been made thereafter (section 33), "where in any county, burgh, or town, any county, municipal, parochial, or other public assessment, or any assessment, rate, or tax under any Act of Parliament is authorised to be imposed or made upon or according to the real rent of lands and heritages, the yearly rent or value of such lands and heritages as appearing from the Valuation-roll in force for the time under this Act in such county, burgh, or town, shall from and after the establishment of such valuation therein be always deemed and taken to be the just amount of real rent for the purposes of such county, municipal, parochial, or other assessment, rate, or tax, and the same shall be assessed and levied according to such yearly rent or value accordingly, any law or usage to the contrary notwithstanding." A form of Valuation-roll is prescribed (section 35 and Schedule) which contains distinct columns for proprietor, tenant, and occupier. Another use of the Valuation-roll is set forth in section 34. By that section it is made the criterion of value in all questions and proceedings relating to the franchise and the representation of the people in Parliament. And, lastly, there is the important saving clause: Nothing contained in this Act shall (section 41) "exempt from or render liable to assessment any person or property not previously exempt from or liable to assessment."

Such, then, are the provisions of the Act under which this Court sits. Resuming them, it provides for the establishment of a uniform valuation for the purpose of assessment of all local rates and taxes; all such rates and taxes are to be assessed and levied "*on the basis*" of the valuation so established; where lands and heritages are not let on a *bona fide* lease, the value is to be taken to be the rent at which, one year with another, such lands and heritages might *in their actual state* be reasonably expected to let from year to year; and this valuation *is not to affect* either exemption from or *liability* to assessment. I may here at once say that I regard these words "on the basis of" and "in their actual state," and the avoiding of any effect either on exemption or liability, as expressions of most important meaning and effect. What is to be prepared is to be a *basis* of assessment, let there be what grounds of exemption from or liability for assessment there

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Feb. 8, 1912. may. And the valuation is to be of the subjects in their *actual*, and by
 Glasgow *actual* I understand *actual physical*, state. We are not concerned, in my
 Parish Council opinion, with the uses, or the effect on profitable occupation of the uses, to
 v. Assessor for which subjects are put, whether by private owners, municipal or other
 Glasgow. public authorities, or by statute.

Glasgow But though I think these considerations are sufficient, I do not think it
 Parish Council right to proceed on this narrow ground of judgment.

v. Glasgow First, then, the case of the *Mersey Dock Trustees v. Jones, &c.*,¹ must
 Corporation. be regarded as a Scots case, as it was decided *unico contextu* with *Clyde
 Navigation Trustees v. Adamson*,² the judgment being, I think I may say,
 common to the two cases. It was there held that the Mersey Docks and
 Harbour Board and not the public were "occupiers of the docks and
 harbour within the true meaning of the word 'occupier' in the Act of
 Elizabeth." So I think that the occupation of the Glasgow parks is that
 of the Corporation and not that of the public in the sense of the Valuation
 Acts. They are proprietors of the parks. But as a municipal corporation
 they hold the property in trust. They may be bare trustees in the sense
 that they have no private beneficial interest. But they hold in order that
 they may apply the property to the uses for which it is vested in them.
 And in the sense of the Valuation Acts they occupy it for these purposes.
 The Valuation Acts look for a taxable occupier—for a person who, if he
 is not proprietor and occupant, or tenant and occupant, is occupant under
 a definite and continuous right. A nebulous body styled the public, or
 the local public, can have no such occupation in the sense of the Valuation
 Acts, but even this nebulous body in the case of the Glasgow parks has no
 continuity of occupation. It is turned out at sundown, or at such time
 and for such time and to such extent as the Corporation please, and the
 Corporation through their officers, or their tenants or their licencees, resume
 exclusive occupation. In truth it cannot be redargued that in fact the
 Corporation are in the sense of the Valuation Act both the proprietors and
 the occupiers, and that the public, general or local, are no more the occupiers
 in the sense of the Acts than they are the proprietors.

Second. But the *Mersey Docks* case¹ is also authority for the distinction
 between a valuable and a profitable occupation. It is admitted that if the
 Corporation was laid under obligation to acquire, lay out, and maintain a
 park, and did so, their occupation, though not profitable, would be valuable
 to them as enabling them to fulfil a duty. I cannot follow the distinction
 between acquiring as a duty and acquiring as an act of statutory discretion.
 I should be disposed to say that, when their discretion tells them that they
 ought to acquire land under their powers, it becomes their duty to do
 so (*Julius v. Bishop of Oxford*³). In either case what they acquire is of
 the same value as enabling them to supply a want of those for whom they
 are trustees, and its value to them might fairly be measured, apart from
 the express terms of the statute, by what they find themselves obliged to
 give, or in their discretion think they are justified in giving, for it. So
 measured, the value would be immensely higher than the modest sum

¹ 3 Macph. (H. L.) 102.

² 3 Macph. (H. L.) 100.

³ (1880) 5 App. Cas. 214.

which we are asked to put upon the subjects. We have nothing to do Feb. 8, 1912. with the fact that the use to which the Corporation are obliged to put, or do put, the land, precludes the occupation being profitable or even involves a loss. The same would have been the case had the Corporation at their own hand proceeded to lay out and maintain, say, Kelvingrove Park as part of the common good, which at first it was in fact, without obtaining the Act of 1859. For us it is enough that the occupation is valuable.

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Third. If the subjects are of value for occupation, it is the statutory duty of the Valuation Authority to value them. But the Valuation Authority is not entitled, under the statute, to put upon them a value measured by what the Corporation have thought proper to spend on the subjects. The Valuation Authority is told by the Act to value them in their *actual state*. A proprietor may so deal with a heritable subject as to put it in an actual physical condition in which its value is much less than in its natural state, or in one in which its value is much greater than in its natural state. The Valuation Authority is not to speculate on what was or what might be. They are required to take things as they are. Taking things from that point of view, you have in the present case the area of any one of these parks put into a particular condition to suit the purposes of the Corporation as proprietors. They are called on to put on that area the value which a hypothetical tenant would reasonably be expected to give for it, in the form of rent, in that actual condition; quite irrespective, in my opinion, of any restrictions or limitations, statutory or otherwise, of its use in the hands of the present proprietors. And, in determining the value, one of the factors in the consideration is that the proprietors and present occupants may fairly be regarded as at any rate one such hypothetical tenant. They might, in consequence of their operations on the ground, not be exposed to competition, though in some cases competition is conceivable. Hence, as I have said, the Valuation Authority ought not to use against them the means they have of testing the true value to them, from the price they have paid for the ground and the money they have laid out on it. It might well be argued that if the municipality are prepared to pay interest on the money borrowed to purchase and lay out, they would, if the subject was in other hands, readily pay the same amount in the shape of rent. But the fair answer would be, we should have no competition to meet, and would have complete control of the market, if the subject was in the market. The valuation ought therefore to be a fair compromise between those two positions. We are, I am glad to say, saved from having to go into the actual question of value, as the parties have very reasonably agreed upon figures in case they should be required. And all I need add is that in my opinion they are extremely moderate figures.

Fourth. I have already said that it is no part of the Valuation Authority's duty to consider any question of rateability or to allow such questions to affect their determination of value. And the reference I have already made to the Valuation Acts is sufficient for the support of that proposition.

I therefore propose to your Lordships that we should find the determination of the Valuation Committee wrong, and should adopt the figures agreed upon by the parties. On the incidental matter of the correction of the

Feb. 8, 1912. entries in the column for "Occupier," we can only give the Assessor our opinion, which no doubt will be acted upon.

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LORD SALVESEN.—This appeal has been brought for the avowed purpose of asking us to reconsider a judgment pronounced by the Valuation Appeal Court on 12th March 1910 (1910 S. C. 823). The subjects are the same as some of those dealt with in that case, and if we are to follow it, the entries in the Valuation-roll, against which the appeal is taken, and which describes the occupiers of the park as "the public" and the assessable rental or value as £1, must be repeated.

It was not seriously contended that it is incompetent for us to review a judgment pronounced in this Court, whether by the Judges who now constitute the tribunal or by their predecessors. It was, however, urged with much force that it is desirable to have continuity in the principles which the Court from time to time lays down, and I agree that we should not reconsider any judgment pronounced in this Court unless we came to be clearly of opinion that it was erroneous, and that its application would lead to inequitable results. It cannot be affirmed of any Court that its decisions are infallible; nor is it the practice of the Court of Session or the Justiciary Court to follow blindly all the decisions which have been pronounced in these Courts. It is true that, so far as these Courts are concerned, a decision of importance is not usually reconsidered, except by a fuller bench than that which originally pronounced it, although cases might be cited where one Division of the Court of Session has refused to follow the decision of the other, and that without consultation with the other Division, or has deliberately reversed a decision which it regarded as erroneous without recourse to a larger tribunal. In this Court there is no machinery by which we can call to our aid other Judges; but that does not relieve us from the duty of reconsidering a decision which we think contrary to the law which we are bound to administer. The Valuation Appeal Court is no doubt final, but it is so only on questions of value, and technically it is only final as regards the value of a heritable subject for the year to which its decision relates. Unlike the other Courts which I have mentioned, our decisions do not constitute *res judicata* in the sense that the parties are precluded from raising the same question at any future period. The Court has therefore no analogy with the House of Lords, which we are told, on high authority, never affirms any principles inconsistent with those which have been laid down by its predecessors—a statement which we must accept as an article of faith.

That it is not incompetent for the Valuation Court to reconsider a decision pronounced in that Court appears from the judgment under consideration; for that judgment not merely adopted new principles of valuation, but did so with regard to the very subjects the value of which had been previously fixed by the same Court's decision. In *Ferrier v. The Assessor for Edinburgh*,¹ the valuation of the Edinburgh parks fell to be determined, and with regard to three of them, the Braid Hills, entered at a valuation of £115; Blackford Hill, entered at £160; and Inverleith Park, entered at £220, the decision of the Valuation Committee was affirmed. I select

¹ 19 R. 1074.

these three as examples, although it was merely on a question of value that Feb. 3, 1912. the Court differed from the Valuation Committee with regard to the other three. The principle of valuation adopted by the Magistrates was that the three parks in question should be valued at the rents which were paid when they were private property immediately before their acquisition by the Corporation, these rents being the same as might be obtained if they were again let and the public excluded. This was adopted as the true principle of valuation by Lord Kyllachy and Lord Wellwood, who constituted the Valuation Appeal Court at the time. The Corporation of Edinburgh were entered both as proprietors and as occupiers; and they were, accordingly, assessed for poor-rates in both capacities at the values then determined. They continued to be so assessed until 1910, or for a period of eighteen years, when "the public" were entered as the occupiers of the parks in question, and the yearly value was fixed at a nominal sum of £1. There is no suggestion that prior to *Ferrier's case*¹ any different method had been followed; and it may therefore be taken as matter of fact that, since the Valuation Act of 1854 was passed, there has been a uniform practice of assessing public parks held by a corporation for behoof of its citizens at the value for which the land would let if the public were excluded. This practice was overturned by the decision which we are now asked to reconsider. I do not see, therefore, that any peculiar sanctity attaches to that decision, or why it should be considered as binding upon us, any more than *Ferrier's case*¹ was considered as binding on the Valuation Appeal Court of 1910 as then constituted. The fact that the decision is so recent does not weigh with me at all. On the contrary, I should be much more unwilling to disturb a decision which had been acted upon for many years, and in reliance on which a uniform practice had been developed. I consider myself, therefore, absolutely free to deal with the question raised in this case, just as if it were raised for the first time and had not been made the subject of two irreconcilable decisions of equal authority.

On the general question whether the decision in the *Lambeth case*² rules the present I refer to the opinion I gave in the case of *The Parish Councils of Glasgow and Govan v. The Assessor for Glasgow*,³ to which I have very little to add. It was assumed that parks dedicated to the use of the public are in exactly the same position as public roads, which have never entered the Valuation-roll in Scotland. But there appears to me to be a marked distinction between the two. In the first place, a public road has no lettable value even if the public could be excluded, for its sole value consists in the access which it affords to lands or houses, and so far as it is valuable, its value is taken into account in valuing them. In the second place, a public road exists for the convenience of the inhabitants of the United Kingdom, none of whom can be excluded from it, although it may be most used by those members of the public who reside in the district which it serves. The parks of Glasgow, on the other hand, were acquired by the Corporation for the recreation of the inhabitants of Glasgow—a large public, indeed, but still limited. It may not be practicable to exclude persons not inhabitants of Glasgow from those public parks; but I apprehend that no one who is not

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¹ 19 R. 1074.

² [1897] A. C. 625.

³ 1911 S. C., at p. 994.

Feb. 3, 1912. an inhabitant of Glasgow has a right to complain of any bye-laws which may be enacted by the Magistrates; or, indeed, to enforce any of the so-called public rights in the parks. There is this important distinction between the park which was the subject of decision in the *Lambeth* case¹ and the Glasgow parks, that while the Lambeth park was dedicated by statute to the sole use of the public, under section 35 of the Glasgow Public Parks Act, 1878, it is expressly declared to be lawful for the Corporation "to sell, lease, feu, or convey" for valuable consideration "such portions of the lands and buildings . . . acquired or held, or which may be acquired or held, by them for the purposes of the Act of 1859, or of this Act, as they shall consider not to be required for the purposes of this Act." Under the Glasgow Corporation and Police Act, 1895, the Corporation are further empowered to set apart portions of parks for games; they may let portions of the parks to private parties for purposes of recreation or games, on such terms and subject to such conditions as they think fit; and they may levy reasonable charges for the use of ground set apart for games, &c., and for the use of buildings erected upon them. There is thus a potential beneficial occupation of the subjects, which is only prevented from being made actual by the policy which the Corporation have followed of making the charges for the parts which they have set aside for special purposes so low that the costs of maintenance exceed the revenue. I am unable to understand, however, why that circumstance should exclude them from the Valuation-roll; for that is practically the effect of entering them at a nominal value. In *Ferrier's* case² Lord Wellwood said: "In the present case the Magistrates, instead of letting the subjects out-and-out, have thought fit to devote them primarily to the recreation of the public. That is much as if a private individual were to lend his mansion-house and policies to a friend free of rent, and merely let the grazings of the surrounding parks. This would certainly not prevent the whole of the subjects from being valued for purposes of assessment at the rents which they would bring if let." I think this is the true principle which ought to be applied to public parks, just as it is to public undertakings for the benefit of an urban community, such as the provision of sewers, water supply, and the like. The distinction taken that the Corporation were under no statutory duty to provide public parks, whereas they are charged with the statutory duty of draining the houses within their area is, I think, not substantial. Whenever the public money has been expended on the acquisition of parks under statutory authority there is a duty on the Magistrates to maintain them for the purpose for which they were acquired. In each case it is the limited public who inhabit the area who obtain the primary benefit; for the general public derive just as much advantage from the streets of a town they visit being well drained or well lighted as they do from the privilege which is accorded to them of obtaining access to its parks.

There is another consideration (that has not hitherto been adverted to in any of the cases), which, I think, makes it illegal for us to sustain the entries in the Valuation-roll that are the subject of this appeal. By section 41 of the Valuation of Lands (Scotland) Act, 1854, it is enacted that:—

¹ [1897] A. C. 625.

² 19 R. 1074, at p. 1076.

"Nothing contained in this Act shall exempt from, or render liable to, Feb. 3, 1912.
assessment any person or property not previously exempt from or liable to
assessment." To enter the value of land, which is capable of being let in
its existing physical state, at a nominal value is, in effect, to exempt it from
assessment, and that is not within the jurisdiction of the Valuation Appeal
Court. We have nothing to do with rateability; and this is best demon-
strated by the fact that it has been more than once decided that subjects
which are exempt from assessment by statute, must nevertheless enter the
Valuation-roll in exactly the same way as any other lands and heritages,
even although they cannot enter it for any practical purpose. Here, if the
proper value be placed upon the parks, even if it should be held that the
public ought to be entered as occupiers, the public are certainly not the
owners; and though the public cannot be assessed, the owners may be for
their proportion of poor-rates. There is no case of an owner escaping taxa-
tion because he had chosen to dedicate part of his property to public uses.
The importance of this consideration is demonstrated by the other case¹
which has been brought before us on appeal, where the Corporation of Leith
have leased a park from a private owner for the recreation of the inhabitants.
If in such a case the value was entered, not at the rent stipulated in the
lease, but at a nominal figure, the owner would occupy the unique position
of not paying any local taxes on a revenue derived from land. This con-
sideration could not have been before the minds of the Judges who decided
the *Lambeth* case²; for all the rates in England are levied on occupiers,
and not shared, as in Scotland, between owners and occupiers.

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It was pressed upon us by the counsel for the respondent that, just as
sewers have not in practice been entered in the Valuation-roll where laid
within the streets of a burgh, because their value is already taken into
account in the annual value of the houses which they serve, so the public
parks of Glasgow may be assumed to increase the value of the houses in
their neighbourhood, and thus, in effect, to enter the Valuation-roll. This
might be so in the case of a burgh common, to which all the inhabitants
have access as matter of right and from no part of which they can be
excluded, and where no actual rent is derived from grazings; but not to
parks in which the Corporation have a beneficial occupation in the sense to
which I have already referred. Nor do these considerations apply to the
case of the Tollcross Park, which, though it belongs to the Corporation of
Glasgow, lies in the county of Lanark.

For these reasons I am of opinion that we should revert to the rule
established by *Ferrier's* case,³ and value the subjects, as similar subjects
have for more than fifty years been valued under our valuation statutes, at
the yearly rent which they would fetch if the public were excluded from
them. There is no difficulty in applying the rule in any of the cases,
because the parties are agreed as to what are the proper figures, if we hold
that a nominal value cannot be placed upon them. I desire, however, to
emphasise what I pointed out in my opinion at last sittings, that our judg-
ment cannot prevent the question of rateability being raised and disposed
of in an action of declarator in the Court of Session; to which, if necessary,

¹ Reported *supra*, p. 812.

² [1897] A. C. 625.

³ 19 R. 1074.

Feb. 3, 1912. reductive conclusions may be added. That is the proper tribunal for settling questions of exemption from rateability, whether such exemption is based upon statute or upon restrictions on occupation, such as are alleged here to render the subjects incapable of yielding a rent.

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LORD CULLEN.—The question raised in this case is directly ruled by the decision of this Court in 1910, and I confess that I have felt very grave doubt whether we are entitled to do otherwise than follow that judgment. Dealing, as it does, with the valuation in a particular year, it is not technically *res judicata*. But it proceeds upon an enunciation of general principles, and it has been rarely, I think, that the Judges in this Court have felt entitled to deviate from a well-considered decision of their predecessors in office. When, however, the principles on which it proceeds are examined, it appears to me that the decision in question is only one of a number in which these have been involved, and with some at least of the other cases it seems to me not to be consistent. Looking to this, and to the importance and generality of these principles, I have come to be of opinion, though with very considerable hesitation, that we are entitled to reconsider the question raised. And having done so, I have arrived at the same conclusion as have your Lordships.

I do not think that I can usefully add much to the reasons which have been fully given in the opinions just delivered, and shall state my view as briefly as possible.

Regarded physically, the lands in question are undoubtedly susceptible of valuation in terms of the statute, and their value is a substantial one. The respondents' argument is directed to legal restrictions said to affect the mode of occupation. Their contention is that these legal restrictions prevent the possibility of actual letting by the owners, and that, while legal restrictions disabling an owner from letting do not always have the effect of excluding valuation, the restrictions affecting the lands now in question do have that effect, because they are imposed by statute. The respondents also introduce into their argument the consideration that the restrictions in question are for the benefit of the "public," who, and not the Corporation, are, they say, the "occupiers." It does not seem to me that this element in the case, when examined, really adds to the respondents' argument, which may, without reference to it, be stated to be that the lands are by force of statute incapable of being let, and are therefore, for purposes of valuation, to be treated as sterile.

Now, I think it is the result of many decisions both in Scotland and England that subjects may fall to be valued and rated although the conditions and restrictions legally affecting the owners are such as to make an actual letting of them impossible. A familiar instance is the case of subjects vested by a private trust in a public body or other trustees for behoof of some particular section of the community, under conditions which disable the owners in trust from letting them. And there are many corresponding instances of restrictions arising from statute. Of these the *Erith* case¹ is a signal instance. There, in the absence

¹ London County Council v. Churchwardens, &c., of Erith, [1893] A. C. 562.

of the possibility of actual letting, a hypothetical tenant was found in Feb. 3, 1912. the owning body, the London County Council, and that on the assumption that they were, under their statutes, legally unable to be tenants. Now, so far as the respondents' contention here is that the land included in the parks is dedicated by statute to purposes which preclude the possibility of an actual let, I do not find anything in this statement of the case—assuming it to be accurate in fact—which differentiates it from the cases of statutory restriction to which I have already referred, and of which the *Erith* case¹ is an example. The difference, if it exists, must apparently be found in the search for the hypothetical (and sometimes impossible) tenant. The respondents' contention must be that the land is so conditioned by statute that no hypothetical tenant can, for purposes of valuation, legitimately be conceived, even of the legally impossible kind admitted in the *Erith* case.¹ But, whatever may be the right view on this subject, to which I shall hereafter advert, I have been unable to satisfy myself of the soundness of the respondents' fundamental proposition that the land in question has been so dedicated by statute as they allege. The Corporation are, by their statutes, clothed with power to acquire and lay out land as public parks, and to assess for the purpose. The empowering statutes do not "sterilise" any particular area by dedicating it *in perpetuum* to the use of the inhabitants of the city. The acquisition of land in exercise of the power is a discretionary act on the part of the Corporation. Nor does the acquisition have the effect of fastening on the land so acquired any permanent statutory appropriation. For the Corporation possess under their Acts powers of selling, feuing, and leasing such portions of the lands acquired as they may consider not needed for the purposes of parks. These powers, as given, are of indefinite extent. The statutes define no limit to them. The matter, as is not unnatural, is left to the discretion of the Corporation. Hence the retention of any particular portion of the acquired ground as park ground is not the doing of the Legislature, but is the act of the Corporation. Further, while ground is retained as park ground, the Corporation have large powers of letting out such parts of it as they think right. I do not propose to recite the statutory provisions giving powers of selling, feuing, and leasing to the Corporation, as these have already been fully referred to. The result, in my opinion, is that, whatever may be the effect of an actual dedication by statute to such "public" uses as are in question, there is here no such dedication, but that the present use of this land as public parks rests on the act of the Corporation, whose proceedings in the matter are merely made lawful to them by the sanction of statute.

In the process of valuation of these subjects I do not, in any view, perceive any greater difficulty than has presented itself in many cases of subjects held for statutory purposes of a public nature, so as to be incapable of being let. If the London County Council in the *Erith* case¹ could be regarded—in the absence of the possibility of an actual let—as the hypothetical tenants, even on the assumption that they were legally disabled under their statutes from being tenants, I do not see why the Cor-

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¹ [1893] A. C. 562.

Feb. 3, 1912. Corporation of Glasgow may not just as well be regarded as the hypothetical tenants here, if indeed that conception is required for the process of valuation. If it be true that they are now under an imperative statutory duty to hold the lands for the use of the citizens, I do not see why, in the process of valuation, they may not be regarded as hypothetical tenants occupying for the purposes of discharging that duty. The distinction in this respect between a statutory duty to acquire and hold land, on the one hand, and a statutory duty to hold it, if and when acquired, on the other hand, fails to impress me as substantial, when it is considered how highly artificial the conception of the hypothetical tenant has become.

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The respondents, in stating their argument regarding statutory dedication, laid much emphasis on the view that the alleged dedication was to the use of the "public." In considering this, one may at once put out of view the class of cases in which subjects devoted to public purposes subserving the general government of the realm have been admitted to share in the exemption from taxation generally enjoyed by Crown property. The subjects in question do not belong to that class. The "public" are only the citizens of Glasgow. And it seems to me to make no difference to the case whether the subjects are held for the benefit of all the citizens of Glasgow or only of one or more of them. Whoever may be the person or persons for whose behoof they are held, the question is the same, viz., whether the subjects, if they are, according to the respondents' contention, subject to legal restrictions exclusive of actual letting, are thereby necessarily excluded from valuation.

It is said by the respondents that the Corporation do not occupy the lands, and that the occupiers are the inhabitants of Glasgow. Now, it is certain that no particular inhabitant of Glasgow who from time to time recreates himself in these parks can be said to occupy them, and thus, on the respondents' view, the occupiers are a series of individuals none of whom occupies. It appears to me that the occupiers of the parks are the Corporation. They are not in the position of being merely vested with the legal title. They have and exercise the whole powers of maintaining them, and of regulating and controlling the use of them; they levy charges in respect of certain uses, they levy assessments, and expend the sums raised on upkeep, and they have and exercise powers of leasing, &c. I do not see how the Corporation, having and exercising these powers, can be otherwise than in occupation of the subjects. That the occupation of particular subjects by a public body is fiduciary in character does not alter the fact of their occupation, or its effect for purposes of valuation and rating. This, I think, is quite settled.

Tollcross Park Case.

LORD JOHNSTON.—The Corporation of Glasgow in addition to parks within the limits of the city have acquired Tollcross Park outside these limits and within the Lower Ward of the county of Lanark, and have laid out and maintained the same as a park for the public of their city. In all respects this park is *in pari casu* with the city parks already dealt with in the judgment in the last case. But the contention of the Corporation and the determination of the Valuation Committee exhibit an extension in the

application of the doctrine on which that determination proceeds, which Feb. 8, 1912. results in the reduction to a nominal value of a valuable heritable subject outside the boundaries of the city, by the exercise of the discretionary power of the Corporation of Glasgow. It is therefore a step in advance in the application of that doctrine, of which the Leith Golf Course case,¹ to be immediately dealt with, is only a further, and it may logically be maintained a legitimate, sequel however extravagant.

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The Valuation Committee have given great care and consideration to the case, and their judgment is set forth in a most ably written paper. Standing the judgments of this Court in the two cases of *The Parish Councils of Glasgow and Govan v. The Assessor for Glasgow*,² I think your Lordships will agree with me that the Valuation Committee had no alternative but to hold, first, that the Tollcross Park itself was of a nominal value; second, that the various buildings within the park enumerated in the appeal were not of separate value, but were adjuncts of it; and third, that the public and not the Corporation were the occupiers. But the first and third of these conclusions are inconsistent with the judgment pronounced in the Glasgow General Parks case just decided. I refer to my opinion in that case, which entirely covers the ground of the present so far as these two conclusions are concerned. The remaining conclusion is supported by an incidental part of the judgment in the second Glasgow case above referred to.²

Accordingly, in my opinion, the determination of the Valuation Committee here must be corrected by valuing the Tollcross Park, and by treating the buildings enumerated as adjuncts, and therefore not to be separately valued. The agreed-on value, on the assumption of this judgment, is £281.

The entry of "the public" as "occupiers" ought to be corrected, and the Corporation entered in their stead. But this can only be done by agreement.

LORD SALVESEN and LORD CULLEN concurred.

THE COURT were of opinion that the determination of the Valuation Committee was wrong both in the General Parks case and in the Tollcross Park case; that the annual value of the public parks and buildings, &c., should be entered as follows:—Alexandra Park, £60; Glasgow Green, £420; Kelvingrove, £250; Ruchill, £150; Springburn, £150; Bunhouse Recreation Ground, £60; and that Tollcross Park and buildings should be entered as a *unum quid* at an annual value of £281. They were further of opinion that the Corporation of the city of Glasgow (Parks Department) should be entered as occupiers of the said subjects, and of consent directed that the Valuation-rolls be altered accordingly.

MACKENZIE, INNES, & LOGAN, W.S.—SIMPSON & MARWICK, W.S.—
CARMICHAEL & MILLER, W.S.—Agents.

¹Reported *supra*, p. 812.

² 1910 S. C. 823, and 1911 S. C. 988.

No. 118. THE LORD PROVOST, MAGISTRATES, AND COUNCILLORS OF THE BURGH OF DUNDEE, Appellants.—*Clyde, K.C.—H. P. Macmillan.*
 Feb. 8, 1912. ASSESSOR FOR FORFARSHIRE, Respondent.—*Murray, K.C.—*
Hon. W. Watson.
 Magistrates of Dundee v. Assessor for Forfarshire. *Valuation Acts—Subjects—Value—Public sewer—Burgh sewer passing through adjacent county.*

An underground sewer, belonging to and serving a burgh but yielding no profit, was laid for a portion of its length in the adjoining county. *Held* that the portion so laid fell to be entered in the Valuation-roll of the county at its fair yearly value, fixed, in the circumstances of the case, at a figure representing 5 per cent of the cost of construction plus a sum of £50 payable for wayleave.

Lands Valuation Appeal Court. AT a meeting of the Valuation Committee of the County Council of Forfar, held at Forfar on 11th September 1911, the Provost, Magistrates, and Council of Dundee appealed against the following entry in the Valuation-roll for the county of Forfar:—
 Ld. Johnston.
 Lord Salvesen.
 Lord Cullen.

Case 310.

No.	Description and Situation of Subject.	Proprietor.	Tenant.	Occupier.	Inhabitant Occupier not rated (48 Vict. cap. 3, sections 3 and 9).	Annual Value of Dwelling-house of Inhabitant Occupier or Feuduty or Ground-annual of other Subjects.	Yearly Rent or Value.	Agricultural Rating Act, 1896, 8ths of Rent or Value.
224	Lochee Sewer.	Dundee Town-Council, per Alex. W. Stiven, C.A., Treasurer, Commercial St., Dundee.		Proprietors.		£50, 5s.	£300	

The appellants craved that the sewer should not be entered in the Valuation-roll, and that the entry should be deleted, or alternatively, that it should be entered at the nominal value of £1, or at anyrate at not more than £200.

The Committee having dismissed the appeal, the appellants obtained a stated case which set forth that the facts of the case were admitted to be as follows:—

“ 1. The sewer in question was formed in or about the year 1873 by the Dundee Police Commissioners, who are now merged in the appellants, and has throughout been maintained by these local authorities in succession. It was constructed in virtue of the powers contained in the Dundee Police and Improvement Act, 1871. It serves what may be generally described as the Lochee district of the burgh of Dundee.

" 2. The main trunk of the sewer commences within the municipal boundary of Dundee at Lochee, and is carried thence southwards to the road from Dundee to Perth within the burgh of Dundee, near the Firth of Tay, into which the sewage is ultimately discharged. Between these points (because of intervening elevated ground) the sewer was constructed with a bend to the westward, and because of this bend it is for the greater part of its course outside of the municipal boundary to the west, and within the united parish of Liff and Benvie in the county of Forfar. The entry in the Valuation-roll of the county objected to is applicable to the part of the sewer which, because of the westward bend, is outside the burgh boundary. The length of the part in question is approximately two miles. In addition to the main trunk of the sewer there are numerous branches or tributaries laid in the streets of Lochee, all within the municipal boundary. After the main trunk of the sewer rejoins the burgh territory, it is also utilised for drainage of that district within the burgh boundary.

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" 3. The sewer is constructed entirely underground, and apart from ordinary manholes (some of which are within and some outside the burgh) it occupies no part of the surface of the ground. The sewer is constructed partly in the public streets of the town and partly through private ground. So far as constructed in streets, this was done in virtue of the Commissioners' rights in the streets. So far as constructed through private grounds, this was done in virtue of an agreement for a wayleave through such ground. The Town-Council do not own any part of the grounds through which the sewer passes except so far as they own the streets. The wayleave payable amounts to £50 per annum, and applies exclusively to lands outside the municipal area. So far as the sewer is outside the burgh boundary, it is laid almost entirely through private ground. The ramifications or tributaries extend to several miles in length, and are laid entirely within the streets of the burgh of Dundee.

" 4. The matter which the sewer conveys consists of domestic sewage and other sewage from the various buildings and premises in the urban district of Lochee, which it serves, and the district within the burgh limits near its outfall, as well as the drainage water of the said districts and the surface water from the street channels. No material is received by the sewer after it leaves the burgh until it returns to the burgh territory, except that, by permission of the appellants, given in the year 1901, there is discharged into the sewer material from the premises of the Dundee Floorcloth and Linoleum Company, Limited, which are outside the burgh boundaries, for which privilege that Company makes an annual payment to the appellants as in lieu of sewerage assessment of a sum equal to the produce of a rate of 50 per cent over the city rate on the rental of the works, which is £1080. The annual payments vary slightly—with the variation of the Dundee sewerage assessment. The amount for the current year is £14, 6s. 10d.

" 5. The sewer is maintained by the appellants (like all other sewers within the burgh of Dundee) by means of assessments levied on all lands and heritages within the burgh of Dundee—irrespective of whether these lands and heritages are served by any particular sewer or not. The sewerage assessments are applied, *inter alia*, in payment of interest on sums borrowed to construct sewers and towards the sinking funds.

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from occupiers of mills for the privilege of discharging their trade refuse into the sewer. It was strongly argued that every member of the public has the benefit of the particular sewer in so far as it drains certain of the streets of Dundee; and that, therefore, the public should be entered as occupiers of the sewer and not the Dundee Town-Council. In my opinion the premises on which this argument proceeds are unsound. The sewer was constructed primarily for the benefit of householders in Dundee, and in order to enable the Town-Council to discharge a statutory duty towards them. Any additional comfort which visitors to Dundee enjoy through the streets being properly drained is too remote a benefit, and is not in any way different from the advantage of having a street well lighted or well watered from a town supply. But the benefits of water and gas are intended for, and are enjoyed mainly by, the inhabitants of the burgh or district for which the public works that supply them have been undertaken. The same is true of a sewerage system. It may well be that, when the sewers are constructed entirely beneath the streets or property of a burgh, they should not enter the Valuation-roll as a separate subject of assessment; for, in reality, the additional value which the houses derive from being properly drained is reflected in the rents which can be obtained for them. But the County Authorities in this case derive no benefit from the existence of the sewer in their area. It does not serve any houses within it from which they are under a statutory obligation to remove the sewage; and there is no reason why a valuable heritable subject belonging to the Town-Council of Dundee, of which they have the beneficial occupation for behoof of ratepayers in their own area, should not be assessed so far as constructed within the county.

The appellants also objected to the valuation which has been put upon the sewer. The Assessor has fixed this valuation by taking 5 per cent on the ascertained cost of the sewer and adding thereto the sum of £50 which is payable for wayleave. It was pointed out by the appellants that the rate of interest which they have paid on money borrowed to construct the sewer averages $3\frac{1}{4}$ per cent, and that the rate of 5 per cent would be more than the annual payment required to pay this interest and sinking fund charges. At first sight the rate of interest seems high, but we have no materials before us that would justify a reduction of the Assessor's valuation. The expense of maintenance and the renewal of the sewer, when it becomes worn out, obviously fall to be provided for by the owners. The hypothetical rent that they would pay if the sewer had been constructed at their request by the county authorities might therefore well amount to the 5 per cent of the cost on which the Assessor has based his calculation. At all events, in the absence of all information and evidence on the subject we cannot affirm that the valuation is excessive, and I am accordingly of opinion that the determination of the Valuation Committee is right.

LORD CULLEN.—I concur.

LORD JOHNSTON.—I concur in the result to which your Lordships have come. There is a valuable occupation, and it must therefore be valued.

The *West Kent* case¹ is an important decision, and difficult to reconcile with the *Lambeth* case.² But I prefer not to rest upon the English case upon rating, but rather upon our own authority of the *Inveresk Paper Company*,³ and upon the grounds of judgment adopted by your Lordships in the *Glasgow Parks* case⁴ just decided.

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THE COURT were of opinion that the determination of the Committee was right.

MORTON, SMART, MACDONALD, & PROSSER, W.S.—J. & J. GALLETLY, S.S.C.—Agents.

JAMES STEIN, Appellant.—*MacRobert*.
ASSESSOR FOR FALKIRK, Respondent.—*D. M. Wilson*.

No. 119.

Valuation Acts—Appeal—Procedure—Times at which various steps must be taken—Delay in lodging cases on appeal to Lands Valuation Appeal Court—Preparation of stated cases—Duties of Appeal Committee in stating cases.

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Stein v. Assessor for Falkirk.

Valuation Committees in counties and burghs must hold their Courts between 10th and 19th September, with continuation of days, and complete their work and dispose of all appeals before 30th September. Parties appealing against any determination of a Committee, and the respondents in such appeal, must hand to the Clerk of the Committee their reasons for appeal and answers respectively within ten days from the determination appealed against, i.e., in no case later than 10th October; and the Clerk of the Valuation Committee must transmit the complete case to the Inland Revenue as soon after that date as is reasonably possible, and at anyrate in time for the sitting of the Lands Valuation Appeal Court.

In preparing the case it is the duty of the Committee themselves to state the facts and their determination upon them, and to add the reasons of appeal and the answers furnished by the parties; but it is also proper and convenient that the Committee should submit a draft of the case to the parties for their observations, provided that no undue delay is thereby caused.

JAMES STEIN, publican, Falkirk, appealed against a determination of the Valuation Committee for the burgh of Falkirk, as to an entry in the Valuation-roll for the year ending Whitsunday 1912, relating to the annual value of a public-house in Falkirk of which the appellant was proprietor and occupier.

Lands Valuation Appeal Court.
Ld. Johnston.
Lord Salvesen.
Lord Cullen.

The sittings of the Lands Valuation Appeal Court were fixed by the Judges for 5th December 1911, the date of the sittings being intimated in the Rolls on 28th September, and a notice containing a copy of the intimation in the Rolls was sent to all Clerks of Committees on 11th October.

Case 311.

The Court sat from 5th to 15th December, and heard all appeals lodged prior to the latter date.

On 17th January 1912 the present appeal was lodged with the Inland Revenue by the Town-clerk of Falkirk.

A special sitting of the Court was held on 8th February 1912 to dispose of the case.

When the case was called, and before parties were heard, the follow-

¹ [1911] A. C. 171.

² [1897] A. C. 625.

³ 1907 S. C. 747.

⁴ *Supra*, p. 818.

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ing observations were made by Lord Johnston, and concurred in by Lord Salvesen and Lord Cullen :—

LORD JOHNSTON.—It is necessary, in consequence of the delay which has taken place in bringing this case before the Court, to say something on the subject, not only for the benefit of the Town-clerk of Falkirk, but for the benefit of county and town-clerks generally.

We would, in the first place, point out that the Valuation Act of 1854 (17 and 18 Vict. cap. 91), section 12, specially provides that the Roll, when all appeals have been disposed of, is to be authenticated as therein provided, and is, when so completed, to be the Valuation-roll for the year from Whitsunday to Whitsunday. It is manifest that though there are many purposes for which that Roll is necessary, the primary purpose is that of the assessment and collection of the year's taxes, and it would be a very strange thing if that Roll was to be in a state of incompleteness down to such a point of time as the months of February or March and even later, when the year of assessment ends in May. We are of opinion that the statute contemplated something very different.

We need not refer to the provisions with regard to the Assessor making up his Roll. But the Valuation Act of 1854, sections 9 and 13, the Valuation Act of 1857 (20 and 21 Vict. cap. 58), section 2, and the Valuation Act of 1879 (42 and 43 Vict. cap. 42), section 6, provide for appeal from the Assessor to the Commissioners of Supply and the Magistrates of the burghs—now to the Valuation Committees in counties and in burghs respectively. And the Local Government Act of 1908 (8 Edw. VII. cap. 62), section 7, subsection 1, provides that these Committees shall hold their Courts for appeal between the 10th and the 19th of September, with continuation of days. Those dates are fixed in order to give the Assessor time between Whitsunday and the end of August to prepare his Roll and for parties interested to examine it. And those Appeal Courts, having to be thus held not later than the 19th of September, must, under the definite provision of the Valuation Act of 1854, section 8, complete their work and dispose of the appeals taken to them before the 30th of September. These provisions indicate impliedly but distinctly the intention of the Legislature that the procedure in disposing of appeals, with a view to the completion of the Roll, is to be prompt and peremptory.

The Valuation Appeal Committee's judicial work being thus concluded on the 30th of September, the next point is the matter of appeal to this Court. It is open to any party aggrieved with the decision of an Appeal Committee to appeal to this Court. The Acts of 1857, section 2, and 1879, sections 7 and 9, provide that, on demand of an appellant, the Valuation Committee shall state a case, "setting forth the facts proved, together with the determination thereupon," and in addition to these particulars, "shall set forth the grounds of appeal or complaint, and the replies thereto, in such terms as shall be submitted to them by the parties within ten days after the determination appealed against." Accordingly, by the 10th of October at latest, the parties to any appeal are bound to hand in to the Appeal Committee—that is, of course, to their clerk—on the one side their reasons for appeal, and on the other side their answers thereto. That gives another

important fixed point of time, and indicates, though the Valuation Com- Feb. 8, 1912.
mittee is not directly limited in the matter of time in the statement of a ^{Stein v.}
case, that they are expected to have it ready for transmission to this Court, ^{Assessor for}
if not on the 10th October, at least within a reasonable and short time ^{Falkirk.}
thereafter. ^{Ld. Johnston.}

For the preparation of the reasons of appeal and replies the Appeal Committee are not responsible. Their duty is to state the facts and their determination, and to add thereto the reasons of appeal and replies. And then the case is to be transmitted to the Inland Revenue for the purpose of being laid before the Appeal Judges, and the Appeal Judges are to give their opinion thereon "with all convenient speed," again emphasising the necessity of prompt dispatch. It is not provided that there shall be a hearing before the Court. The opinion of the Court may be given in chambers and without such hearing, but it has been found very convenient in practice that the cases should be heard in open Court, and there is no doubt that that practice will continue to be followed, unless in exceptional cases.

It is quite clear, therefore, that shortly after the 10th of October these cases ought to be in the hands of the Inland Revenue to be laid by them before this Court, in order that this Court may give its decision thereon in such time as to allow the Valuation-rolls for the year to be timeously completed.

It is perfectly true that for a number of years past, from continually increasing delays in preparing and forwarding cases, the sittings of this Court have been pushed later and later into the spring, until last year our decisions were not all given until April. We thought that it was not right that this should continue, and, accordingly, we fixed the date of the sitting of the Court for 5th December, and, in respect of the delays which had become customary, we not only caused the date of the sittings to be intimated in the Rolls so early as 28th September, but we issued, or caused to be issued by the Inland Revenue, a notice to all the clerks concerned which stated that in order to secure the prompt transmission of lands valuation appeals, "a copy of the above notice which appeared in the Rolls of the Court of Session of Thursday, 28th September last, is, by instruction of the Court, addressed to you." This circular notice was issued to all clerks concerned on the 11th October, yet, though the Court did not sit till the 5th of December, the appeal which we are called on to deal with to-day was not in the hands of the Inland Revenue until 17th January, six weeks too late for the regular sitting of the Court.

The excuse tendered is a mere admission of such laxity on the part of the Town-clerk of Falkirk that the notice sent to him was not observed by anybody, and is not now to be found. But the correspondence, with a copy of which we were furnished, also discloses a course of practice which seems to us to be not in accordance with the intention of the statute. It discloses an amount of coming and going between the Town-clerk and the agents for the parties, which leads to the conclusion that the Town-clerk regards the case as a thing not so much to be prepared by him, as to be adjusted between the agents. That is not as it should be, and the practice doubtless accounts for a considerable part of the delay which has occurred. The case is, according to the statute, to be stated to the Appeal Court by the Appeal Committee. As I have already

Feb. 8, 1912. said the statute requires it to contain the Committee's statement of the facts which were found proved, and on which therefore they proceeded. Stein v. Now, these facts are certainly in their knowledge alone. At the same Assessor for Falkirk. time, it is always possible that the Committee's statement of them may not include some fact proved, which is necessary to support a contention which Ld. Johnston. one or other of the parties means to maintain on appeal. We think, therefore, that, though the statutes are silent on the subject, there is manifest convenience in the draft case being submitted by the clerk to the parties for their observations, but so that undue delay is not thereby involved. This manifest convenience affords no countenance to the idea, that the case is to be bandied about between the parties *inter se* and between them and the clerk, as if it was intended to be a concerted statement.

In the next place, the Committee are to state their determination, and their determination is also solely in their own breasts. What they have to add—and this only, I think, brings them in contact with the parties—is the statement of reasons of appeal and replies thereto. Beyond that they have nothing to do. I can quite understand that if a statement were submitted to them which did not contain reasons of appeal, or replies, it would be their duty to send back such statement, and decline to accept it until it was altered in conformity with the statutory intention. But, otherwise, their duty in connection with the preparation of appeals simply is to state the facts found, to state their determination, and to append the reasons of appeal and replies tendered to them. The only other thing they have to do is to append the notes of evidence, where such notes have been taken at the request of the parties.

I state this with your Lordships' approval in order that the public interested may know that the procedure in stating cases has evidently hitherto been lax and dilatory, and that such delays will not for the future be allowed. The object of the statute is, as I have shown, to get the Valuation-roll finally adjusted as soon after 10th October in each year as conveniently can be. The sittings of this Court in the future will be fixed at an earlier date than of recent years. They were fixed so late as December this year in order not to make the resumption of a proper practice too abrupt, but in future years the Court will, we trust, be held early in the month of November at latest.

As regards the case of Stein at present before us, on inquiry into the circumstances, we find that the delay in presenting it was not the fault of the parties or their agents, but entirely that of the Town-clerk of Falkirk. Were the case refused a hearing, the appellant would suffer injustice for a cause for which he is not responsible, and we have therefore consented to hold a special sitting for its disposal. But it must be apparent that where Judges have to be withdrawn from three different departments of the Court this has not been done without great inconvenience. And we think it right to say that in the future appeal cases are peremptorily required to be in the hands of the Inland Revenue in time for the sittings of the Appeal Court, of which due notice will be given in the Rolls.

THE COURT then heard and disposed of the appeal.

JAMES PURVES, S.S.C.—MACPHERSON & MACKAY, S.S.C.—Agents.

SHANKLAND & COMPANY, Pursuers (Respondents).—

No. 120.

*Graham Stewart, K.C.—T. G. Robertson.*H. M. M'GILDOWNY, Defender (Appellant).—*Sandeman, K.C.—*

Mar. 15, 1912.

*W. T. Watson.*Shankland &
Co. v.
M'Gildowny.*Arrestment jurisdictionis fundandæ causa—Subjects arrestable—Sum consigned in hands of Clerk of Court.*

A foreigner brought an action in the Sheriff Court of Lanarkshire against a Scotsman for payment of certain sums alleged to be due for limestone and sand. The defender admitted liability for the sum claimed for the limestone, but denied that he was due anything for the sand in respect of a counter claim with regard to it which he stated in the action. With his defences he consigned in the hands of the Sheriff-clerk the amount claimed for the limestone, taking a simple receipt which did not specify the purpose of the consignment. The action was afterwards settled on terms which involved the return to the defender of the sum he had consigned.

Before the action was settled a creditor of the foreigner arrested in the hands of the Sheriff-clerk the consigned money *jurisdictionis fundandæ causa*, and on the strength of this arrestment brought an action in the Sheriff Court of Lanarkshire against the foreigner.

Held (diss. Lord Johnston) that the arrestment was bad in respect that, at the time it was laid on, the Sheriff-clerk was under no obligation either to pay or to account for the consigned sum to the foreigner; and plea of no jurisdiction *sustained*.

Lockwood, (1738) M. 736, and Pollock v. Scott, (1844) 6 D. 1297, examined and distinguished.

IN December 1910 Shankland & Company, coal, sand, and limestone merchants, Glasgow, brought an action in the Sheriff Court there for payment of a sum of money, against H. M. M'Gildowny, 1st DIVISION.
Sheriff of
Lanarkshire.
Clare Park, Ballycastle, County Antrim, Ireland.

The pursuers had used arrestments *jurisdictionis fundandæ causa* against the defender, and the latter pleaded, *inter alia*, (1) No jurisdiction.

The circumstances in which the arrestments had been laid on were thus narrated in the opinion of the Lord President:—"The present defender, M'Gildowny, raised an action in the Sheriff Court in Glasgow against a person of the name of Hart, making a claim for limestone and sand delivered to him under contract. The sum which he claimed for the limestone was £64, 11s., and £33, 6s. 1d. for sand. Hart admitted that he was due the sum for the limestone, but he did not admit that he was due the sum for the sand, because he said that he had a counter claim upon that matter for damages. The conclusion of the action, as I understand, was for a lump sum, being the amount of the two items added together. Hart accordingly put in defences, and with his defences he consigned a sum of £64, 11s., corresponding exactly to the sum which was due for the limestone. This consignment was not made in connection with any minute in the case, nor was there any interlocutor, so far as I know, pronounced upon it; but it was simply consigned with the Sheriff-clerk, and the Sheriff-clerk granted a simple acknowledgment which bore,—'The defender has this day consigned in my hands the sum of £64, 11s, sterling,' not a word being said as to why or wherefore it was consigned. Now, while the money was in this position the arrestments in question were executed

Mar. 15, 1912. —that is to say, a notice of arrestment was served upon the Sheriff-clerk, on 5th December 1910, arresting all sums due to M'Gildowny. What happened afterwards was that the action was settled between the two parties upon certain terms with which we have nothing to do; but under the settlement the consignor of the money, namely, Hart, was entitled to get it back again, and accordingly, although we have not any actual evidence of that before us, we find from the excerpt which we have got from the consignment-book that the money which had been consigned by the defender with the defences on a certain date, and had been paid into bank and on which a little interest had accrued, was paid back to Messrs Mackay & M'Intosh, agents for the defender (that is to say, the person who had consigned the money), per order of the Court dated 21st December 1911.*

Shankland &
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On 13th May 1911 the Sheriff-substitute (Fyfe) sustained the defender's first plea, and dismissed the action.†

* The Consignation Book bore that the money had been consigned "By defender with defences *i. c.* A1168/1910 H. M'Gildowny *v.* Maxwell Mure Hart. (Ordinary Court)"; and the entry as to repayment was in the following terms:—"Paid to Messrs Mackay and Mackintosh, writers, Glasgow, agents for the defender, *per* Order of Court dated 21st December 1911, the sum of Sixty-six pounds, ten shillings, and ninepence stg.

"For MACKAY & M'INTOSH,
"JAMES M'INTOSH.

"27/12/11.

"£66 10 9."

† "NOTE.—As this process now stands the single and interesting question raised by defender's first plea is whether an arrestment of funds consigned in Court is valid to found jurisdiction.

"The defender, in the words of section 6 (c) of the Sheriff Courts Act, 1907, is 'a person not otherwise subject to the jurisdiction of the Courts of Scotland.' He is therefore liable to be sued in this Court only if the money which lay in the Sheriff-clerk's hands on 5th December 1910 was money 'belonging to him' in the sense of that clause 6 (c)."

[The Sheriff-substitute then referred to the action at the instance of M'Gildowny against Hart, and continued]:—"In that process, Hart, on 27th June 1910, consigned the amount of the limestone account, £64, 11s. On 5th December 1910 that sum was arrested in the Sheriff-clerk's hands, conform to execution of arrestment No. 5/3 of process. On the same date (jurisdiction being assumed to have been founded by this arrestment) the present action was raised.

"I think that the sole question is, was the arrestee (the Sheriff-clerk) at 5th December 1910 a person bound to pay to, or at least liable to account to, the common debtor (M'Gildowny)? I do not think he was. He was merely a custodier. He held the money for the Court, not for either M'Gildowny or Hart. He could not at his own hand either give it back to Hart, or pass it on to M'Gildowny; nor could either of them demand payment. The Sheriff-clerk's duty was to hold the consigned fund till the Court directed what was to be done with it; and to part with it only upon the Court's order. Unless and until the Court repelled the counter claim M'Gildowny could not claim the arrested fund.

"It was entirely problematical whether M'Gildowny would ever be in a position to ask the holder of the fund to pay or account to him.

"I think it is an essential element in arrestment, alike on the dependence, in execution, and *ad fundandam jurisdictionem*, that the common debtor must have a present claim against the holder of the fund, which he could vindicate in an action for payment, or at least in an action for count and reckoning. The exact amount of the common debtor's claim against

On appeal the Sheriff (Millar), on 2nd August 1911, recalled the Mar. 15, 1912. interlocutor of the Sheriff-substitute, repelled the first plea in law for the defender, and remitted to the Sheriff-substitute for further procedure.*

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the arrestee may be not yet ascertained, or it may be indefinite, but on principle the relationship of debtor and creditor must subsist between the arrestee and the common debtor. A Court official, who holds a fund subject to the direction of the Court, is at no point of time a debtor to anybody. At 5th December 1910 there certainly did not exist the relationship of debtor and creditor between the Sheriff-clerk of Lanarkshire and H. M. M'Gildowny.

"I am opinion that the arrestment which is now alone relied upon as founding jurisdiction against the defender was not an effective arrestment for that purpose; or, in other words, that the circumstances as disclosed in evidence do not bring the defender within the scope of section 6 (c) of the Sheriff Courts Act, 1907. The defender's first plea is therefore well founded, and the action accordingly falls to be dismissed."

* "NOTE.—The question that is raised in this appeal is whether an arrestment in the hands of the Clerk of Court *ad fundandam jurisdictionem* of funds in which the defender has an interest is sufficient to found jurisdiction against him. The facts with regard to the money which was arrested are set forth in the note to the learned Sheriff-substitute's interlocutor, and it is not necessary for me to recapitulate them. It appears that in an action raised by the present defender against a man Hart, Hart admitted that he had received the goods therein specified from the pursuer, but he stated a counter claim for an illiquid claim of damages arising out of the same contract. He accordingly consigned in Court the amount which he admitted to be due under one branch of the contract, namely, £64, 11s. Thereafter that sum was arrested *ad fundandam jurisdictionem*, and the present action has been raised. Now, I think it clear that the Sheriff-clerk was, at that time, the custodier of a sum in which the present defender clearly had an interest. The arrestment could not in any way interfere with the disposal of the money by decree of Court, or interfere with the Court's power of disposing of it in any way. But subject to that, if the arrestment had been in execution, then it would have attached the fund, if any, to which the debtor of the party arresting would ultimately have been found entitled. If that is so, then it would equally have attached the fund if the arrestment was to found jurisdiction. An arrestment in the hands of a Clerk of Court has long ago been held good in the law of Scotland. It is so laid down in More's Notes on Stair, II. cclxxxvi. The matter was again raised before the Whole Court in the case of *Pollock v. Scott*, (1844) 6 D. 1297, when it was decided that such an arrestment was good. It was further maintained that as a result of the other action it may turn out that there was no sum due to the present defender, and that, therefore, at the present time the Clerk of Court could not be said to be either a debtor or a custodier for him. But in the case of *Lindsay*, 22 D. 571, it was decided that where there is a subject in which the party has an interest, although on an accounting it may be found that that interest was nil, nevertheless the arrestment *ad fundandam jurisdictionem* is sufficient. The ground of the decision, therefore, was that it was impossible to have a trial of the cause in the other action in order to decide the question of jurisdiction in the case in which the arrestment is pled—nor could the case be sisted until the other action was decided. It was enough if the Court found that the defender had an interest in the subject-matter of the other action, although eventually it should prove, on an accounting, that the interest had disappeared and that he could not obtain decree in it. Now, I think in the present case the defender clearly had an interest in the sum consigned in the hands of the Clerk of

Mar. 15, 1912. The defender appealed to the Court of Session, and the case was heard before the First Division (without Lord Mackenzie) on 21st November 1911.

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Argued for the appellant;—The Sheriff Courts Act, 1907, section 6 (c),¹ provided that a defender could be subjected to the jurisdiction by arrestment of debt or money “belonging to him.” The sum arrested here never “belonged to” the defender. No decree in his favour had been pronounced in the action in which the money was consigned, and the money had remained the property of the consignor.² The effect of consignment was merely to subject the money to the orders of the Court; not to deprive the consignor of his property in it.³ Admittedly, money consigned in the hands of the Clerk of Court could be arrested by creditors of the consignor,⁴ but not by creditors of the other party to the case, except where the money was bound eventually to be paid to him.⁵ Arrestment *ad fundandam* was only valid if the fund could have been arrested in execution,⁶ and this fund could not. The test was whether there was a present obligation on the part of the consignee to pay or to account to the common debtor.⁷ There was no such obligation here, and accordingly, judged by that test, the arrestment was ineffective to found jurisdiction. To hold otherwise would be to extend the limits fixed by the existing decisions, and any extension of the right of arresting *jurisdictionis fundandæ causa* was inexpedient.

Argued for the respondents;—It was competent to arrest a sum consigned in Court, although the arresters were not the creditors of the consignor.⁸ This was not a case of revocable consignment, for if the parties were disputing their right to the consigned money the consignment was irrevocable. The sum had been consigned for the express purpose of meeting such claims as the defender might substantiate, and, accordingly, he had at the time of arrestment a *prima*

Court, because the defender in the other action had admitted the present defender's right by consigning the sum. I am therefore of opinion that the arrestment founded on in the present action did attach a fund in which the present defender had an interest, and that, therefore, jurisdiction was founded against him. It is nothing to say that the fund remained at the disposal of the orders of the Court, because the effect of an arrestment *ad fundandam jurisdictionem* does not permanently attach the fund arrested, but the effect of it is gone as soon as the action following on the arrestment is raised and the sum remains freely in the hands of the Clerk of Court and subject to its orders. I am therefore of opinion that the first plea for the defender ought to be repelled and the case sent back to the Sheriff-substitute for further procedure.”

¹ Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. cap. 51).

² Pollock v. Scott, (1844) 6 D. 1297, Lord Fullerton, at p. 1313.

³ Gordon v. Brock, (1838) 1 D. 1; Stiven v. Reynolds & Co., (1891) 18 R. 422, Lord Justice-Clerk, at p. 426, Lord Rutherford Clark, at p. 427.

⁴ Pollock v. Scott, 6 D. 1297.

⁵ Lockwood v. Wilson, (1738) M. 736; More's Notes on Stair, II. cclxxxvi.; Lindsay v. London and North-Western Railway Co., (1860) 22 D. 571.

⁶ Leggat Brothers v. Gray, 1908 S. C. 67.

⁷ Riley v. Ellis, 1910 S. C. 934, Lord President, at p. 941; Trappes v. Meredith, (1871) 10 Macph. 38; Haddow v. Campbell & Co., (1796) M. 763; Stair, iii. 1, 31; Ersk. iii. 6, 8; Bell's Commentaries, ii. 72; Stewart on Diligence, 81.

⁸ Lockwood v. Wilson, M. 736.

facie, if contingent, right to the sum; and that was sufficient to make the arrestment good.¹ It was immaterial that it might eventually turn out that nothing was due to the defender, and, accordingly, that the consignee could not be required to account to him; the test fell to be applied at the date of arrestment, and if at that date there was a contingent right in the defender, and so a contingent duty to account on the part of the consignee, all the requisites for valid arrestment to found jurisdiction were present.²

At advising on 15th March 1912,—

LORD PRESIDENT.—The sole question before your Lordships in this action is whether jurisdiction was properly founded. With the merits of the action at present we have nothing to do, and of them we know nothing. Now jurisdiction was only founded, admittedly, upon an arrestment *jurisdictionis fundandæ causa*. I need scarcely remind your Lordships that this is a way of founding jurisdiction which is rested upon a fiction which may almost be said to be peculiar to our system, and which I certainly think ought not to be extended one whit beyond the limits laid down by the decisions.

Now the arrestment was founded in the following way:—[His Lordship then gave the narrative of the circumstances quoted *supra*, and proceeded]—

In these circumstances the learned Sheriff-substitute held that it was not a good arrestment. The learned Sheriff-substitute says in his note, after pointing out the facts:—“It was entirely problematical whether M’Gildowny would ever be in a position to ask the holder of the fund to pay or account to him. I think it is an essential element in arrestment, alike on the dependence, in execution, and *ad fundandam jurisdictionem*, that the common debtor must have a present claim against the holder of the fund, which he could vindicate in an action for payment, or at least in an action for count and reckoning. The exact amount of the common debtor’s claim against the arrestee may be not yet ascertained, or it may be indefinite, but on principle the relationship of debtor and creditor must subsist between the arrestee and the common debtor.” And then he goes on to say that a Court official who holds a fund subject to the direction of the Court is at no point of time a debtor to anybody.

The learned Sheriff recalled the Sheriff-substitute’s interlocutor, holding that the matter was really settled by the law as laid down in More’s Notes on Stair (II. cclxxxvi.), and finally decided by a Whole Court case, *Pollock v. Scott*,³ where it was held that an arrestment in the hands of the Clerk of Court was good.

Now, with the general proposition which I have quoted from the learned Sheriff-substitute’s note I entirely agree. I would alter the phraseology a little by saying that I think it is not so much a claim which he could vindicate in an action for payment or count and reckoning as one which might found an action for payment or count and reckoning. I do not think it is

¹ Douglas v. Jones, (1831) 9 S. 856.

² Lindsay v. London and North-Western Railway Co., 22 D. 571, Lord Ivory, at p. 591, Lord Deas, at p. 595; Baines & Tait v. Compagnie Générale des Mines d’Asphalte, (1879) 6 R. 846.

³ 6 D. 1297.

Mar. 15, 1912. necessary to repeat again what I said in the case of *Riley v. Ellis*.¹ I have
 Shankland & most carefully reconsidered the matter, and although I was in a minority of
 Co. v. the Court upon the precise matter which was decided in *Riley*,¹ I see no
 M'Gildowny. reason to go back on anything which I said in that case. I am not bound
 Ld. President. by the decision there to go back upon the opinion which I gave, inasmuch
 as the Lord Ordinary was with me as against two of my brothers; and as
 I understand Lord Kinneir agrees with me on the grounds I then put, I am
 the more strengthened in the opinion I am to deliver.

I think it is impossible to reconcile the various judgments except upon the proposition that arrestment always depends upon a present duty of accountability. Accordingly I think the learned Sheriff-substitute is right in what he said in his general proposition. But then he went on to say,—
 “A Court official who holds a fund subject to the direction of the Court, is at no point of time a debtor to anybody.” Although I have great sympathy with that, and although I think if the slate were clean I would be inclined to hold that it was a corollary to the general proposition, I think it is otherwise settled by authority. I mean, the mere fact that a fund is held by a Court official, and necessarily therefore subject to such orders as the Court may give, does not necessarily destroy the present accountability of that Court official or make an arrestment impossible in his hands. That, I think, is settled by authority. But I do not think any more is settled by authority. I do not wonder that Mr More in his Notes to Stair (II. cclxxxvi.), drew the conclusion from the cases, which I shall presently examine, and laid it down in the general proposition which the learned Sheriff-depute refers to, that, when a fund is consigned in Court, you may then have an arrestment by a creditor of any party to the cause. That is really what Mr More said, but I do not think it is law. The whole matter really depends on what was settled by the older cases; and in particular the learned Sheriff-depute puts it upon the case of *Pollock*.² I will come to the case of *Pollock*² second, because the case went to the Whole Court on the specific question whether an arrestment was good in the hands of a Court official, and upon that matter the consulted Judges in *Pollock*² all went upon the case of *Lockwood*.³ Now, the case of *Lockwood*³ was this, as reported in Morrison, 736,—“Sir James Campbell of Auchinbreck, having purchased several adjudications affecting the lands of Kirnan, did, in virtue thereof, insist in a sale of that estate; during the course of which, it was found, that Sir James was bound to communicate the eases he had got from the creditors; whereupon a count and reckoning ensued, from which it appeared there was a balance due to Sir James; and which balance Kirnan, by a docquet at the foot of an account, obliged himself to pay betwixt and Martinmas then next. This sum he offered to Sir James; but upon his refusal, Kirnan applied to the Lord Ordinary, craving, that he would authorise him to consign the money, which was accordingly granted, reserving the consideration of what effect it should have. In consequence of this interlocutor, Kirnan, on the 11th of November 1736, consigned the money in the clerk's hands; and, on the 19th, the Lord Ordinary, after

¹ 1910 S. C. 934.

² 6 D. 1297.

³ M. 736; Elchies, *voce* Arrestment No. 8.

hearing both parties, sustained the consignment: Likeas, on the 12th and Mar. 15, 1912. 13th of the said month, Richard Lockwood, &c., as creditors to Sir James, ^{Shankland & Co. v.} laid on an arrestment in the clerk's hands; and, on the 18th, William ^{M'Gildowny.} Wilson, another creditor of Sir James's, arrested the said sum in the hands of Kirnan; whereupon a competition ensued betwixt them." Ld. President.

Now, your Lordships will notice that what happened there was this. It having been found that these eases were to be communicated by Campbell, that is to say, that he was not entitled to stick to his adjudications for the full nominal sum, but that he was bound to reconvey the lands if the sum as brought out after the eases were communicated was paid to him, his debtor by a docquet obliged himself to pay at Martinmas. At Martinmas he offered the sum but, notwithstanding, the holder of the adjudications refused to reconvey the lands; whereupon, in order to prevent any question of interest running, and also in order to get back the lands, the original debtor asked the Lord Ordinary for leave to consign the sum, and leave was granted, and all that was left then in the action was to find whether, the sum which was admittedly due having been consigned, Kirnan should get rid of the adjudications. In other words, your Lordships will notice that nobody could ever get that money except Campbell; it was there for the purpose of being paid to him, and nothing was left except the transference to Campbell's pocket. The only question was whether, that money having been consigned, there should be a conveyance of the lands free of the adjudications, or the adjudications should subsist till more money was paid. That being so, I can quite understand why there should be a perfectly good arrestment in the hands of the Clerk of Court, because after all the Clerk of Court is only holding the money *ad interim*, and the person he was bound to pay the money to was Campbell. Therefore, I can perfectly well understand its being arrested for Campbell's debt.

But when you come to the question of competition between Wilson, who had laid on a posterior arrestment in the hands of Kirnan instead of in the hands of the Clerk of Court, that raises another set of circumstances; and there, although it is a decision, there is great variety in the views upon which the decision was given. Now, the decision is reported in Morrison as follows:—"The Lords found the arrestment, laid on in the clerk's hands by Richard Lockwood, upon the 12th and 13th of November 1736, preferable to the arrestment laid on by William Wilson in Kirnan's hands, upon the 18th November 1736." That leaves it dubious what the true ground of preference was. And the history of that case is put very well in Elchies' Cases (*voce* Arrestment No. 8), from which it appears that the Lords "were divided in the reasons of preference. Some indeed thought the money not at all arrestable, because secured by adjudication; but that being got over, some thought Lockwood's preferable, because in the clerk's hands, which they thought more habile than in Kirnan's; others thought it preferable only because prior in date, and thought both arrestments equally habile; *to reconcile them, I proposed to mention in the interlocutor the date of the arrestments,** and upon a narrow division, it carried to mention the

* The words in italics are interpolated from the Notes in the 2nd vol. of Elchies.

Mar. 15, 1912. dates of the arrestments in the interlocutor." So that Lord Elchies's attempt at compromise really only resulted in making the interlocutor as pronounced quite ambiguous as to what was the true ground upon which the preference was allowed.

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 Ld. President. I have gone into this matter very carefully, because I think it is necessary in view of what happened in the next case. It is quite true that when one looks into that case narrowly it is really only a decision that, where there could be no question that the money must be paid to a certain person, an arrestment in the clerk's hands, who must eventually pay, is a good arrestment; and further than that, it does not decide anything.

I come next to the case of *Pollock v. Scott*.¹ Now, *Pollock's case*¹ also is a case that has to be narrowly examined, because there, again, the facts are somewhat complicated. Thomas Scott held a lease of a farm belonging to Campbell of Islay, and Campbell of Islay presented a petition to the Sheriff for payment of arrears of rent and containing conclusions for removing. As appears from the report of the case, he also presented a petition for sequestration for the current rent. These petitions were conjoined. Scott lodged defences; but after some procedure, decree of removing and for payment of the arrears was pronounced on 18th March 1834. On 7th April 1834 a petition was presented in name of Thomas Scott, praying to be reponed against the decree. Consignation was at the same time made of £634, 5s. 4d.—being the arrears of rent, interest, and expenses decerned for—in the hands of the Clerk of Court.

Now, your Lordships will see that consignation was made for the necessary purpose of being allowed to be heard upon the reponing note against the decree of sequestration and removing that had been pronounced. Well, then, nothing more happened in the case, and no other procedure was taken till, shortly after, there was an interposition by William Scott, Thomas Scott's brother. William Scott compeared in the process and put in a minute in which he stated that it was really he who had consigned the money which was ostensibly consigned by his brother Thomas, and that he had only consigned it with a view to joint action with the other creditors of his brother. Probably Thomas's only estate was this lease of the farm which he had got. If the lease of that farm was allowed to be forfeited under removing, Thomas would have nothing left, and therefore William, thinking that the other creditors would act with him, found the money with which to have this reponing note made good that they might contest the question whether Thomas should be turned out of the farm or not; and the minute for William Scott went on to say that he now found that the other creditors would not move with him and it was not worth while going on, and therefore he asked that the money should be returned to him inasmuch as he was the man who had provided it. Now, Campbell, who was the real person who was in one sense interested in the money, did not make any objection to that. He said: "You can have the money if you like, provided that your reponing note goes by the board, and that I may extract my decree," and accordingly, so far as the other party to the action was concerned, there was no objection. In other words, again you are in the

¹ 6 D. 1297.

position that the money could not be paid to the pursuer in the action at Mar. 15, 1912. all, because he said, "I am done with it; I do not want it." And now, a ^{Shankland & Co. v. M'Gildowny.} very peculiar thing happened. First of all, an arrestment was laid on after the consignment. Pollock, a creditor of Thomas (that is, the tenant who had in form consigned the money), used arrestments to the amount of £150 Ld. President. in the hands of the Clerk of Court. Then the Sheriff, in respect that it was admitted by the defender and not denied by the pursuer that the consignment in question was made by the compeerer William Scott (that is, the brother), authorised him to uplift the sum of £634, 5s. 4d. consigned in the hands of the Clerk of Court. Upon this interlocutor the Clerk of Court paid to William Scott the consigned fund, under deduction of the sum contained in Pollock's arrestment. A multiplepounding was thereafter brought in the Clerk's name before the Sheriff of Lanarkshire for determining who had best right to the balance remaining in his hands, and the compeerers in that multiplepounding were Pollock, who had arrested upon the footing that it was due to Thomas Scott who had nominally consigned it, and William Scott, who alleged that the money was his. In that state of affairs the learned Judges of the First Division were divided in opinion, and as the report bears (6 D., at p. 1302), "At the debate in the Inner House, the argument was confined to the point how far the respondent's allegation, that the money consigned was his, and not Thomas Scott's, and had been consigned by him, and not by Thomas, was relevant as against the advocator's arrestments. The Lord President and Lord Fullerton were of opinion that it was irrelevant. Lord Mackenzie and Lord Jeffrey, on the other hand, were of opinion that it was relevant, and ought to be admitted to proof. The Court being thus equally divided in opinion, the cause stood over for reconsideration, and the Judges retaining their opinions, minutes of debate to the Whole Court were ordered. On the suggestion of Lord Fullerton, the interlocutor was expressed so as to embrace the separate question, as to the competency of arresting a sum consigned in a depending action in the hands of a Clerk of Court."

Now when the consulted Judges came to give their opinion upon that pure question whether it was competent to arrest in the hands of the Clerk of Court, they said that that was settled in the case of *Lockwood*.¹ But they did not give any opinion, and were not asked to give any opinion, as to whether an arrestment in the hands of the Clerk of Court would be a good arrestment as in a question with anybody in Court to whom that money might be paid under a decree of the Judge in the cause in which the money had been consigned. After that they differed a great deal as to whether William Scott had made a relevant averment or not, and they differed also among themselves as to whether there was sufficient relevancy in William's averment that the money was rightly his and not Thomas's, or whether it was also necessary for William to prove a further averment which he made that Pollock, when he laid on the arrestment, knew that the money was his (William's) and not Thomas's. I need not count the heads of the Judges, but the opinion of a majority was that it was sufficient for William to say that the money was his, without going further and saying that Pollock knew

¹ M. 736.

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Ld. President. But your Lordships will at once see that that case could not, and did not, decide the general question which is put down by Mr More in his Notes to Stair, namely, the general question as to whether, when there is an arrestment in the hands of the Clerk of Court, that is a good arrestment as in a question with every party to the process. I humbly think it is not, because I think that we find in the end that an arrestment in such a position has only been sustained where there was no question but that the Clerk of Court should pay it to one person and one person alone. In *Lockwood's* case,¹ as I have already pointed out, the money could only be paid to Campbell; and it would have been likewise in *Pollock's* case² also, if they had held on the result of the proof (of which we know nothing because we do not know the sequel to the case) that it was a bad arrestment in respect of a debt of Thomas. I think you always get back to this, Is there or is there not a present accountability to one person and one person alone?

I quite see in certain consignations there may be an accountability to one person only, but in the present case no one knew to whom the sum would eventually be paid, and I quite agree that you cannot, so to speak, judge an arrestment by being wise after the event, because you must take the accountability as at the time the arrestment was laid on. If you were wise after the event here, M'Gildowny never got the money at all, Hart got it; and you would have the peculiarity that a *nexus* was put upon a fund as belonging to M'Gildowny which M'Gildowny never got, and, for all one can see, never had a chance of getting.

Accordingly, upon the whole matter, I come to the conclusion that the learned Sheriff-substitute here was right, and that this was a bad arrestment; and I go really upon his general grounds, although I think he went too far when he implied that the mere fact of its being an arrestment in the hands of the Clerk of Court made it a bad arrestment.

LORD KINNEAR.—I entirely agree with the opinion which has just been delivered by the Lord President, and I have little to add; and in particular I have no intention of examining in detail the authorities his Lordship has cited. I take the effect of the decisions to be as he has explained them. I should add that I agree also with the statement of the law given by your Lordship in the chair in the case of *Riley v. Ellis*.³ I express no opinion at all as to the application of the rule so laid down to that particular case. The question for decision was totally different from that which is before us now, and we are not called upon to reconsider the judgment; but, as regards the general law as to arrestments *ad fundandam jurisdictionem*, I have no hesitation in expressing my agreement with your Lordship. I think that the true rule is stated correctly in your Lordship's words,⁴ "The only general rule that I can deduce is that arrestment is only possible where there is a present liability to account. By present, I mean

¹ M. 736.

² 6 D. 1297.

³ 1910 S. C. 934.

⁴ 1910 S. C., at p. 941.

at the date of the arrestment"; and then your Lordship goes on to guard that proposition by pointing out that it does not necessarily mean that there is a present debt—a debt presently payable; but, on the contrary, that an arrestment of a present liability to account may be perfectly good although it may turn out in the end that there was no money actually due to the common debtor. I think that is in accordance with all the authorities so far as I know. I think the rule is that there must be a real claim at the instance of the common debtor against the arrestee, either for payment of money or for delivery of moveables or for accounting. If there is no such claim, then I apprehend there is nothing whatever to arrest.

Now, the learned Sheriff has said that a different rule of law has been established. He says that in the case of *Lindsay v. London and North-Western Railway Company*¹ it was decided that where there is a subject in which a party has an interest, although on an accounting it may be found that that interest is nil, an arrestment *ad fundandam jurisdictionem* is sufficient. With great respect it appears to me that that statement is inexact; and whether it can be accepted as to any extent sound depends upon what is meant by "an interest" and what is meant by "nil." If "an interest" means a right which gives rise to a present claim for accounting at the instance of the common debtor against the arrestee, then I agree, because in that case the arrestee is prohibited from performing his obligation towards his own creditor—the common debtor. A *jus crediti* in the common debtor is thus attached in the hands of the arrestee. But if the learned Sheriff means that an arrestment is good although there is no debt or *jus crediti* in existence as between the arrestee and the common debtor, so that there is nothing whatever that can be attached, then I am unable to agree with him. The learned Sheriff refers as an authority to the case of *Lindsay v. The London and North-Western Railway Company*,¹ which is a very important decision, because the whole law upon the subject was very carefully investigated; but I think it establishes the very reverse of the doctrine for which the Sheriff appears to cite it. In that case arrestments were used in the hands of the Caledonian Railway Company in order to found jurisdiction against the London and North-Western Railway Company. There were a great many subjects arrested, and in particular the arresting creditor arrested shares in the Caledonian Railway Company which were held for the London and North-Western Railway Company; he arrested a quantity of rolling stock in the possession of the Caledonian Railway Company; and he arrested also certain claims for accounting between the two companies upon their joint traffic. There was thus a substantial amount of property attached, if it was effectually attached at all; but I presume the point for which the learned Sheriff refers to the case is the decision of the Court upon the arrestment of a claim of accounting against the Caledonian Railway Company by the London and North-Western Railway Company upon the conduct of their joint traffic; and as to that it was held that there was a good arrestment notwithstanding that it could not be proved, at the time when the question was raised, that there was actually a balance due by the Caledonian Railway Company to

¹ 22 D. 571.

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Mar. 15, 1912. the London and North-Western Railway Company upon that series of transactions. But when we examine the grounds upon which that was held, I think it brings out exactly the doctrine which your Lordship laid down in the case of *Riley v. Ellis*.¹ I refer to Lord Curriehill's opinion because, although he says nothing which is not in accordance with the views of Lord President M'Neill and Lord Ivory, he states the particular point in a more explicit form, and he says,²—"Two objections are made in regard to this matter. One of these is, that the Caledonian Company had counter claims against the London and North-Western Company; and that we do not see, if the accounts had then been balanced, how the balance would have stood. That is quite true. I do not think that we have any evidence how the balance would have stood. But we have clear evidence that they were not then balanced. No balance did then take place as to a considerable amount of these sums, and I do not care whether the counter claims which the London and North-Western Company may have had against the Caledonian Company may have been greater or less. These counter claims do not operate *ipso jure* so as to extinguish either of them. They do not so operate, unless there has been either a settlement between the parties, or the claims have been pleaded in a Court of law, the one as compensating the other." And therefore he says there was an arrestable fund at the date of the arrestment, because there was then a claim for accounting which involved a claim for payment at the instance of the common debtor against the arrestee. His Lordship then goes on to explain why this was sufficient for the purpose by pointing out the distinction between an arrestment for founding jurisdiction and an arrestment in execution.

The material point—which, however, is elementary—is that arrestment for founding jurisdiction is only a part, and not the effective part, of the diligence of arrestment and furthcoming. The purpose and effect of that diligence is to enable the arresting creditor to enforce for his own benefit obligations which are prestable to the common debtor by the arrestee. It has, accordingly, been defined as an adjudication preceded by an attachment. But the essential part of the diligence is the adjudication or furthcoming. It is obvious that, for the purpose of execution, an arrestment of a debt which, although due at the time, is liable to be wiped out by a counter claim, must, in the end, be futile if, when the account is taken, the balance is found to be in favour of the arrestee and against the common debtor. But in the case of an arrestment for founding jurisdiction there is no occasion for considering the question of ultimate liability as between common debtor and arrestee, because the arrestment can never be used for the purpose of enforcing payment or performance. Its only purpose and effect is to fix the thing arrested in this country until the jurisdiction has been sustained; and accordingly it is familiar practice that when that object has been once attained, there is no longer any *nexus* upon the fund or property arrested in the hands of the arrestee; and, if the arresting creditor desires to get the benefit of arrestment as a diligence, he must arrest again on the dependence. This is the rule laid down by Mr Erskine, i. 2, 19. The

¹ 1910 S. C. 934.

² 22 D., at p. 593.

effect is "to fix the debtor's goods within the Judge's territory, and thereby to subject him to the jurisdiction of the Courts of Scotland. . . . The *nexus* laid on the goods is loosed so soon as the foreigner gives security *judicio sisti*, that is, to appear in Court upon the day to which he shall be cited." And Lord Curriehill applies this doctrine with exactness when he says¹: "The only question is, whether, at the moment it is arrested, there is a claim against the arrestee by the common debtor?" Therefore the whole foundation of the judgment on this point was that, since the sole purpose of the arrestment is to compel the foreigner to submit to the jurisdiction by preventing him until he does so from enforcing his own claims against his Scottish debtors, there must at the moment of the arrestment be a present claim at his instance against the arrestee; and it was because there was a claim for the payment of money by the one railway company against the other which could be attached by arrestment that the jurisdiction was sustained. It may be true that nothing is attached effectively by this kind of arrestment, because it will not of itself support a furthcoming, and the *nexus*, such as it is, flies off as soon as the defender enters appearance in Court. But the rule is fixed that there must be a debt or obligation prestable by the arrestee which is capable of being attached. It is of no consequence that the common debtor may have some contingent or reversionary interest in the arrested funds if he was not the direct creditor of the arrestee when the arrestment was laid on—see *Whittal v. Christie*.² The rule, although not perhaps more irrational than the fictions which have been invented for giving jurisdiction in other legal systems, is not easily reconcilable with principle; but for that very reason it is not to be extended further than has been already decided. It follows that jurisdiction on this ground cannot be sustained unless there is, at the time of the arrestment, a personal obligation on the arrestee to pay money or deliver goods to the common debtor.

I therefore agree with your Lordship that in the present case it is impossible to sustain the arrestment, because there is nothing to show that there ever was any claim at the instance of the appellant against the Sheriff-clerk for the payment of this particular sum. All that we know is that the money was deposited in the hands of the Sheriff-clerk by Hart, under no express written conditions so far as we see, and that ultimately the money was paid back to the person who had deposited it. It is possible that the appellant may have had an interest which might have been so far established in the course of the process as to enable him to obtain an order from the Sheriff for payment of the whole or a part of the deposited sum. But there is nothing in the process before us to prove even this. And if it were proved, it would only follow that the Sheriff-clerk had no duty or obligation to pay, until the rights of parties were determined by the Court or settled by mutual agreement. It appears to me to be out of the question to say that the Sheriff-clerk was debtor to the appellant at the moment when the arrestment was used; and if he was not, there was nothing in his hands for the appellant's creditor to attach.

I desire to repeat what your Lordship has said, that in considering

¹ 22 D., at p. 594.

² (1894) 22 R. 91.

Mar. 15, 1912. questions of this kind we must be careful not to go beyond what has been actually decided. I think that principle was laid down in the case of *Cameron v. Chapman*,¹ in the opinion of Lord Corehouse and the other Judges, in very clear terms. Their Lordships say²: "It is not necessary to inquire on what principle the custom is founded of arresting moveables to found a jurisdiction against their owner, being a foreigner. It is plainly in opposition to the general doctrine both of the Roman law and modern jurisprudence, both of which admit the maxim *actor sequitur forum rei*. It was borrowed in Scotland from the law of Holland, where, as Voet observes, it had been introduced, contrary to principle, from views of expediency, and for the encouragement of commerce. We are of opinion, therefore, that it must not be carried farther in any case than is expressly warranted by authority and precedent."

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I agree with your Lordship that the arrestment in the present case is not warranted by any previous authority, and therefore that we should sustain the appeal.

LORD JOHNSTON.—The preliminary question at issue in the action at present before this Court, which was raised on 22nd December 1910 by Shankland & Company against M'Gildowny in the Glasgow Sheriff Court, is whether Shankland & Company have founded jurisdiction by arrestment against M'Gildowny.

While I regret that I cannot acquiesce in the judgment your Lordship proposes, I am inclined to think that the point of difference between us is not in law but in fact. I take it that your Lordship has very much adopted the Sheriff-substitute's view of the facts. Now, he says at one place that "it was entirely problematical whether M'Gildowny would ever be in a position to ask the holder of the fund to pay or account to him." I quite admit that it was problematical whether M'Gildowny would ever be in a position to ask the holder of the fund to pay, but I dispute that it was in the least problematical whether M'Gildowny would not be in a position to require him to account. Further, the Sheriff-substitute goes on to say that it is an essential element in arrestment that "the common debtor must have a present claim against the holder of the fund, which he could vindicate in an action for payment, or at least an action for count and reckoning." In that I entirely concur. But it does not seem to have been observed in this case that, in the circumstances, an action of count and reckoning proper was not necessary; that there was within the action in which the consignation was made the means of adjusting accounts, without calling for any such thing as a separate action of count and reckoning. On the facts, if they are properly understood, it appears without doubt that M'Gildowny had such a claim against the holder of the fund as entitled him to an accounting, and entitled him to payment, or the equivalent of payment, as the result of that accounting—that is, either to cash or to credit in account—notwithstanding that the accounting would take place, not in a separate action of count and reckoning, but in the action itself in which the consignation was made. It is further clear, as I think I shall

¹ (1838) 16 S. 907.

² *Ibid.*, at p. 918.

show your Lordships, that M'Gildowny did get the benefit of the sum that Mar. 15, 1912. was consigned, and did get the benefit of it under circumstances which I think your Lordships have misapprehended. Your Lordship in the chair in your concluding words said, in effect, that in point of fact M'Gildowny never got this fund, and for all that could be seen never had a chance of getting it. I must respectfully say that I think M'Gildowny did get that fund, and that from the time that it was consigned he could not do otherwise than get that fund, it might not be in cash, but certainly in account. As the question, in my opinion, depends so entirely upon matters of fact, I must ask your Lordships' indulgence if I deal with the facts as precisely as I can, and with necessary detail.

M'Gildowny is a proprietor in Ireland carrying on a trade in the export of limestone and sand from his estate. Shankland, Hart, & Company, consisting of Shankland and Hart, were M'Gildowny's shipping-agents, and also purchased from him on their own account. They dissolved partnership somewhere in 1909, Shankland, under the firm of Shankland & Company, continuing to be M'Gildowny's shipping-agents, and Hart taking over in his own name a current limestone contract and a current sand contract.

In these circumstances, a triangular duel has arisen in the Glasgow Sheriff Court in this manner :

In the first place, on 16th June 1910 M'Gildowny raised an action against Hart for £97, 17s. 1d., as per account annexed. And the account annexed to the summons showed that the sum sued for was made up of two distinct sums, viz. :—

for 322 tons limestone,	£64 11 0
and for 156 tons sand,	33 6 1
delivered respectively under the above-mentioned contracts,	_____
making the total of	£97 17 1

and in respect of non-payment M'Gildowny stopped further delivery under both contracts. Hart made no difficulty about the £64, 11s. claimed for limestone, but, though he did not dispute the sum claimed for sand either, he made a counter claim in respect of loss of profit on certain sand shipped to him but diverted into another channel, and damages to the amount of £67, 4s. 1d. for the stoppage of further delivery of sand.

The position of matters in this action was that, when the record was closed on 28th July 1910, Hart had admitted in his defences that the £64, 11s. was due on the limestone contract, alleged a tender of this sum made prior to the action being raised, and, having consigned the sum in the hands of the Clerk of Court, thus referred to the consignment in his defences, "said sum is herewith consigned," but added nothing further in explanation of the consignment. At the same time he took no exception in his defences to the £33, 6s. 1d. claimed for sand, but stated a counter claim of damages of £67, 4s. 1d. for non-delivery under the sand contract.

The consignment receipt written on the interlocutor sheet bore simply—

"Glasgow, 27th June 1910.—The defender has this day consigned in my hands the sum of £64, 11s. sterling.

W. G. K. DONALDSON,

"Sheriff-Clerk-Depute of Lanarkshire."

But the note in the Sheriff-clerk's consignment book bore the additional

Mar. 15, 1912. information, consigned "with defences i.c. A1168/1910 H. M'Gildowny v. Maxwell Mure Hart (Ordinary Court)."

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In the second place, Shankland & Company, on 22nd December 1910, as already stated, raised the action at present before the Court against M'Gildowny, having arrested on 5th December 1910 in the hands of the Sheriff-clerk "all goods, debts, money, or other moveable property belonging to the defender" in common form. This action was to enforce claims arising out of Shankland & Company's shipping agency for M'Gildowny.

Ld. Johnston.

In the third place, Hart on 12th January 1911 raised an action against M'Gildowny *ex reconventionem* claiming £127, 9s. 5d. as damage for breach, by stoppage of deliveries, under the limestone contract.

After the cases between M'Gildowny and Hart, first and third above mentioned, had proceeded a certain length parties settled. The cases had never been conjoined, though motions to that effect had been made. The settlement was this: M'Gildowny surrendered his claim for the two sums of £64, 11s. for limestone delivered and of £33, 6s. 1d. for sand delivered—though both claims were admitted—in consideration of Hart's abandoning his counter claim of £67, 4s. 1d. for sand undelivered, and his claim of £127, 9s. 5d. in respect of limestone not delivered. That is to say, Hart's disputed counter claims of £67, 4s. 1d. and £127, 9s. 5d., or £194, 13s. 6d. in all, were set against M'Gildowny's admitted claims of £64, 11s. and £33, 6s. 1d., or £97, 17s. 1d. in all, and on that footing both actions were settled and taken out of Court. Consequently, as no money was to pass on the settlement, Hart fell to receive back the consigned money, viz., £64, 11s.

The settlement was carried out by two minutes: one in M'Gildowny v. Hart—"The parties concur in craving the Court to dismiss the action, finding no expenses due to or by either party, and to make an order for payment of the consigned money to the defender" (that is, to Hart); and the other in Hart v. M'Gildowny—"The parties concur in craving the Court to dismiss the action, finding no expenses due to or by either party." To these minutes the Sheriff, on 21st December 1911, interposed authority by separate interlocutors in the two actions, and in M'Gildowny's action authorised "the Clerk of Court to pay up the consigned money with accrued interest to the defender." Accordingly, the Sheriff-clerk's consignment book bore that the money was paid out to the defender's agents on 27th December 1911, "*per* order of Court dated 21st December 1911."

When therefore the arrestment to found jurisdiction was, on 5th December 1910, laid on in the Sheriff-clerk's hands, he held a sum consigned, and necessarily, though not expressly, consigned subject to the order of the Court, in which M'Gildowny was interested to this extent and effect, viz.:—He was admittedly entitled to it, and it was consigned, that he might ultimately receive it, either in cash or in account, in order that the first branch of the case might not involve the consignor in the expense of litigating on the subject of that branch. It could not have been withdrawn or reclaimed by the consignor at his own hand. He could only obtain repetition in whole or in part by establishing a counter claim. But such repetition, if successful, could only proceed on the footing that the pursuer's primary right to the consigned fund was admitted, and that it would go to his

credit in account, when claim and counter claim came to be adjusted. Mar. 15, 1912. But the possible result that the adjustment of claim and counter claim might have returned a part or even the whole of the consigned fund to Hart, the consignor, does not affect the arrestability of the interest of the pursuer, M'Gildowny, in the consigned fund as at 5th December 1910. The Sheriff-clerk, as the hand of the Court, held it for him, subject to the order of the Court, and was bound to account to him for it. It was his either to recover in cash, or to recover in the form of relief from a counter claim. It could not go back to the consignor in cash under any circumstances. It could only do so in account, when the result of the counter claim was ascertained.

As I said at the outset, while I regret to find that I am obliged to differ from your Lordships, I feel satisfied that the ground of difference is on a question of fact, and not on any question of principle. Your Lordship in the chair has adverted to the case of *Riley v. Ellis*.¹ I am equally satisfied that the difference between the majority of the Court and your Lordship in that case was also not on any question of principle in the law of arrestment, but on the application of these principles to the facts of the case.

I am at one with both your Lordships in holding that to validate an arrestment there must be a present debt due by the arrestee to the common debtor. I also gather that your Lordships admit that a present debt may involve a question of accounting, in respect that it is not ascertained in amount, or that there are counter claims requiring the ascertainment of a balance. I think that the validity of the arrestment is not affected, though its productivity may be, by the fact that on an accounting nothing may be found due. I quite admit that the subject of arrestment to found jurisdiction must not be an elusory subject. But if there is an accountable interest the subject is not rendered elusory because, on the accounting, it may produce nothing. The common debtor's interest may be extinguished by set-off, and so may produce nothing or less than nothing, but it is not elusory merely because it is non-productive.

Where I think I differ from your Lordships is in holding that at 5th December 1910 the Sheriff-clerk, as the hand of the Court, did hold a sum which was presently due to the common debtor, and which must have been paid to him either in cash or in account, the consignee merely awaiting the direction of the Court as to whether it was to be paid out in cash or was to suffer deduction or even extinction, according to the result of a separable part of the same litigation in which the consignment was made. Whatever the result, the common debtor must have got full value for it, either in cash or in account.

That arrestment can be laid on in the hands of a judicial consignee was decided in *Lockwood*,² in a case where the consignment was made in the hands of a Sheriff-clerk, under the express authority of the Sheriff. And the arrestment was, as here, of the interest of the pursuer of the action in which the consignment was made. In *Pollock*,³ though the consignment in the hands of the Sheriff-clerk was, as here, voluntary, this was regarded as of no materiality, and the arrestability was so fully recognised that, in the

¹ 1910 S. C. 934.² M. 736.³ 6 D. 1297.

Mar. 15, 1912. first discussion, the point was not debated in the Inner House, and it was only because the case was sent on another question to the Whole Court that, on the suggestion of Lord Fullerton, the question of the arrestability in the hands of the Sheriff-clerk was embraced in the reference. Two only of the Judges entertained any doubt on the point—Lord Moncreiff and Lord Jeffrey—and even they, though doubting the principle, held themselves bound by the authority of *Lockwood's* case.¹ The case of *Pollock*² is of the greater importance for my present purpose, in that what was arrested was the interest of the consignor, which could only be an interest on a balance in account, or in reversion. Lord Wood expresses, I think, the opinion of the Court when he says³ “arrestment in the hands of the Clerk of Court is competent, subject to the limitation, that the object of the consignation shall not be thereby interfered with.” And Lord Fullerton explains the principle on which the arrestability of the fund rested, thus⁴: “It rests on this, that it is held to be a conditional debt. It is what may be due to one or any given number of the parties in the process in which it was consigned. It is arrestable, therefore, by the creditors of any one of the claimants in the process, subject to the result of the process. It is a conditional debt, which becomes payable either to one of the claimants, or to the consigner, in the event of none of the claimants being found entitled to it. This last is the case here.” These words of Lord Fullerton were expressly applicable to the circumstances of the case before him, which was a multiplepounding. But they are equally applicable to the circumstances of the present case, and recognise that the consignee is in the position of debtor, and, though he may be debtor to the consignor in reversion, is necessarily debtor primarily to the person for whose security and satisfaction the consignation has been made, whose claim, as it happens in this case, is admitted as the basis of the consignation—though I do not think that that is essential—and who must be satisfied out of the consigned money before there can be any reversion for the consignor.

I have pointed out that the validity of the arrestment must be decided as at 5th December 1910. What happened on 21st December 1911 does not affect that question. As the arrestment to found jurisdiction laid no *nexus* on the subject, the parties concerned were entitled to transact about the arrested subject as they pleased. But be it noted that the common debtor got full value for the sum consigned in the comprehensive settlement of claims arising in the action in which the consignation was made, and also outside that action.

I therefore conclude with the learned Sheriff-depute that the arrestment to found jurisdiction in this case was good.

THE COURT sustained the appeal, recalled the interlocutor of the Sheriff dated 2nd August 1911, and reverted to, and affirmed, the interlocutor of the Sheriff-substitute dated 13th May 1911.

WHIGHAM & MACLEOD, S.S.C.—GORDON, FALCONER, & FAIRWEATHER, W.S.—Agents.

¹ M. 736.

³ 6 D., at p. 1310.

² 6 D. 1297.

⁴ *Ibid.*, at p. 1313.

THE GOVERNORS OF GEORGE HERIOT'S TRUST, First Parties.—

Constable, K.C.—Russell.

WILLIAM FALCONER AND OTHERS (Charles Lawrie's Trustees),

Second Parties.—*Cooper, K.C.—A. J. P. Menzies.*

Superior and Vassal—Feu-contract—Construction—Composition—"Double" of feu-duty.

No. 121.

Mar. 15, 1912.

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A feu-contract, by which certain building lots were conveyed, provided for an annual feu-duty of stated amount in respect of each lot, payable by equal portions at Whitsunday and Martinmas in each year. The feu-contract imposed this further obligation on the vassals, "as also paying to" the superior "a double of the said respective feu-duties before mentioned in name of composition at the expiry of every twenty-two years from the" term of Whitsunday from which the feu-duty in each case commenced to run.

Held (dub. Lord Johnstone) that the sum payable in name of composition was, in each case, a sum equivalent to double of the annual feu-duty, over and above the half-year's feu-duty due at the term at which the composition fell to be paid.

ON 7th July 1911 a special case was presented for the opinion and judgment of the Court as to the amount of a composition which fell to be paid to the Governors of George Heriot's Trust, the superiors of certain lands, *first parties*, by the late Charles Lawrie's trustees, their vassals in the lands, *second parties*.

The case stated that by feu-contract, dated 9th and 11th February, and registered in the General Register of Sasines 9th April 1889, the first parties feued to Charles Lawrie and Thomas Scott, the authors of the second parties, certain lands in Hillside Crescent, Edinburgh, numbered 1, 2, and 3 respectively on a feuing plan, on the conditions contained in the contract.

The tenendas and reddendo clauses in this contract were in these terms:—"To be holden the said subjects before disposed of the said The Governors of George Heriot's Trust and their successors as immediate lawful superiors thereof in feu-farm, fee, and heritage for ever: Paying therefor yearly the said Charles Lawrie and Thomas Scott, trustees foresaid, and their foresaids, to the said The Governors of George Heriot's Trust and their foresaids in name of feu-duty as follows, *videlicet*:—For the said lot number one on the plan prepared by said John Chesser the sum of thirty-six pounds; for the said lot number two on said plan the sum of thirty-six pounds; and for the said lot number three on said plan the sum of thirty-four pounds sixteen shillings; and that at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment of the said sum of thirty-six pounds for said lot number one at the term of Martinmas Eighteen hundred and eighty-nine, and the next term's payment at the term of Whitsunday following (said feu-duty commencing to run at the term of Whitsunday Eighteen hundred and eighty-nine), and so forth half-yearly thereafter in all time coming; beginning the first term's payment of the said sum of thirty-six pounds of feu-duty payable for said lot number two at the term of Martinmas Eighteen hundred and ninety, and the next term's payment at the term of Whitsunday following (said feu-duty commencing to run at the term of Whitsunday Eighteen hundred and ninety), and so forth half-yearly thereafter in all time coming; and beginning the first

Mar. 15, 1912. payment of the sum of thirty-four pounds sixteen shillings of feu-duty payable for said lot number three at the term of Martinmas Eighteen hundred and ninety-one, and the next term's payment at the term of Whitsunday following (said feu-duty commencing to run at the term of Whitsunday Eighteen hundred and ninety-one), and so forth half-yearly thereafter in all time coming; with a fifth part more of each term's payment of the said respective feu-duties of liquidate penalty in case of failure, and interest at the rate of five per centum per annum of each term's feu-duty from the respective terms of payment until the actual payment thereof: As also paying to the said The Governors of George Heriot's Trust and their foresaids a double of the said respective feu-duties before mentioned in name of composition at the expiration of every twenty-two years from the following terms, *videlicet*:—From the term of Whitsunday Eighteen hundred and eighty-nine for said lot number one, beginning the first payment thereof at the term of Whitsunday Nineteen hundred and eleven; from the term of Whitsunday Eighteen hundred and ninety for said lot number two, beginning the first payment thereof at the term of Whitsunday Nineteen hundred and twelve; and from the term of Whitsunday Eighteen hundred and ninety-one for said lot number three, beginning the first payment thereof at the term of Whitsunday Nineteen hundred and thirteen, and so forth, at the expiration of every twenty-two years after said respective terms, with interest at the rate of five per centum per annum on said respective compositions from the respective terms when the same become payable until the actual payment thereof: Declaring that each of the said lots and building or dwelling-house thereon, and the piece of back ground effeiring thereto respectively, shall be liable only in the feu-duty and composition payable therefor as above mentioned."

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The contractual obligations which the feuars undertook were expressed thus:—"For which causes and on the other part the said Charles Lawrie and Thomas Scott, as trustees foresaid, bind and oblige themselves and their foresaids to make payment to the said The Governors of George Heriot's Trust and their foresaids of the foresaid sums of feu-duties at the respective terms of payment before mentioned with penalty and interest as aforesaid: As also to make payment to the said The Governors of George Heriot's Trust and their foresaids of a double of the respective feu-duties before mentioned of composition, and that at the terms and with interest as aforesaid."

In terms of the clause first above quoted compositions in respect of the three separate lots conveyed fell to be paid at the following dates, viz., in respect of lot No. 1, at Whitsunday 1911; of lot No. 2, at Whitsunday 1912; and of lot No. 3, at Whitsunday 1913.

The first parties' contention was that on a sound construction of the feu-contract the sums payable in name of composition for each of the lots were fixed at twice the amount of the respective feu-duties, viz., £72, £72, and £69, 12s., and that over and above the annual feu-duty of the year in which the composition became payable.

The second parties maintained that the sums payable in name of composition were respectively the amount of one year's feu-duty in addition to the annual feu-duty of the year in which the composition became payable, and that on that basis the sums payable in name of composition were respectively £36, £36, and £34, 16s.

The questions of law for the opinion of the Court were:—"Are the sums payable to the first parties by the second parties in name

of composition, in addition to the annual feu-duty, (a) twice the amount of the said respective feu-duties, viz., compositions of £72, £72, and £69, 12s. respectively? or (b) the amount of one year's said feu-duty respectively, viz., £36, £36, and £34, 16s.?"

The case was heard before the First Division on 22nd February 1912, when the undernoted authorities were referred to.¹

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At advising on 15th March 1912,—

LORD PRESIDENT.—This is a special case for the Governors of George Heriot's Trust and the trustees of the deceased Charles Lawrie; and the question put before us is, What are the sums which the second parties as trustees are bound to pay in name of composition?

The contract of feu which embraces the subjects in question was dated in February 1889. It is therefore a contract of feu which has been entered into since the Act of 1874, and, as your Lordships are aware, after 1874 it was impossible in a new feu to have casualties in the same way as casualties could be had before the Act; but it was possible to stipulate for a casualty which should be payable at regular intervals. [His Lordship then quoted the reddendo clause from the feu-contract, and continued]—Now, the whole question between the parties is whether this demand of a double of the said respective feu-duties in name of composition means that they are to pay as composition a sum equal to twice the yearly feu-duty as well as paying the feu-duty for the year, or whether they are to pay in all only two feu-duties—one ordinary feu-duty, and another feu-duty as composition.

That is a pure question of construction of what the parties meant, and I cannot say that personally I have had much difficulty in coming to a conclusion.

Certain cases were quoted to us, and in such a matter cases are useful; but unless the cases deal with words which are exactly similar they are not absolutely authoritative. In all these cases the question was the same—that is to say, whether the sum was to be three times or was to be twice the feu-duty. In *Earl of Zetland v. Carron Company*² the words were, paying a sum “over and above” the feu-duty. Probably that left no very easy case for the vassal to argue, although it was argued, but at any rate the Judges thought that the words “over and above” were conclusive. In the deed under consideration in *Cheyne v. Phillips*³ the words “as also” were used, and there were other expressions, including a reference in a subsequent clause to the payment as a “further sum.” There again it was held to be a casualty equal to a double of the feu-duty. In *Alexander's Trustees v. Muir*⁴ the vassal was taken bound to pay a feu-duty of £248, 8s. 2d. yearly at the term of Whitsunday, as also to pay to “me . . . at the term of Whitsunday 1824 the sum of £497, 16s. 4d., being the double of the said yearly feu-duty which will be then due for the said whole subjects; as also to pay to me . . . and my foresaids every nineteenth year (counting from the said term of Whitsunday 1824) the

¹ Stair, ii. 4, 27; Erskine, ii. 5, 49; *Earl of Zetland v. Carron Co.*, (1841) 3 D. 1124; *Cheyne v. Phillips*, (1897) 5 S. L. T. 27; *Alexander's Trustees v. Muir*, (1903) 5 F. 406.

² 3 D. 1124.

³ 5 S. L. T. 27.

⁴ 5 F. 406.

Mar. 15, 1912. said sum of £497, 16s. 4d. sterling, being the double of the said yearly feu-duty which will then be due for the whole subjects above mentioned, and so forth, doubling the said yearly feu-duty every nineteenth year counting from Whitsunday 1824," and the superior was bound to enter as vassals the heirs, disponees, or singular successors, without demanding or being entitled to exact any composition whatever "in regard that the fore-said feu-duty, together with the double thereof in every nineteenth year . . . are the agreed and fixed consideration hereby accepted of in lieu of all compositions for the entries of heirs, disponees, and singular successors in the foresaid lands and others." Now, in that case it was held that only the two payments were exigible.

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I think as a matter of construction clearly here a composition is meant to be paid over and above the feu-duty. Although the words "as also" were used in *Alexander's* case,¹ there was there a form of expression which showed that there was to be a doubling of the feu-duty every nineteenth year, and that in respect of that doubling the lands were to remain free of composition. There is no such expression here. Here you have done with the clause dealing with the feu-duty, and then the deed goes on to say, "as also, you shall pay a double of the feu-duty every twenty-second year as a composition." There is another matter, which is this, that the composition is to be paid at a different term from the feu-duty. The feu-duty is to be paid at two terms in the year, and this composition is to be paid at the term of Whitsunday at the expiration of every twenty-two years.

Upon the whole matter, therefore, I come to the conclusion that, as matter of construction, the composition is to be paid by paying a sum equivalent to double of the annual feu-duty over and above the feu-duty which falls to be paid at that particular term, that is to say, the half-year's feu-duty then due, and accordingly that the question put to us ought to be answered subhead (a) in the affirmative, and subhead (b) in the negative.

LORD KINNENAR concurred.

LORD JOHNSTON.—I have experienced considerable difficulty in this case. Were it an isolated case, I should not have thought myself justified in expressing the doubt which I entertain of the conclusion at which your Lordship has arrived. But I understand the judgment will cover a considerable amount of property, held under the first parties on the same form of title.

The reddendo for the first of the feus is stated to be "paying therefor yearly in name of feu-duty" a certain sum of money, £36 I think, and that at two terms in the year, Whitsunday and Martinmas, "as also paying" "a double of" the said feu-duty at the expiry of every twenty-two years from Whitsunday 1889. The feu-contract is dated in that year, and is therefore subject to section 23 of the Conveyancing Act, 1874, which abolishes relief and composition as formerly exigible. The payment is simply conditioned as part of the reddendo. Moreover, the sum called feu-duty is payable half-yearly at Whitsunday and

¹ 5 F. 406.

Martinmas. This extra payment is payable in whole at every twenty-second Whitsunday. Whatever, therefore, be the meaning of "a double," the question does not arise in this which has arisen in former cases, viz., whether the extra payment stipulated is cumulative with, or in substitution for, the feu-duty of the year. It is, under the terms of this feu-contract, clearly a separate payment altogether. Nor do I think that the usual addition, "over and above the feu-duty of the year," or some equivalent, would have been apposite, or that its omission calls for remark.

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The sole question then is, what is the meaning of "a double of"? I have carefully considered the authorities cited, but I cannot say that I think they afford much assistance, as so much depends on the particular turn of expression. The question is, to my mind, very much one of impression. But I think that one ought to approach that question with the knowledge that the payment is really, though not formally, in lieu of the old casualty of relief and the payment of composition; on the footing that the feu-duty was a competent avail and therefore the measure of composition as well as of relief in the normal case; and further, that from nineteen to twenty-two years has come to be regarded as, so to speak, the average duration of a generation in feu-holdings. Hence if parties were merely seeking for an average equivalent of the former feudal exactions on transmission, a payment, as such equivalent, of a sum equal to the feu-duty is what one would fairly expect. But it was quite open to the superior to stipulate for any payment he could get his vassal to assent to, provided he made the stipulation so as clearly to disclose his meaning. Not only, then, is he *in petitorio*, but he is asking for what would not be based on the fair calculation of the normal, but would have a colour of the severe or exacting, condition. I therefore think that I am specially bound to be satisfied, not on probability, but on language which is conclusive, that the stipulation in question bears the superior's interpretation.

Now I must say that the impression which the words used have made upon me is that "a double of," in the collocation in which the words occur, naturally means "a replica of"—that is (as the "double" is something to be calculated in money), that these words mean a sum which is the same as, and not twice as much as, the feu-duty. Had the superior intended to stipulate the latter it would have been easy for him to use words distinctly expressing that the parties meant a sum equal to twice the amount of the sum which is the stipulated feu-duty. I cannot say that I am satisfied that the superior has done so. And I do not think that I am entitled to give him the benefit of the doubt, on the assumption that it is most probable that he intended the higher exaction.

But the words used are susceptible of a different meaning. Your Lordships, being differently impressed by them, are prepared to give them a different interpretation. Accordingly, though I have expressed my doubt, I agree in the judgment which your Lordship has proposed.

LORD MACKENZIE concurred.

THE COURT answered the question (a) in the affirmative, and (b) in the negative.

PETER MACNAUGHTON, S.S.C.—DUNCAN SMITH & M'LAREN, S.S.C.—Agents.

No. 122. THOMAS TAYLOR, Pursuer (Respondent).—*Horne, K.C.—Lippe.*
 Mar. 19, 1912. THE PROVOST, MAGISTRATES, AND COUNCILLORS OF THE BURGH OF
 SALTCOATS, Defenders (Reclaimers).—*Wilson, K.C.—MacRobert.*

Taylor v.
 Magistrates
 of Saltcoats.

Reparation—Burgh—Street—Public footpath—Accident caused by defective footway—Disused railway embankment in burgh area frequented by public—Responsibility of magistrates—Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), sec. 4 (31)—Burgh Police (Scotland) Act, 1903 (3 Edw. VII. cap. 33), sec. 104 (2) (c).

In an action against the Magistrates of a burgh the pursuer claimed damages for personal injuries resulting from a fall sustained by him at a place within the area of the burgh, which he described as a "promenade" and a public thoroughfare within the jurisdiction and under the control of the defenders. He averred that the defenders had neglected a duty of keeping the place in a condition of safety for the public.

The place in question was an embankment situated between a public railway and the seashore; it belonged to a private owner, and had at one time been used for a private mineral railway. The embankment had originally been supported by a retaining wall furnished with a parapet, but the wall and parapet had been swept away in places by the action of the waves. The public, with the tacit consent of the proprietor, frequented the embankment for the sake of the view, and the Magistrates had provided seats for the accommodation of the public, and steps leading down to the shore. The pursuer averred that he had stumbled on a dangerous inequality on the footway and, through the absence of a parapet, had fallen down the embankment on to the shore.

Held (rev. judgment of Lord Dewar) that the place in question being neither a street in the ordinary sense of the term, nor a public street or public footpath within the meaning of the Burgh Police Acts, the defenders were under no obligation to keep it in a safe condition; and defenders *assolized*.

1st DIVISION. ON 30th October 1911 Thomas Taylor brought an action of damages for personal injuries against the Provost, Magistrates, and Councillors of the burgh of Saltcoats.
 Lord Dewar.

The pursuer averred that while he was walking on a "promenade" or footpath within the burgh boundary, situated upon an embankment immediately overlooking a part of the seashore at Saltcoats known as the East Shore, he slipped and fell owing to the uneven nature of the footway and, through the absence of a parapet, rolled down the embankment on to the shore, sustaining the injuries of which he complained. He further averred:—(Cond. 8) "The said promenade is a public thoroughfare within the defenders' jurisdiction. It was, at the date of the said accident, within the knowledge of the defenders, a public passage or place used by foot-passengers within the said burgh over which they exercised jurisdiction, and for the safe condition of which, for the use of foot-passengers thereon, they were responsible. Members of the public had exercised a right of way over it for more than the prescriptive period prior to the accident in question; and the defenders invited and induced foot-passengers to use it as such. At the time of said accident it was managed and controlled by the defenders."

With regard to the nature and situation of the place where the accident occurred, the question upon which the case turned, the averments of the pursuer (which were in all material points admitted by

the defenders) were summarised as follows by the Lord President in Mar. 19, 1912. his opinion :—

“ The place where the accident happened is, so far as the land is concerned (that is, the land *a coelo usque ad centrum*), the property of Mr Cuninghame of Auchendarvie. In olden days the Cuninghames had one of the old mineral railways, and the old mineral railway was at this place. To put the railway at a proper level and to protect it from the sea there was an embankment constructed upon the foreshore. I am not using the word ‘foreshore’ in a technical sense, because I do not know precisely where the high-water mark was, but at any rate this is a place to which admittedly the sea has access, and when it is rough, comes with considerable violence. Accordingly, when this old mineral railway was constructed there was an embankment constructed, and it was protected from the sea by a sea-wall, and the sea-wall had a parapet at the top which would have prevented a person who was on the embankment from tumbling over the edge. This mineral railway fell into disuse, and the Glasgow and South-Western Railway Company, getting the necessary ground under ordinary parliamentary powers, constructed a public line of railway just upon the landward side of this old embankment at practically the same level as the old embankment. They put their railway fence, so to speak, between their lands and the old embankment, with the result that the old embankment outside the railway fence became available to those who chose to walk there. As the old railway embankment was no longer used for the purposes of a railway, nobody took any trouble to keep it up, and the sea, as I said, had unrestricted access to it, and, as might be supposed, in process of time battered down the retaining wall at several places. Where it battered down the wall so badly that it encroached on the old embankment and threatened to pierce through the old embankment and undermine the foundations of the Glasgow and South-Western Railway, the railway company got leave from the proprietor of Auchendarvie to put down heaps of slag in order to protect their line from the sea. That was done from time to time, and doubtless would be done again if the sea in a bad storm came up and made a breach in the railway. At some places the old retaining-wall still remains, and the embankment stands and has a top to it, varying in width, but of several feet. At other places the old retaining-wall has been battered down by the sea and the breadth of the embankment has been encroached upon and is in places, so to speak, reduced to almost nothing. Now, inasmuch as from the top of the embankment there is a clear view to the sea, the public began to walk there. Nobody ever interfered with them, and there is no question that now the embankment, by consent of the proprietor—because he never in any way interfered—is a place of *de facto* public resort. As such it is dignified by the pursuer with the name of ‘promenade.’ ”

It also appeared that access to the embankment was afforded by a crossing on the level of the Glasgow and South-Western Railway Company’s line, under the control of the company, not far from the scene of the accident, and that the defenders had constructed steps leading down the embankment to the shore opposite this level-crossing, and had also placed certain seats upon the top of the embankment for the use of the public who frequented the spot.

The pursuer pleaded, *inter alia* ;—(2) The said promenade being a public thoroughfare, and at the time of the said accident under the

Mar. 19, 1912. control and management of the defenders, they were bound to keep and maintain it in a safe and secure condition, and, having failed to do so, are liable to make reparation to the pursuer for the injuries sustained by him as condescended on. (3) The defenders having by their actings invited the public to use said promenade as a public path lying within their jurisdiction, they were bound to keep it in a safe condition, and, having failed to do so, are liable to the pursuer in reparation for injuries received by him in consequence of their failure.

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On 24th January 1912 the Lord Ordinary (Dewar) allowed issues for the trial of the case.*

* "OPINION.—[After narrating the circumstances]—The grounds upon which he [the pursuer] seeks to make the defenders liable are these:—The promenade, he says, was a public thoroughfare within their jurisdiction, for the safe condition of which they are responsible to the public; and the defenders not only knew that it was a place of public resort, but they invited and induced the public to use it as such, and assumed the control and management of it. They formed steps down the embankment to provide access to the sea, they repaired the promenade from time to time, and provided seats at various intervals so placed that the public were invited to traverse the promenade from end to end and to use the seats as resting places. And he further states that for years the public have so used the promenade, relying, as the defenders by their actings led them to rely, on the promenade being kept safe through the defenders' administration and control thereof.

"Assuming (as I must at this stage assume) that these averments can be proved, I think they are sufficient to establish liability against the defenders.

"The case of *Innes v. The Magistrates of Edinburgh*, 6 Feb. 1798, M. 13,189, established the principle that magistrates were responsible for accidents caused by the defective condition of the public streets. In *Kerr v. The Magistrates of Stirling*, 21 D. 169, the question was raised, but not decided, whether magistrates of a burgh were responsible—apart from any question of ownership—for the proper maintenance, not only of the streets, but of every thoroughfare—even a mere footpath—within their jurisdiction. This question has, I think, been decided in the affirmative by later decisions. In *Carson v. The Magistrates of Kirkcaldy*, 4 F., p. 18, where an accident happened on a partly formed private road within the burgh which the public were in the habit of using, it was held that the magistrates were liable on the ground that they were 'the guardians of the public in the town, who have to look after the interests of the town and see to it that there are not dangerous places into which the public may fall.' And in *M'Fee v. Police Commissioners of Broughty-Ferry*, 17 R., p. 764, the defenders were held liable because it was their duty 'to see that the road of which they have the custody and guardianship is in a safe condition for public use. If it is not, it is for them, if they cannot put it in such a state, or compel those whom they allege to be the right persons to make it safe to do so, to stop that traffic upon it which cannot be conducted without danger.' I think it follows from these decisions that the magistrates of a burgh are responsible for the public safety, not only in the streets, but in all public thoroughfares over which they have control within their jurisdiction; and that this responsibility arises not from ownership, but because they are charged with the duty of guarding the public against dangerous places.

"In the present case the pursuer states that the promenade was a public thoroughfare within the jurisdiction of the defenders, that they assumed management and control of it, and invited the public to use it. I think that is sufficient, if true, to infer liability against the defenders.

"On the question whether it appeared from the pursuer's averments that

The defenders reclaimed, and the case was heard before the First Mar. 19, 1912. Division on 22nd February 1912.

Argued for the reclaimers;—The pursuer had averred no relevant ground of liability against the defenders. The defenders had no right of property in, or of control over, the embankment, and, in particular, they had no right to fence or to repair it. The fact that they had provided seats upon the embankment and made steps down to the shore did not affect their legal obligation. The cases cited by the Lord Ordinary only decided that a burgh authority must keep its streets in a state of safety. *Innes's case*¹ and *Carson's case*² concerned royal burghs where the *solum* was the property of the burgh authority, and in both of these cases the accident occurred on what was a public street in the ordinary sense of the term. *M'Fee's case*³ also concerned a public street. These cases accordingly did not help the pursuer, as the place in question was not a public street, and, further, was not the property of the magistrates. It was not, moreover, a public footpath, so that it was impossible for the pursuer to argue that the charge and control of the place in question was imposed on the magistrates by the provisions of the Burgh Police Acts.* There was no provision in these or any other Acts which

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the defective condition of the footway was the proximate cause of the accident, the defenders argued that it was obviously due to the pursuer's own want of care and prudence. It was daylight at the time, and, if the surface was 'rough and uneven,' that must have been patent to the pursuer; and, if the pathway was too narrow, it was imprudent to walk, as he alleges he walked, with Mrs Morrison 'leaning on his arm' at this point. There is a good deal of force in this criticism; but I do not think that it is possible to dispose of the case before hearing the evidence, and I accordingly allow the issue."

¹ (1798) M. 13,189.

² (1901) 4 F. 18.

³ (1890) 17 R. 764.

* The Burgh Police (Scotland) Act, 1892 (55 and 56 Vict. cap. 55), sec. 4 (31), enacts:—" 'Street' shall include any road, highway, bridge, quay, lane, square, court, alley, close, wynd, vennel, thoroughfare, and public passage, or other place within the burgh used either by carts or foot-passengers, and not being or forming part of any harbour, railway, or canal station, depot, wharf, towing-path, or bank."

The Burgh Police (Scotland) Act, 1903 (3 Edw. VII. cap. 33), sec. 103, enacts:—"Expressions used in this Act shall, unless there be something in the subject or context repugnant to such construction, have the same meaning as in the principal Act [Burgh Police (Scotland) Act, 1892]: Provided that, unless there be something in the subject or context repugnant to such construction, the expression . . . (5) 'public street' shall in the principal Act and this Act mean (i.) any street which has been or shall at any time hereafter be taken over as a public street under any general or local Police Act by the town-council or commissioners; (ii.) any highway within the meaning of the Roads and Bridges (Scotland) Act, 1878, vested in the town-council; (iii.) any road or street which has in any other way become, or shall at any time hereafter become, vested in or maintainable by the town-council; and (iv.) any street entered as a public street in the register of streets made up under this Act."

Sec. 104 (2) (c), which makes a new 128th section for the Burgh Police (Scotland) Act, 1892, enacts:—"Subject to the provisions of the Roads and Streets in Police Burghs (Scotland) Act, 1891, and of the Burgh Police Acts, the town-council shall have the sole charge and control of the carriage-way of all the public streets within the burgh and footways thereof, and also of all public footpaths, and all such public streets, footways, and foot-

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imposed the charge and control of such a place on the burgh authority,¹ even if it were open to the pursuer, who had based his case on record entirely on common law, to found in argument on statute.

Argued for the respondent;—The obligation of the Magistrates to keep the embankment in a safe condition did not depend upon any right of property, but on the facts that the place was a public thoroughfare within the jurisdiction of the Magistrates and that they had undertaken the custody and control.² The pursuer's averments on these points were sufficiently specific. They set forth that public streets led down to the embankment; that the Magistrates had made steps for getting from the embankment to the beach; and had encouraged the public to resort to the embankment by the provision of seats. It was further clear that the spot where the accident happened was in the thoroughfare between the level-crossing and the steps leading to the beach. In any case, this was a "footpath" such as was put in the charge and control of the defenders by the very wide terms of section 104, 2 (c), of the Burgh Police (Scotland) Act, 1903, and the duty of charge and control necessarily included that of maintenance in a state of safety for the public.

At advising on 19th March 1912,—

LORD PRESIDENT.—This is an action brought by a gentleman, who happened to be in the town of Saltcoats, against the Magistrates and Council of the burgh of Saltcoats for an injury to his ankle. The accident, described in popular language, is simply this, that he was walking one evening along the top of a certain embankment, which in his condescendence he dignifies by the name of a promenade, and that, going rather near the edge, he slipped and tumbled down the slope on to the seashore. The ground upon which he seeks to make the Magistrates liable is that this promenade was under their custody and control, that it was rough instead of smooth, and that he was made to trip by its rough surface. In other words, he puts his action exactly as if the accident had happened in an ordinary street in the burgh owing to a defective condition of the pavement.

Now, if I had the slightest doubt as to the particular situation of this place where the accident happened, I would not decide this case without there having been a proof of some sort. The Lord Ordinary has sent the case to a jury. But at the discussion before us certain photographs were produced, and both parties said that they were reliable. I would not go upon these photographs alone, but these photographs are a pictorial representation of what the parties in their pleadings say, and there was in reality no difference between the parties upon the facts of the matter. They have a vastly different view as to what the legal result that flows from these facts is; but upon the facts I think there is no difference whatever, and I think it would be really a waste of time and money to have a proof in order to

paths are, for the purposes of the said Acts and of such charge and control, hereby vested in the town-council accordingly."

Counsel also referred to secs. 128 and 129 of the Act of 1892.

¹ Dunfermline Town-Council v. Rintoul, 1911 S. C. 737, *per* Lord Ardwall, at p. 742.

² Laurie v. Magistrates of Aberdeen, 1911 S. C. 1226, *per* Lord President Dunedin, at p. 1231; Laing v. Paull & Williamson, *supra*, p. 196.

establish what we can perfectly clearly grasp from the condescendence and Mar. 19, 1912. answers. I do not think there is a shadow of doubt as to the state of matters.—[His Lordship then gave the description of the *locus* quoted ^{Taylor v. Magistrates of Saltcoats.} *supra*, and proceeded]—

Now, “promenade” is not a *nomen juris*, and although there are many ^{Ld. President.} words in the Burgh Police Act of 1892 “promenade” is not one of them, and the question really comes to be whether there is a duty on the Magistrates to keep this road or passage—for I cannot call it a pavement—in what may be called a safe condition, so that those who go along it may not find any rough place where their foot may trip. I am of opinion that there is no such duty, and accordingly that the case here stated is an irrelevant case.

The Lord Ordinary, I think, evidently sent the case to the jury with some reluctance, because probably he thought it was the pursuer's own fault that he fell down, but that that was a fact which must be considered on inquiry. He quoted certain cases in support of what he did. I do not think any of these cases apply to a situation such as this. The first case is the old case of *Innes v. The Magistrates of Edinburgh*.¹ That case was occasioned by a hole that was dug in College Street, that is to say, a public street of Edinburgh, within the burgh. Now, I rather think that within the old royalty the streets belonged to the burgh as a corporation; but at any rate, whether that is so or not—because it is left in doubt from the report—there is no question that the hole was a hole in the public street. In the next case, *Kerr v. The Magistrates of Stirling*,² the question was raised but not decided. It is quite clear that their Lordships thought there was a great distinction between public places and streets. Then in the case of *Carson v. The Magistrates of Kirkcaldy*³ the Lord Ordinary quotes in inverted commas one sentence of the judgment of Lord Young. That sentence cannot be taken as laying down the law to the full extent which the sentence taken by itself would justify. The facts in *Carson*³ were these. There was a private road within the burgh, that is to say, a road which probably would begin life as a private street, and then perhaps would be taken over by the burgh. The private road was being formed: it was very soft, and a motor-car sank so much in it that it had to be dug out. After it was taken out there was a large and ugly hole remaining. Nobody did anything to fill up the hole, and Carson tumbled in and was killed. His widow and children brought an action which they directed both against Mr Oswald, who was the proprietor of the private street which was being formed, and against the Magistrates of Kirkcaldy. The Lord Ordinary assoilzied Mr Oswald, and against that the pursuers took a reclaiming note. Why they thought it necessary to do that I do not know; but perhaps they were afraid that if they did not keep both adversaries, one might escape them in the Outer House and the other in the Inner House. When the reclaiming note came up in the Inner House counsel for the magistrates, for reasons best known to themselves, stated that they no longer disputed the relevancy of the averments as against the burgh. In other words, counsel admitted that this was a street. That case, therefore, cannot be put as a decision upon the question, What

¹ M. 13,189.² (1858) 21 D. 169.³ 4 F. 18.

Mar. 19, 1912. is a street, and what is not a street? The last case which the Lord Ordinary quotes, *M'Fee v. The Police Commissioners of Broughty-Ferry*¹ was a case also of a public street of the burgh. It had originally been an old road or passage formed by a railway company under the railway, but had become a public street under the charge of the Police Commissioners. Sufficient headroom had not been left, and a cabman drove his head against the crown of the bridge. It was held that inasmuch as it was a street, the magistrates were bound to have it in a safe condition; and if they had taken over an old road in which there was not sufficient headroom they should have made it safe by getting the railway company to heighten the bridge or by lowering the road so as to let an ordinary cab go through.

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Your Lordships will see that the authorities cited by the Lord Ordinary only come to this that, where there is admittedly a street, the public authorities having custody and control of the street are liable for a bad condition of that street. That is a proposition which I do not think anyone doubts, and it certainly was authoritatively recognised by this Division, assisted by three consulted Judges, in the recent case of *Laurie v. The Magistrates of Aberdeen*.² But the question here is, Is a piece of land, in the condition which I have described, a street? For there is no proposition, so far as I know, that the magistrates of a burgh are bound to have everything safe that is within the bounds of the burgh. The practical application of that, of course, would be almost ridiculous. Whoever would suppose, for instance, that if a gentleman went walking upon the path at the foot of the Salisbury Crag, and went a little too near to the edge and slipped his foot upon a loose stone and tumbled down the long slope to Holyrood, in which case he might well hurt himself, he could bring an action against the magistrates because the condition of that path was not safe.

Now, I think the only ground upon which the authorities here can be liable is that this place is, in view of the Police Acts, a public street or a public footpath. The 104th section, subsection 2 (c), of the Burgh Police Act, 1903, makes a new 128th section for the Burgh Police Act, 1892, and the new section runs thus: "Subject to the provisions of the Roads and Streets in Police Burghs (Scotland) Act, 1891, and of the Burgh Police Acts, the town-council shall have the sole charge and control of the carriage-way of all the public streets within the burgh and the footways thereof, and also of all public footpaths, and all such public streets, footways, and footpaths are, for the purposes of the said Acts and of such charge and control, hereby vested in the town-council accordingly."

The place in question here is obviously not a public street. The question therefore is, Is it a public footpath? I am clearly of opinion that it is not. I think a public footpath means a footpath which is a recognised way of getting from one place to another, and means something of the character of a street. The same thing, I think, is found in the definition of "street" in the Burgh Police Act, 1892, section 4 (31). "'Street' shall include any road, highway, bridge, quay, lane, square, court, alley, close, wynd, vennel, thoroughfare, and public passage, or other place within the burgh, used

¹ 17 R. 764.

² 1911 S. C. 1226.

either by carts or foot-passengers, and not being or forming part of any harbour, railway," &c. Mar. 19, 1912.

I do not think that actual definition has any direct application, because, as I have already shown, the new 128th section puts the Town-Council in control and custody only of public streets and of public footpaths, but I think it shows incidentally that the idea which is underlying a street, of which the definition is a very wide one, is that it is some place which is really used as a proper means of passage from one place to another. Now this place is evidently not so used. Nobody goes on the top of this embankment to go from one place to another. Of course, a person can go from one place to another by it in the same sense as "all roads lead to Rome," but really the only reason for going on the top of this embankment is in order to look at the view. I think it is out of the question to say that the moment there is a place where the public are allowed to congregate, either by permission of the burgh or the proprietor of the ground, that place, for the purposes of control, becomes a street, and carries with it an obligation on the magistrates to keep it in such a condition that nobody can slip. The mere fact that in some places the parapet wall still remains, and the Magistrates put down a few seats for the people who liked to sit there and gaze upon the view, cannot, in my view, alter the obligations which are upon the Council.

I think, upon the whole matter, that there is no ground of liability to support the case against the Magistrates. If people choose to go out for an evening stroll on places where they may tumble, they must really do so at their own risk.

LORD KINNEAR, LORD JOHNSTON, and LORD MACKENZIE concurred.

THE COURT recalled the interlocutor of the Lord Ordinary, and assoilzied the defenders.

MYLNE & CAMPBELL, W.S.—W. CROFT GRAY, S.S.C.—Agents.

THE INCORPORATION OF MALTMEN OF THE BURGH OF STIRLING AND WILLIAM ROBERT GALBRAITH, Petitioners.—*J. A. Inglis.* No. 123.

Mar. 20, 1912.

Burgh—Trade Incorporation—Alteration of bye-laws—Incorporation nearly extinct—Transference of funds to new governing body—Application of benefits to an educational charity—Sanction of the Court—Burgh Trading Act, 1846 (9 and 10 Vict. cap. 17), sec. 3. Incorporation of Maltmen of Stirling.

The Incorporation of Maltmen of the burgh of Stirling, an ancient trading corporation, whose membership had become reduced to that of a single member, presented a petition under the Burgh Trading Act, 1846, for the sanction of the Court to certain proposed alterations on the bye-laws of the Incorporation. There had been no applications for admission to the Incorporation for fifty years, and it appeared to be improbable that there would ever again be anyone qualified for admission. The purposes of the proposed alterations were to associate the provost and magistrates of the burgh with the members of the Incorporation, if any, as a governing body, and to apply the funds, so far as not required for the existing purposes of the Incorporation, for the benefit of an educational trust in the burgh.

The Court, in respect that no objections had been stated by any party interested or by the Lord Advocate, *granted* the prayer of the petition.

Mar. 20, 1912. ON 21st December 1911 a petition was presented, under section 3 of the Burgh Trading Act, 1846 (9 and 10 Vict. cap. 17), by the Incorporation of Maltmen of the burgh of Stirling and William Robert Galbraith, the sole surviving member of that Incorporation, for approval of certain bye-laws.

Incorporation
of Maltmen
of Stirling.
1st Division.

The petition (as amended) set forth as follows:—

“That the petitioner, William Robert Galbraith, is, so far as can be ascertained, the sole surviving member of the Incorporation of Maltmen of the burgh of Stirling. He was admitted a member on 17th November 1857.

“Down to the year 1846 the Incorporation had from a very early period enjoyed the exclusive privilege of malting within the burgh of Stirling. This privilege was recognised in a Seal of Cause from King James VI. in 1603, and several grants and enactments have subsequently been made in favour of the Incorporation by the Magistrates of the burgh.

“The Incorporation has no written constitution, but its bye-laws and regulations seem to have been either made or confirmed by the Town-Council. Under the regulations for entry, thus made, sons of members were entered for a payment of £1, sons-in-law for £1, 3s. 4d., and strangers for £6, latterly £8.

“The Incorporation was in the practice of giving pensions or charitable grants to members and to the widows and children of members, and payments were also made for clothing and funeral expenses. Since 1686, and probably prior thereto, an annual sum of £5, 16s. 8d. has been paid to the Town-Council of Stirling under the name of ‘ladleroll money.’ Occasional grants out of surplus income have been made to the poor of the town generally, and to various public undertakings, such as the first water scheme of the burgh, the building of schools, and the improvement of the high roads.

“By the Burgh Trading Act, 1846 (9 and 10 Vict. cap. 17), the exclusive privileges of trading incorporations in burghs were abolished, and thereafter the membership of this Incorporation declined. No new members have been admitted since 1862, and the petitioner is not aware of anyone who has since then applied to be admitted. In the year 1884, so far as can be traced, there were five members, other than the petitioner, alive, but they are all known to be dead.

“There is no record of any meeting since 1864, except a meeting in 1886, when the question of taking counsel’s opinion as to winding up the Incorporation was considered, but no action followed.

“There is no record of any new pensions or gratuities having been granted since 1864, and all the pensioners then alive are now dead.

“Mr James Brown, writer, Stirling, who for many years acted as treasurer of the Incorporation, died in the month of August 1909, and no successor has been appointed. His executrix-nominate is Mrs Jessie Davie or Brown, widow, residing at No. 11 Windsor Place, Stirling, who is called as a respondent in this petition.

“The petitioner, as sole surviving member, being desirous of making arrangements for the continuation of the Incorporation, and of putting the management of its affairs under proper control, signed on 27th November 1911 a minute containing certain bye-laws and regulations as follows:—

"Minute by William Robert Galbraith, Civil Engineer, 91 Finchley Road, London, as sole surviving member of the Incorporation of Maltmen of the burgh of Stirling. Mar. 20, 1912.

"Whereas the said William Robert Galbraith is now, so far as is known, the sole surviving member of the Incorporation of Maltmen of the burgh of Stirling: And whereas there have not been, since the year 1862, any entrants to the said Incorporation, nor, since the year 1888, any pensioners receiving pensions from the funds of the Incorporation: And whereas it is desirable to make provision for the continued management of the funds of the Incorporation, and for applying the funds of the Incorporation to the purposes to which such funds have hitherto, according to use and wont, been applied, and for disposing of any surplus funds for kindred or analogous purposes: Therefore the said William Robert Galbraith, as sole surviving member foresaid, has resolved, and hereby resolves, subject to the approval of the Town-Council of the burgh of Stirling, and thereafter the approval and sanction of the Court of Session being obtained, that the following be the bye-laws and regulations for the management and application of the funds and property of the Incorporation, viz.: (*First*) That the funds and property of the Incorporation shall be held and managed by a governing body, consisting of the Provost and Magistrates for the time being of the royal burgh of Stirling, and the said William Robert Galbraith, and such of the other members of the Incorporation as may be duly admitted into the Incorporation, and elected to act on said governing body by annual election by the members of the Incorporation to the number of not exceeding six in all, a majority of the members of the governing body acting for the time being always a quorum. (*Second*) That the said governing body shall apply the income of the funds and property of the Incorporation, and such portions as they may think fit of all future entry moneys of members joining the said Incorporation as follows, *videlicet*:—(1) In payment of the necessary expenses of management. (2) In payment of pensions, grants, and allowances, according to the use and wont of the Incorporation, that is to say, in payment of pensions, grants, and allowances to members of the Incorporation who may be in destitute or necessitous circumstances, and to the widows and children of deceased members who have been left or are at the time in destitute or necessitous circumstances, and in payment of the funeral expenses of deceased members who may have died in such circumstances, all as the recipients of such pensions and other payments shall be selected by the governing body. (3) In payment of any surplus remaining after meeting the foregoing purposes to the Governors of the Stirling Educational Trust, to be applied by the said Governors for such of the purposes of the scheme for the administration of the Stirling Endowments framed by the Educational Endowments (Scotland) Commission, and approved by Her late Majesty Queen Victoria, by Order in Council, 3rd April 1886, as they in their sole and absolute discretion may decide. (*Third*) That the said governing body may appoint such office-bearers as they deem necessary. (*Fourth*) That the members of the Incorporation shall have the whole powers, rights, and privileges competent to the members of the Incorporation, according to use and wont, save only as altered by the provisions hereof.

"For the purposes of this minute, the said William Robert Galbraith hereby records that to the best of his knowledge and

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belief the funds of the Incorporation as at present existing are as follows:—(1) £100 Edinburgh Corporation 3 per cent Redeemable Stock. (2) £200 on loan to the Town-Council of Stirling. (3) £170 on loan to Spittal's Hospital, Stirling. (4) Four pews in the East Church, Stirling, yielding an annual revenue of £1, 10s. (5) Sums in bank on deposit-receipt amounting in all to £200 or thereby.

"27th November 1911.

WM. R. GALBRAITH.

"Before signing said minute, the petitioner submitted it to the Town-Council of the burgh of Stirling, and by letter of date 21st November 1911, from the Town-Clerk to Messrs Mathie, MacLuckie, & Lupton, writers, Stirling, agents for the Incorporation, the Town-Council intimated their approval of the said minute, and consented to an application being made to your Lordships for the sanction of the bye-laws and regulations therein contained.

"The Town-Council and Magistrates further agreed that the Provost and Magistrates for the time being would act on the governing body as provided by said minute, in the event of your Lordships' sanction being obtained."

On 23rd January 1912 the Court remitted to Lord Kinross, advocate, to inquire and to report.

On 8th March 1912 Lord Kinross reported in favour of the proposed alterations on the bye-laws. In the course of his report he explained the purposes of the Stirling Educational Trust as follows:—"The Stirling Educational Trust administer a scheme under the Educational Endowments Act, 1882, under which certain foundationers are maintained and educated at the High School, Stirling, chosen from among the sons of persons resident in Stirling, who belong to or have belonged to the Seven Incorporated Trades of, or Guildry, or Society of Mechanics in Stirling. The funds are also utilised for the furtherance of higher education and the establishment of bursaries."

The petition was called in Single Bills in the First Division on 9th March 1912, when attention was drawn by the Court to the fact that the petition did not appear to have been intimated to the Crown, and it was appointed to be heard in the Summar-roll.

The petition was called in the Summar-roll of the First Division on 20th March 1912, when counsel for the petitioners submitted a letter from the Lord Advocate intimating that he had no observations to make,* and moved the Court to grant the prayer of the petition.¹

LORD PRESIDENT.—This is a somewhat unusual and peculiar application. It has been presented by the sole surviving member of one of the old trading incorporations, the Maltmen of the Burgh of Stirling. He quite frankly not only admits that he is the last maltman, but says that it is very improbable that there will ever be a maltman again. I do not suppose any other such person can be found in Stirling—I mean a person who could have entered the Incorporation in the way in which the rules provide. He

* The letter submitted was addressed to the agents of the petitioners, who had on 9th March 1912 forwarded a print of the petition, with the report by Lord Kinross, to the Lord Advocate, for his Lordship's consideration.

¹ The case of The United Incorporation of Masons and Wrights of Haddington, (1881) 8 R. 1029, was referred to.

comes forward with an application for the sanction of some new bye-laws Mar. 20, 1912. which he, as the Incorporation, has passed; and those bye-laws provide that, for the future, there shall be an association of the Provost and the Magistrates of Stirling with the members of the Incorporation, if any, that is to say, himself at first and his successors, if any; and that this new governing body shall dispose of the funds, first of all, according to use and wont, that is to say, in payments to the members of the Incorporation, if any such exist; and then anything that is left over is to be transferred to the Governors of the Stirling Educational Trust—a trust existing in Stirling, which is administered in terms of a scheme approved under the Educational Endowments Act.

As to the actual application of the moneys, I do not have any difficulty, because, although no doubt we are aware that these trading incorporations generally spend their moneys upon themselves and their members, I do not know that they might not have devoted their moneys to any purposes of education or charity if the Incorporation were willing to do so, and I do not see why we should not have sanctioned bye-laws for such purposes. The real difficulty which has weighed upon me is that, under the colour of a change of bye-laws, there is being provided a new governing body; and inasmuch as I am quite clear that we are only sitting here in terms of the Burgh Trading Act of 1846 (9 and 10 Vict. cap. 17) to give our sanction to bye-laws, I confess that I think the application is very unusual, and I am not sure that I should have seen my way to granting it but for two things. The first is, that the same thing seems to have been done by the other Division of the Court in a case quoted to us (*The United Incorporation of Masons and Wrights of Haddington*¹), and the other is—and it weighs with me quite as much—that there are no objections. We have got to consider who are the persons who could object. The only persons who could object—there being no actual maltmen—within the limits of Stirling would be the burgh of Stirling itself, I mean the Provost and Magistrates. They clearly do not object, because they have approved of the new arrangement. The only other person who, I think, might have objected, would be the Lord Advocate, representing the Crown as *ultimus hæres*, and so entitled to take up any derelict funds. The matter has been intimated to him, and we have a letter from him in process saying that he does not object to the prayer of the petition being granted. In these circumstances I think we ought to grant the prayer of the petition.

LORD KINNEAR, LORD JOHNSTON, and LORD MACKENZIE concurred.

THE COURT granted the prayer of the petition.

FRASER, STODART, & BALLINGALL, W.S., Agents.

¹ 8 R. 1029.

No. 124. ROBERT MORRISON, Pursuer (Reclamer).—*Constable, K.C.*—
D. Anderson.

Mar. 20, 1912. MRS MARGARET M'KILLOP OR MORRISON (Alexander Morrison's Executrix), AND OTHERS, Defenders (Respondents).—*J. A. Christie—Mercer.*

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Process—Title to Sue—Sisting of new pursuer—Expenses—Beneficiary suing for debt due to executry estate—Executor sisted as pursuer—Conditions as to expenses—Consignation in lieu of caution—Executor—Act of Sederunt, 20th March 1907, sec. 2 (a).

The Act of Sederunt, 20th March 1907, provides, sec. 2 (a), that where an action has been commenced in the name of the wrong person as pursuer, the Court or Lord Ordinary may, in certain circumstances, allow any other person to be sisted as pursuer in substitution for, or in addition to, the original party, on such terms as to expenses as to the Court or Lord Ordinary may seem proper.

An action, in which it was sought to establish that a certain debt was due to the estate of a deceased intestate, was brought by one of the deceased's next of kin in his own name. The Lord Ordinary having dismissed the action on the ground that the pursuer had no title to sue, *circumstances* in which the Court *allowed* the executor of the deceased to be sisted as a pursuer in the action on payment by the original pursuer of the expenses already incurred, and on consignation by him of the sum of £200, in lieu of caution, in security of any expenses in which the executor might be found liable in the course of the proceedings; the Court intimating that the executor would, in the future, be entitled to apply to the Lord Ordinary, if necessary, for further indemnification.

Title to Sue—Debt due to a deceased's estate—Action at instance of a beneficiary.

Circumstances where held by the Lord Ordinary (Skerrington), and approved of by the Court, that a beneficiary on the executry estate of a deceased was not entitled to sue for a debt due to the estate, although he averred that the deceased's executor had an adverse interest and had refused or delayed to take action.

1ST DIVISION. ON 3rd June 1911 Robert Morrison, as one of the next of kin of his deceased brother William, brought an action against Mrs Margaret Morrison, widow of Alexander Morrison, one of his brothers, and others, in which he sought to establish that at the date of William's death there had been a partnership between William and his two brothers, Alexander and James. The action also contained conclusions for accounting with and payment to William's executor, George Steel Morrison, another brother of the pursuer and of the deceased.

Lord
 Skerrington.

The following narrative is taken from the opinion of the Lord Ordinary (Skerrington):—"The pursuer is a brother and one of the five next of kin and heirs *in mobilibus* of William Morrison, who died on 18th May 1905, unmarried and intestate. The pursuer was resident in Johannesburg at the time of the intestate's death, and two other brothers of the intestate, viz., Alexander Morrison junior and George Steel Morrison, were appointed executors. The former died in January 1906, and the latter is the sole surviving executor of the intestate. He is cited, but only for any interest he may have as executor or as an individual. His sister, Mrs Brockley, is also called for her interest. The defenders are (1) the widow and executrix of

the said Alexander Morrison junior, and (2) the trustees of the de-
ceased James Morrison, who was also a brother of the intestate, and
who died on 26th August 1910. The first conclusion of the action is
for declarator that the said William Morrison was, at the date of his
death, entitled to an equal one-third share of the capital, stock, and
goodwill of the firm of Alexander Morrison & Sons, leather merchants
and boot and shoe manufacturers, Linlithgow, and also to an equal
one-third share of the whole profits made by the said firm from 31st
December 1890 to 31st December 1904. In other words, the pur-
suer wishes to establish a partnership between William and his
brothers Alexander and James as at the date of William's death.
There are also conclusions for accounting, and for payment to the
said George Steel Morrison as William's executor."

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The pursuer averred that George Steel Morrison was a trustee and residuary legatee on his brother James's estate, and was also entitled to a special legacy of £700 and a share of James's estate, that he had thus an adverse interest to the pursuer's claim, and, as executor afore-said, had refused to make, or at least abstained from making, any investigation into the matter.

The defenders pleaded, *inter alia*;—No title to sue.

On 24th January 1912 the Lord Ordinary sustained this plea and dismissed the action.*

* "OPINION.—[After the narrative quoted *supra*].—The first plea in law for the defenders is to the effect that the pursuer has no title to sue. In the ordinary case the title to prosecute an action like the present one is vested in the executor as the deceased's legal representative, and a creditor of the executor, including in this description a beneficiary either under intestacy or under a will, has no title to enforce a contract of copartnership to which he was not a party. For this proposition the defenders' counsel cited *Rae v. Meek*, 15 R. 1033, *aff.* 16 R. (H. L.) 31; *Henderson v. Robb*, 16 R. 341; and *Gill's Trustees v. Patrick and Others*, 16 R. 403. It is certainly logical that no one should be allowed to sue an action unless the contract or property right sought to be enforced has been duly transferred to him and is vested in his person. In general, any injustice which this rule of law might operate is obviated by the further rule that the person who has the beneficial interest may compel the person who has the formal title to lend his name as pursuer on receiving security against expenses, or, alternatively, may in certain cases demand an absolute assignation of his own share of the alleged asset. The latter alternative is not always available, and if the former is adopted the pursuer may be unable to find the necessary security. I am of opinion that where justice absolutely requires it, the action may, in spite of legal technicalities, be allowed to proceed at the instance of the party who has the beneficial interest. Lord Herschell indicates an opinion to that effect in *Rae v. Meek* (16 R. (H. L.) p. 33). A decree in such an action would, I think, be *res judicata*, provided always that the whole trustees and beneficiaries had been called as defenders. The case of *Watt v. Roger's Trustees*, 17 R. 1201, was cited by the pursuer's counsel as an example of such an exceptional case, but I rather think that it was a case the facts of which did not bring it within the ambit of the general rule. In that case the real defender was herself one of the trustees, and I think that the pursuer (a beneficiary) had a good title to compel the performance of a duty which was incumbent on the defender, both as factor for the trustees and also in respect of her being a trustee. I am aware that Lord Lee and Lord Young, who sustained the pursuer's title to sue, proceeded upon more general grounds. On the other hand, Lord Rutherford Clark, in the Inner House, and the Lord Ordinary (Lord Trayner) held that

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The pursuer reclaimed against this interlocutor, and his counsel was heard before the First Division on 20th February 1912, when the case was continued in order that the pursuer might consider the question of applying to have William Morrison's executor sisted as a pursuer in the action and of finding caution for his expenses.

On 16th March counsel for the pursuer presented a minute, in which it was stated that the pursuer desired to sist his brother William's executor as a pursuer in the action, and was prepared to consign in Court the sum of £200 in security of any expenses in which the executor might be found liable, and asked leave of the Court, in the Single Bills of the First Division (without Lord Johnston), to make the necessary amendments on record.* Counsel intimated that the pursuer was willing to pay the whole expenses of the action hitherto incurred, and explained, with regard to his offer of consignation, that he did not see his way to find caution for future expenses, in respect that he had only recently returned from South Africa, after an absence of several years, and had no friends to whom he could apply to find for him the necessary caution.¹

Counsel for the respondents objected, and argued;—The sum which it was proposed to consign was inadequate. In the circumstances of the case an expensive inquiry, extending over a number of years, would be necessary, and there were now no funds in the hands of the executor, the estate under his administration having already been distributed.

the pursuer had no title to sue. The case of *Teulon v. Seaton*, 12 R. 971 and 1179, is another decision where the title of a beneficiary to sue a debtor to the trust was sustained. According to the report, and also according to my recollection as one of the counsel in the case, the pursuer's title to sue was not much discussed or considered in the Inner House, but the judgment, as it stands, is an authority for the proposition that, in exceptional cases, a beneficiary may sue a debtor to the trust. I cannot extract from either of these decisions a general rule to the effect that a beneficiary has a title to sue a debtor to the trust in every case where the trustee in whom the formal title is vested has an adverse interest, either fiduciary or personal. In the present case, the intestate's executor, George Steel Morrison, is one of the two testamentary trustees of the deceased James Morrison, and he is also a beneficiary under the latter's will. These interests, fiduciary and personal, might prevent him from forming an impartial judgment as to the propriety of trying to establish that William was a partner in the firm up to the day of his death. Assuming all this to be the fact, I see no reason why the pursuer should not bring his action in the ordinary way in name of the executor, nor do I see any injustice in requiring from him an indemnity to the executry estate against expenses. I accordingly sustain the defenders' first plea, and dismiss the action."

* The Act of Sederunt, 20th March 1907, sec. 2 (a), enacts:—"Where an action or other proceeding has been commenced in the name of the wrong person as pursuer, or where it has been commenced without a person whose conjunction may be deemed necessary to make a good instance, or where it is doubtful whether it has been commenced in the name of the right person, the Court or Lord Ordinary, if satisfied that it has been so commenced through *bona fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, may allow any other person to be sisted as pursuer in substitution for, or in addition to, the original party, on such terms as to expenses as to the Court or Lord Ordinary shall seem proper."

¹ *Harvey v. Farquhar*, (1870) 8 Macph. 971, was referred to.

At advising on 20th March 1912,—

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LORD PRESIDENT.—This is a case in which the pursuer, as one of the next of kin of a deceased brother, desired the executor of the deceased to raise an action against certain parties, of whom he (the executor) was one, to affirm that the deceased had a partnership with these parties, and that certain moneys were due him. The executor declined to raise such an action, and then the pursuer brought the action in his own name. The Lord Ordinary sustained the plea of no title to sue and dismissed the action, and a reclaiming note was brought against his Lordship's judgment. Your Lordships upon the hearing took the view that the Lord Ordinary's judgment was quite right, but that there was no reason why the pursuer should not take advantage of the recent Act of Sederunt, 20th March 1907, section 2 (a)—that is to say, that he could amend the instance by putting the executor in as pursuer, taking, so to speak, a compulsory borrowing of the executor's name, which is always allowed where an executor will not raise an action which a beneficiary seeks to raise, if the beneficiary keeps the executor free in the matter of expense—and accordingly the parties were given time in order that the proposed amendment might be made and arrangements made about expenses.

Now, the amendment could only be allowed upon payment of expenses, because the progress of the action so far was quite useless—it was really equivalent to making a new action—and the matter came up again by the pursuer's counsel appearing and saying that though the pursuer was willing to make the amendment and to pay the expenses as a condition of being allowed to make that amendment, he was not in a position to find caution in ordinary form for the executor's expenses, because he had been long absent from the kingdom, and he did not happen to have friends whom he could ask to find caution, and in lieu thereof he proposed to consign the sum of £200, and upon that he asked your Lordships to allow the action to go on.

There is no question that the ordinary condition of allowing a beneficiary to use an executor's name is that the executor should be kept *indemnified* by satisfactory caution being found, and I am far from suggesting that we should countenance any deviation from the ordinary rule except in a very special case. It is not to be supposed that parties are to come forward and make offers of consignment where they should find caution. But there are cases—and this may be one of them—where a man has no friends whom he can ask to come forward as cautioners, and where it might amount to a denial of justice if the case were not allowed to proceed on other terms. The executor, however, comes forward and says, “£200 is not enough; that sum would not keep me *indemnified*.” I do not think this is a question which we can at this stage determine. On the other hand, it is quite clear that the executor is entitled to be kept *indemnified* against proper expenses incurred, and therefore I think, following the semi-precedent (it is not really a precedent) in the case of *Harvey v. Farquhar*¹—the circumstances there were different, and that is why I call it a semi-precedent—we should

¹ 8 Macph. 971.

Mar. 20, 1912. pronounce an interlocutor allowing the amendment only upon payment of the actual expenses already incurred, and that we should then remit the case to the Lord Ordinary to allow the pursuer to go on upon the £200 being consigned, but with leave to the executor to apply at any stage of the proceedings in which he can satisfy the Lord Ordinary that the expenses already incurred by him have come so near the £200 that he needs further indemnification, and leave the Lord Ordinary to deal with that situation as it arises.

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Ld. President.

LORD KINNEAR and LORD MACKENZIE concurred.

THE COURT pronounced this interlocutor:—"Recall said interlocutor: Ordain the pursuer to consign the sum of £200 as offered by him in said minute: Find him liable in expenses since the closing of the record on 11th July 1911, and remit the account thereof to the Auditor to tax and to report to the Lord Ordinary, to whom remit the cause to sist George Steel Morrison, executor-dative of the deceased William Morrison, sometime leather merchant and boot and shoe manufacturer, Linlithgow, as a pursuer in the action, and to allow the amendments proposed in said minute, but that only on consignment of the above sum and payment of the expenses above mentioned: Further, grant authority to the Lord Ordinary to decern for the taxed amount of said expenses, and to proceed as accords."

PURVES & SIMPSON, S.S.C.—R. G. STEWART, S.S.C.—Agents.

No. 125.

MASCO CABINET AND BEDDING COMPANY, LIMITED, Pursuers
(Respondents).—*Hon. W. Watson.*

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A. G. MARTIN, Defender (Appellant).—*James Stevenson.*

Masco Cabinet
Co., Limited,
v. Martin.

Expenses—Decree in name of agent-disburser—Compensation—Action for two separate sums—Decree for one—Right to set off against expenses awarded to defender.

In an action, concluding for payment of two sums on different grounds of liability, the pursuers obtained decree for one of the sums only, and the defender was awarded modified expenses. A motion was thereafter made for decree for the defender's expenses in name of the agent-disburser, which was opposed by the pursuers on the ground that they would thereby be deprived of their right to set off the sum for which they had obtained decree against the expenses found due to the defender. The Court *refused* the motion.

2D DIVISION.
Sheriff of
Lanarkshire.

THE MASCO CABINET AND BEDDING COMPANY, LIMITED, brought an action in the Sheriff Court at Glasgow against A. G. Martin, formerly managing director of the Company, in which they claimed payment of (1) £163, 7s. 4d., the amount of an account due to them which they averred was guaranteed by him, and (2) £233, 3s. 2d., being a sum alleged to have been drawn by him in excess of his salary as manager of the business, subject to a deduction to be allowed for a sum of £111, 14s. 3d. standing at his credit in the pursuers' books.

On 11th November 1910 the interim Sheriff-substitute (Welsh) decerned against the defender for £283, 10s. 9d., and, on appeal, this interlocutor was adhered to by the Sheriff (Millar).

The defender appealed to the Second Division of the Court of Mar. 20, 1912. Session.

The pursuers having thereafter gone into liquidation, the official liquidator, J. M. Macleod, was sisted as pursuer and respondent in the cause. Masco Cabinet Co., Limited, v. Martin.

On 29th February 1912 the Court pronounced an interlocutor finding that the respondents had failed to prove by competent evidence that the appellant had guaranteed the debt of £163, 7s. 4d., but that he was liable to repay the amount of salary overdrawn by him, viz., £231, 17s. 8d., subject to deduction of the sum of £111, 14s. 3d., and finding the respondents liable to the appellant in the expenses in the Court of Session modified to one half thereof.

On the case appearing in the Single Bills of the Second Division on 20th March 1912, counsel for the appellant moved for decree for the taxed amount of the appellant's expenses, as modified, in name of the agent-disburser.

Counsel for the respondents opposed the motion, and argued;—The two branches of the action were *partes ejusdem negotii*, and, accordingly, the respondents were entitled to set off the sum for which they had obtained decree against the sum due to the appellant as expenses. If the appellant's motion were granted, the respondents would be deprived of this right; and the motion ought not, therefore, to be granted.¹ *Monro v. Bothwell*² was overruled by the subsequent cases.¹

Argued for the appellant;—The two branches of the action were based on different grounds of liability, the one sum being claimed from the appellant as a guarantor, and the other in respect of his actings as manager of the Company. Further, the claim for expenses was a claim against the liquidator and not against the Company which had pursued the action. In these circumstances the respondents could not set off the sum decerned for against the expenses in which they were liable³; and the motion ought, therefore, to be granted.

THE COURT (Lord Justice-Clerk, Lord Dundas, Lord Salvesen, and Lord Guthrie) refused the motion.

DOVE, LOCKHART, & SMART, S.S.C.—H. H. MACBEAN, W.S.—Agents.

¹ *Grieve's Trustees v. Grieve*, 1907 S. C. 963; *Lochgelly Iron and Coal Co., Limited, v. Sinclair*, 1907 S. C. 442.

² (1846) Arkley 118, at p. 120.

³ *Fine v. Edinburgh Life Assurance Co.*, 1909 S. C. 636; *Dixon v. Murray*, (1894) 1 S. L. T. 600. *Fry v. North-Eastern Railway Co.*, (1882) 10 R. 290, was also referred to.

No. 126. AUGUSTUS CHARLES HUBER, Pursuer (Reclaiming).—*Constable, K.C.*—*D. Anderson.*

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ALEXANDER MACKENZIE ROSS, Defender (Respondent).—*Sandeman, K.C.*—*Wilton.*

Huber v.
Ross.

Reparation—Lease—Urban tenement—Premises let for specific business—Business interfered with by operations carried on by landlord on adjoining premises.

The top flat of an urban tenement was let to a tenant for the purposes of a photographic business. During the tenancy the proprietor of the tenement carried out alterations upon the lower flats which necessitated extensive building operations, and these caused structural and other damage in the top flat and interference with and detriment to the tenant's business.

In an action of damages at the instance of the tenant against his landlord *held* that, while the landlord was admittedly bound to restore the structural damage done to the tenant's premises, he was also (*varying judgment of Lord Guthrie*) liable in damages (1) for injury done to the tenant's furniture and materials; (2) for injury to his business during the work of restoration; and (3) for injury to his business during the landlord's building operations, but only (*diss. Lord Johnston*) in so far as this was due to physical and tangible injury to the premises (as from vibration or dust), and not where it was immaterial or temporary (as from noise or occasional obstruction to the access).

Observed (distinguishing the law of England from that of Scotland) that in Scotland a landlord carrying on operations *in suo* is liable in reparation to his tenant for the consequences thereof only in so far as they amount to a derogation from his grant.

Observations on the distinction between the liability of a landlord and of a neighbouring third party for the consequences of operations carried on *in suo*.

Laurent v. Lord Advocate, (1869) 7 Macph. 607, *commented on and explained*.

1ST DIVISION. ON 27th June 1910 an action was brought by Augustus Charles Lord Guthrie. Huber, photographer, Edinburgh, against his landlord, Alexander Mackenzie Ross, for damages sustained by reason of certain building operations carried on by the defender on premises adjoining those tenanted by the pursuer.

The pursuer averred, *inter alia*:—(Cond. 1) "The pursuer is a photographer, and is tenant of the top flat and attics of the property formerly No. 121, now 120c, Princes Street, Edinburgh. The defender is now proprietor of the said property, having acquired the same from the trustees of the deceased James Paton." (Cond. 2) "By missive of lease, dated 16th April 1907, the pursuer acquired on lease from the deceased James Paton, 5 St James' Square, Edinburgh, the whole top flat and attics of the premises 120c Princes Street, Edinburgh, adjoining the Central Hotel, Edinburgh, and that for the space of seven years from Whitsunday 1907, at a yearly rental of £60. The said James Paton was aware that pursuer acquired said premises for the purpose of conducting therein a high-class photographic business, and in exercise of the right conferred on him by said missive, the pursuer converted the premises, at his own expense, into a studio at a cost of not less than £200." (Cond. 3) "The pursuer has discovered that on or about 8th January 1910 the defender presented a petition to the Dean of Guild Court for warrant to make

extensive structural alterations on the tenements entering by 118 and 120c Princes Street, Edinburgh. In said petition the defender stated that he was then proprietor of the first, second, and attic floors of the said tenement conform to missives of purchase from the trustees of the deceased James Paton, and that he was also proprietor of the shop No. 120A Princes Street. On or about 24th February 1910 warrant was granted by said Dean of Guild Court. The said petition was served on the said James Paton's trustees, but no intimation thereof was given to the pursuer. In the said missives, and the disposition following thereon, the lease in favour of the pursuer was excepted from the warrandice. In terms of the said missives and disposition the defender became the landlord of the pursuer, and accepted and became bound to fulfil all the obligations of the lease in favour of the pursuer, so far as these were binding upon his predecessors in the ownership of the said property." (Cond. 4) "The said structural alterations included slapping out the whole front wall at first floor level of the flats in the tenements supporting the upper portion thereof let to the pursuer. The first and second flats were shored up with temporary wooden supports, and thereafter iron beams were introduced for permanent support. The front wall of the tenement on the first floor level was removed, and wooden oriel windows inserted above the shops. The first flat floor was lowered, and the second flat floor heightened. The first and second flats of said tenement were entirely gutted, the interior partition walls removed and replaced by steel beams. Similar alterations were carried out on the tenement No. 118 Princes Street, immediately to the east of the premises occupied by the pursuer." (Cond. 5) "It was well known to the defender that the pursuer used and occupied his premises as a photographic studio, and that the carrying out of said structural alterations would be deleterious and ruinous to the pursuer's business. Nevertheless, the defender improperly and illegally, and with gross recklessness and with want of due care, or any care or attention to the rights or interests of the pursuer, proceeded with, and, in defiance of the pursuer's remonstrances, carried out, the said structural alterations. The said works, carried out as they were, were also, in the knowledge of the defender, a gross violation of the pursuer's rights as lessee of the subjects occupied by him. The said work was commenced on or about 24th February 1910, and continued daily until 31st May 1910." (Cond. 6) "In consequence of said operations, and the noise and shaking of his premises, pursuer was unable to properly carry on his business as photographer. Numerous customers of pursuer who had called to be photographed refused to sit when they heard the excessive noises and felt the vibration caused by the operations. While numerous others who did sit for their photographs declined to return to be re-photographed in consequence of the negatives being spoiled. Other customers had to sit two or three times, but even then, in some cases, the negatives were spoiled. The pursuer repeatedly made complaints personally and through his agents to the defender during said building alterations, but no attention was paid thereto. The defender's said operations have caused the pursuer's premises to sink and be thrown off the level, and in consequence the doors cannot be opened or shut properly. Further, said operations caused cracks and rents in the walls of pursuer's studio, while the slates and glass in the roof were cracked and broken, with the result that the rain leaked through and

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destroyed pursuer's furniture. The decorations, carpets, and furnishings in pursuer's premises were injured with lime and dust and soot. The entrance and staircase to pursuer's premises were blocked up with scaffolding and building material, and his show-cases in the entrance were covered with lime and dust. The result of the defender's operations was that during the period of reconstruction it was impossible to carry on business in the premises. The appearance of the entrance on street level suggested that the whole premises were closed for alterations, and that no invitation to the public was offered to enter the building in its then derelict condition. . . ."

The material averments as to damage were admitted, and the defender offered to restore, at his own cost, all structural damage done to the pursuer's premises.

The pursuer pleaded ;—(1) The pursuer being entitled to the peaceable possession of the subjects leased by him, and the defender having disturbed him therein as condescended on, decree should be pronounced as craved, with expenses. (2) The operations of the defender having rendered the subjects unfit for the purpose for which they were let to the pursuer, decree should be pronounced in terms of the conclusions of the summons. (3) The operations complained of having been productive of loss, injury, and damage to the pursuer, *et separatim* the said operations having been conducted improperly and illegally, and in gross and wilful recklessness of the rights and interests of the pursuer, and so as to produce great and unnecessary loss to the pursuer, the pursuer is entitled to decree as concluded for. (4) No relevant defence.

The defender pleaded, *inter alia* ;—(1) The averments of the pursuer being irrelevant and insufficient to support the conclusions of the summons, the defender is entitled to absolvitor. (2) *Separatim*, the claim of the pursuer for damages for alleged injury to the structure of his premises falls to be disallowed, in respect that the defender has always been and is willing to repair the same upon the pursuer giving him the necessary access and facilities therefor; and the further claim of the pursuer for alleged loss of custom is, in any event, too remote, and the averments in reference to these claims ought to be excluded from probation.

A proof was allowed and led. The result of the evidence led is set forth in the opinion of the Lord Ordinary, *infra*.

On 25th April 1911 the Lord Ordinary (Guthrie) pronounced an interlocutor in the following terms:—"Finds in fact—(First) That the defender's operations condescended on caused injury (a) to the structure (including the painting and papering) of the pursuer's premises, the restoration of which (the pursuer's business being simultaneously carried on in the premises) would involve an expenditure of £85, during a period of a month to six weeks, in the course of which the pursuer's business would be prejudicially affected to the extent of £30; (b) to the furniture and materials in the pursuer's premises to the value of £40; and (c) to the pursuer's business, apart from the period of six weeks above mentioned, to the extent of £100; and (second) that the said operations were conducted with reasonable regard to the pursuer's interests: Finds in law—(First) That the defender is bound (a) to restore the pursuer's premises to the condition in which they were prior to the commencement of the defender's operations, and that at the sight, and to the satisfaction,

of a skilled person appointed by the Court, or, failing restoration as Mar. 20, 1912. aforesaid, to pay to the pursuer the sum of £85, and (b) to pay to the pursuer the sum of £30 above stated; and (second) that in the circumstances above stated, the defender is not liable in damages for the injury to furniture, materials, and business (apart from the sum of £30 above stated) claimed by the pursuer: With these findings, appoints the cause to be put to the Roll for further procedure." *

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* "OPINION.—The pursuer, a tenant of the defender's, carrying on business as a photographer in the top flat of 120c Princes Street, Edinburgh, (one of the original houses in that street, at least one hundred years old), claims damages from the defender for loss alleged to have been sustained in consequence of certain operations by the defender, or authorised by him, on one of the lower floors of the tenement, and on the tenement to the east. His claim is to be found in the original record and in the minute, No. 120 of process.

"The pursuer took his premises from the defender's predecessor for the purposes of a photographic business, with entry at Whitsunday 1907, for seven years, at the rent of £60. By arrangement with the landlord, the premises were converted by the pursuer, at considerable expense, into photographic rooms. The defender's whole operations were executed under warrant of the Dean of Guild. The defender's petition was not served on the pursuer.

"The pursuer's claim is divisible into three heads—(first) repair of structural damage, including under that head injury to painting and papering; (second) injury to furniture and materials; and (third) loss of business.

"The first head raises no question between the parties except, possibly, one of expenses. The defender offers to repair all structural damage, as above defined, at the sight of a man of skill appointed by the Court. In my opinion, his common law obligation, as landlord, to maintain the pursuer's premises in a tenantable condition during the course of the lease involves this liability; and the extent of his obligation will not be affected by the badly designed or structurally defective condition of the premises at the time when the defender's operations began. Whatever questions might arise as to his liability if the damage resulted from operations of another subjacent or adjoining proprietor, there can be none when the damage results from his own voluntary act. This view makes it unnecessary to consider in detail under this head the evidence (first) as to whether the defender's operations, specially in connection with the pinning or keying up of the steel beams or girders, were conducted with due regard to the pursuer's interests, (second) as to the extent to which the present dilapidated condition of the pursuer's premises is due to the defender's operations, and how much may be attributed to previous subjacent operations, and (third) as to the amount required to put these premises into a proper condition. In case, however, a different view may be taken on appeal, I value the operations necessary to restore the pursuer's premises to a tenantable and habitable condition (the measure of which may fairly be taken, in this case, as the state in which they were before the defender's works below and alongside began), as follows:—

1. Mason, joiner, and plasterer,	£30
2. Painter and paperhanger,	55
	<hr/>
	£85
	<hr/>

"The other heads involve serious questions both of fact and law. So far as loss of business will result from the total or partial stoppage of the pursuer's business during the period of structural restoration, I think it follows that, while the defender would not be liable under this head if the

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On 31st May 1911, a minute of tender having been lodged by the defender, the Lord Ordinary pronounced an interlocutor in the following terms:—"Appoints the defender to restore the pursuer's premises to the condition in which they were prior to the commencement of the defender's operations, and that at the sight, and to the satisfaction, of Mr R. S. Lorimer, architect, Edinburgh; and decerns against the defender for payment to the pursuer of the sum of £30 in full of the conclusion for damages."

On 7th June 1911 the Lord Ordinary, on the motion of the pursuer, granted leave to reclaim.

The pursuer reclaimed, and the case was heard before the First Division on 10th and 11th January 1912.

Argued for the reclaimer;—The obligations of a landlord towards his tenant were higher than those subsisting between neighbouring proprietors, because if a landlord interfered, by operations carried on

loss of business had resulted from the operations of another proprietor, he must be liable, in the circumstances of this case, for this loss of business, as a necessary result of his own voluntary act. I assess this amount at £30, including under this head all incidents, such as the cost of shifting furniture, and damage to furniture and materials, in the course of the operations.

"Putting aside structural damage and loss of business resulting directly therefrom, has the pursuer any claim? Or, to put it in another way, suppose there had been no structural damage, would the pursuer have had any claim?"

"The defender admits that, in so far as his operations were not conducted with a reasonable regard to the interests of the pursuer, he is liable, but not otherwise. The pursuer maintains—(first) that the defender is liable for all injury to his furniture and material, and for all loss of business resulting from the defender's operations, even if conducted with the utmost regard reasonably possible for the pursuer's interests, and (second) that, in any case, the defender is liable for all such damage and loss, because his operations were not conducted with reasonable regard for the pursuer's interests. It is obvious that the latter alternative is too broadly stated; the defender's operations, however skilfully conducted, and under whatever provisions in the pursuer's interests, were bound to cause injury and loss to the pursuer; under the latter alternative, therefore, he can only recover damages to the extent to which his injury and loss were attributable to the defender's negligence.

"I negative the pursuer's first contention as applicable to this case. In the event of a landlord letting premises to tenants who would necessarily make the adjoining premises of one of his existing tenants incapable of use for the special purpose for which they were let, the tenant last mentioned would be entitled either to an interdict or to cancel his lease and claim damages. The case of a building next to a house, already let as a nursing home, being let as a manufactory (both nursing home and manufactory having the same landlord) would be an illustration. If the impossibility of use were only temporary, the same result would follow, unless the landlord was willing to find other premises temporarily for the nursing home, and to bear all incidental expenses of removal and return, or to pay for the loss resulting from the temporary closing of the nursing home.

"In my opinion, the present case does not fall under either of the cases above suggested. The following averment in condescendence 6 is not proved:—"The result of the defender's operations was that, during the period of reconstruction, it was impossible to carry on business in the premises," nor is the averment at the end of condescendence 7 proved:—"During the months of March, April, and May 1910, when the foresaid building operations were being carried on, the pursuer's premises became

in adjoining premises, with the use of premises which he had let for Mar. 20, 1912. a known purpose, his tenant was entitled to recover damages in respect of a breach of his contract of lease.¹ A landlord carrying on such operations was bound to take his tenant's business into consideration, and was liable in damages not only for operations carried on with negligence,² but for any that materially lessened the productive capacity of his tenant's business.³ A landlord, knowing that subjects occupied by his tenant were let for a particular purpose, was bound to keep them in the same condition as when let, and to use adjoining property in a manner consistent with that purpose and so as not to derogate from his grant.⁴ In the law of Scotland these restrictions upon a lessor, who was the proprietor of subjects adjoining those which he had let, were implied.⁵ They were not less enforceable than a covenant for quiet enjoyment under the English law,⁶ which

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useless to him for carrying on his business.' The business recorded in the pursuer's books, while the operations were going on, by itself and by comparison with previous years, disproves this contention. The defender's whole operations did not last more than ten weeks, and during the largest part of that time they were not such as to cause any injury to the pursuer. It is not proved that at any time during the operations (which did not directly affect the storey immediately below the pursuer) the pursuer could reasonably have demanded, at the defender's expense, temporary premises elsewhere. The pursuer could not have interdicted the defender's operations *ab ante*; had he been made a party to the Dean of Guild process, he could not have obtained any alteration in the defender's plans; and, had he applied for interdict during the course of the defender's operations, it would have been refused.

"Therefore, apart from structural damage caused by the landlord involving the landlord's obligation to maintain, the pursuer can only prevail, if, and to the extent to which, he has succeeded in proving loss arising from the defender's failure to work with reasonable regard to his interests. Under this head, the defender is not in breach of any contract, express or implied; and the pursuer's claim is in no better position than if the question has arisen between the pursuer and a neighbouring proprietor—*Laurent v. Lord Advocate*, (1869) 7 Macph. 607; *Cameron v. Fraser*, (1881) 9 R. 26. Of such failure, neglect to apply water so as to keep down the dust, is a good illustration. There is no evidence of such failure, and there is sufficient evidence that the precaution was carefully attended to.

"As already indicated, I have no doubt that the defender's operations resulted in injury to the pursuer's furniture and materials, and in loss of business. That injury and loss have been greatly exaggerated by the pursuer; but the noise, vibration, and dust, and the interference with access,

¹ *Laurent v. Lord Advocate*, (1869) 7 Macph. 607, Lord Deas, at p. 612; *Craig v. Millar*, (1888) 15 R. 1005, Lord Lee, at p. 1020.

² *Laurent v. Lord Advocate*, 7 Macph. 607; *Cameron v. Fraser*, (1881) 9 R. 26.

³ *Macdonald v. Johnstone*, (1883) 10 R. 959, Lord M'Laren, at p. 965; *Hamilton v. Turner and Others*, (1867) 5 Macph. 1086, Lord President Inglis, at p. 1095.

⁴ *Macdonald v. Johnstone*, 10 R. 959, Lord President Inglis, at p. 968, 969; *Blanc v. Greig*, (1856) 18 D. 1315.

⁵ *Ersk. ii.* 6, 43.

⁶ *Shaw v. Stenton*, (1858) 2 H. & N. 858, 27 L. J. Ex. 253; *Aldin v. Latimer Clark, Muirhead, & Co.*, [1894] 2 Ch. 437; *Sanderson v. The Mayor, &c., of Berwick*, [1884] 13 Q. B. D. 547; *Robinson v. Kilvert*, [1889] 41 Ch. D. 88; *Tebb v. Cave*, [1900] 1 Ch. 642.

Mar. 20, 1912. might be implied.¹ The defender should be found liable in damages for injury, during the building operations, to the pursuer's materials and business, as well as for restoration of the premises, notwithstanding the fact that reasonable steps had been taken by him to keep down the damage.

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Argued for the respondent;—In a question with his tenant the defender was in the same position as any neighbouring proprietor with reference to building operations upon urban subjects carried out without negligence²; otherwise the alteration of urban subjects, even with due care, would be impossible. The pursuer had entered upon his lease in knowledge of risks incidental thereto, such as the risk of alterations upon the subjects of adjoining proprietors, and the defender here was not under any peculiar obligation as an adjoining proprietor by reason of his being also the landlord. All the cases relied on by the pursuer were decided upon grounds that distinguished them from the present. Temporary inconvenience suffered by a tenant by reason

inseparable from such operations, however carefully conducted, must have substantially prejudiced the pursuer's moveable property, and his business, so far as it consisted of photographing sitters (especially women and children) on the premises, as distinguished from copying work, and from developing the photographs taken at his branch at Aberdour; and it is proved, both by the direct evidence of sitters and books, and by reasonable if not necessary inference, that it did so in point of fact.

“Such evidence is irrelevant, except in so far as the injury and loss arose from operations by the defender which were conducted without due regard to the pursuer's interests. The operations themselves, in their object and in their method, were of an ordinary nature, and they were planned and executed by competent and experienced architects and contractors; it is, therefore, for the pursuer to aver and prove what things were done or omitted to his prejudice, to which he was entitled to object, or which he was entitled to have done. In case, however, a different view is taken of this point on appeal, I assess the total injury and loss, sustained by the pursuer in consequence of the defender's operations, as follows:—

1. Injury to furniture,	£30
2. Injury to materials,	10
3. Loss of business,	100
		<hr/>
		£140
		<hr/>

“It is proved that certain important provisions were devised and observed for the pursuer's benefit (some of which are contained in the specification, No. 79 of process, and some are not), specially (1) that all materials were carried in, and up, from the back; that sheets of lead were used in connection with the placing of the steel girders, to prevent noise and vibration; (3) that the beams were inserted in short lengths; (4) that water was regularly used to keep down dust; and (5) that as much work was done after the pursuer's working hours as possible without raising questions with the tenant of the Central Hotel on the west. It is remarkable that no complaints were made by any of the other tenants in the tenement, of which the pursuer occupies the top storey and attics, or by any of

¹ Woodfall, Landlord and Tenant, 17th ed. 759; Budd-Scott v. Daniel, [1902] 2 K. B. 351; Browne v. Flower, [1911] 1 Ch. 219, Parker, J., at p. 226.

² Laurent v. Lord Advocate, 7 Macph. 607, Lord President Inglis, at p. 611; Rankine on Leases, 2nd ed., 209; Bevan, Negligence in Law, 3rd ed., i. 413.

of operations upon his landlord's adjoining premises did not constitute any derogation from a grant of urban subjects,¹ and cases of temporary inconvenience might be contrasted with cases of permanent injury.² The pursuer's lease imposed no obligation upon the defender to refrain from operations upon adjoining premises.³

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At advising on 19th March 1912,—

LORD PRESIDENT.—The pursuer in this case took certain premises which consisted of the top flat of No. 120c Princes Street, Edinburgh, for the purpose of a photographic studio. That purpose was undoubtedly known to his landlord at the time, because there were arrangements made by which the pursuer, at his own expense, was to make certain alterations in the premises with the view of making them suitable for the business.

The defender thereafter purchased the whole tenement of which the top flat 120c is a part, and thereby became the pursuer's landlord, and of course became liable under all the obligations of his author towards the pursuer.

the tenants of the adjoining tenement. Some of these tenants carried on businesses liable to be injuriously affected by dust.

"As to the things done, to which the pursuer claims he was entitled to object, he specifies—

"(1) The short time for completion of the work, namely, ten weeks. But this, while it may have contributed to the alleged effect on the structure, does not bear on the noise, vibration, and dust, and the interference with access, with which we are alone concerned in this part of the case. Indeed, had the defender's operations been spread over a longer period, the damage to the pursuer's business would have been so much greater.

"(2) Carrying on business on the ground floor of the tenement while the operations above were going on. The same remark applies here; the pursuer's only ground of objection under this head arises from the occupation of the ground flat, which he says made it impossible to put in what are called shoring, or raking struts, and thus prevented the use of appliances which would have obviated the alleged structural injury to the pursuer's premises.

"(3) Shutting off water on two or three occasions, for a short time on each occasion. It is not proved that the defender was responsible for this, and it is not explained why the pursuer did not utilise the water in his cistern during these short intervals when the main water was shut off.

"(4) Turning off the gas. The defender is not proved to have been responsible for this. In any case, the damage, if any, was trifling.

"(5) Keying up beams during the day instead of after the pursuer's working hours. But the whole operations connected with the insertion of these steel girders required to be carried on continuously, and it is proved that keying-up is an important operation, which is most efficiently done in daylight.

"(6) Obstructing the stair of access. It was proved that the pursuer's stair was made dusty and unsightly through the defender's operations, but

¹ Manchester, Sheffield, and Lincolnshire Railway v. Anderson, [1898] 2 Ch. 394; Clark v. Lloyds Bank, 1910, W. N. 187; Harrison v. Southwark and Vauxhall Water Co., [1891] 2 Ch. 409; Foa, Landlord and Tenant, 4th ed., 302, 304.

² Grosvenor Hotel Co. v. Hamilton, [1894] 2 Q. B. 836; Aldin v. Latimer Clark, Muirhead, & Co., [1894] 2 Ch. 437.

³ Davis v. Town Properties Investment Corporation, [1903] 1 Ch. 797; Browne v. Flower, [1911] 1 Ch. 219, Parker, J., at p. 227.

Mar. 20, 1912. The defender, in pursuance of his ordinary rights as proprietor, proposed to alter the other flats of the tenement in order to make them more commodious and suitable for business premises; and he proceeded to do so.

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Ld. President. The result of his doing so was to necessitate building operations on a large scale whereby great alterations were made in the structure, new doors and windows were struck out and beams were put in, and there were the usual concomitants of dust, noise, and vibration which accompany building operations. The result of these operations generally was to make the pursuer's premises, which remained unaltered, decidedly uncomfortable, if I may use a neutral word, during the period of building. There were also some actual structural lesions caused to the pursuer's premises, and this action was brought to recover damages for the structural damage and for the general discomfort and annoyance to which the pursuer had been put. A proof was allowed, and the Lord Ordinary has brought out his view of what is proved in the case by certain findings. He finds by his interlocutor of the 25th April 1911:—“(First) That the defender's operations condescended on caused injury (a) to the structure (including the painting and papering) of the pursuer's premises, the restoration of which (the pursuer's business being simultaneously carried on in the premises) would involve an expenditure of £85, during a period of a month to six weeks, in the course of which the pursuer's business would be prejudicially affected to the extent of £30; (b) to the furniture and materials in the pursuer's premises to the value of £40; and (c) to the pursuer's business, apart from the period of six weeks above mentioned,” during which reconstruction would be going on, “to the extent of £100; and (second) that the said operations were conducted with reasonable regard to the pursuer's interests.” Upon these findings he found in law, first, that the defender is bound to restore the pursuer's pre-

unnecessary or unduly prolonged obstruction, to the pursuer's loss, was not proved.

“As to the things not done, which the pursuer says should have been done, if reasonable regard had been shown to his interests, he specifies—

“(1) Failure to consult him as to the hours when the defender's operations, causing noise, vibration, and dust, and interfering with access, could be carried on so as not to interfere with his business, or injure his furniture and materials. The pursuer expected that the defender would come to him when any such operations were to be carried on. Looking to the injury which the defender's operations necessarily inflicted on the pursuer, this was impossible; it was the pursuer's business to go to the defender to make any particular arrangement; and it is not proved that special requests made by him, when reasonable, were disregarded. Miss Macrae, pursuer's book-keeper, says, ‘I was sometimes sent down by the pursuer to ask the workmen to stop for a little, in order to allow photographs to be taken. They usually stopped for a sufficiently long time.’

“(2) Failure on the defender's part to take the pursuer along with him in fixing the building conditions in the contract with the contractors. I am not aware of any such obligation in law; but, had such consultation taken place, no reasonable alteration in the contract, in the pursuer's interests, has been suggested.

“The result is that I hold the pursuer's case for damages (apart from his right to restoration), stated in his first and second pleas, and in the first branch of his third plea, as irrelevant; and that I find he has failed to prove the case stated in the second branch of his third plea in law.”

mises to the condition in which they were prior to the defender's operations, Mar. 20, 1912. that is to say, to replace the structural damage ; and, second, to pay to the pursuer the sum of £30 above stated ; and, third, that the defender is not liable in the circumstances for the damages to furniture, materials, and business (apart from the sum of £30 above stated) claimed by the pursuer.

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His Lordship has pronounced that interlocutor ; and I think it is really based upon his view of what was decided in this Court in the case of *Laurent v. The Lord Advocate*.¹ Put in a single sentence, what the Lord Ordinary has done is this : he has said that the pursuer is entitled to restoration of structural damage. There was no necessity to set a figure upon that, because a minute was put in by the defender offering to restore the structural damage physically, and that was accepted by the pursuer. The work of restoration, I understand, has actually either been completed, or is in process of being done, at the sight of an architect appointed by the Court, so that that portion of the case does not need any further determination. But his Lordship found a sum of money due which represents the damage which the business suffered during those necessary operations of restoration of the structural damage. He has—by what I think is really a slip—not included the sum of £40, at which he assessed the damage done to the furniture and materials in the pursuer's premises apart from the structural damage ; at any rate, whether that is a slip or not, I will give my reasons afterwards for saying that that should be included. But he has not allowed any further sum, and, as I have said, I think his judgment is based upon the case of *Laurent v. The Lord Advocate*.¹

I think it is first advisable to say what *Laurent v. The Lord Advocate*¹ exactly decided. It was an action which was brought by the keeper of a public-house in Edinburgh against his landlord for damage (I am reading from the rubric) “ from loss of custom in consequence of the amenity of the pursuer's premises having been injured by the execution of building repairs by the landlord upon adjoining premises belonging to him.” The case was precisely the same as the present to this extent, that the landlord who was sued had not granted the lease, but had acquired the premises subsequently. But the issue—for it was tried by jury—put before the jury in that case was whether between certain dates “ the said Board of Inland Revenue wrongfully executed certain alterations or repairs upon part of the said tenement.” The matter came up upon a bill of exceptions. Now, the Lord President, who delivered the first judgment, after detailing the issue which was put before the jury, said : “ This issue raised no question as between landlord and tenant for breach of the contract of lease. It raised no question as to the liability of the landlord to keep in repair the premises let by the lease according to the obligation which the common law implies in every contract of lease. Any such claim would have been made the subject of an issue expressed in a different form. This is an issue to try a claim of damages alleged to have arisen from a legal wrong or delinquency on the part of the defenders.” And then he goes on to say this : “ It is clear from the pursuer's case, as made at the trial, that it was the proper issue to try the question raised by the record. The defenders' operations

¹ 7 Macph. 607.

Mar. 20, 1912. had the effect of breaking the plaster of the walls, and the glass of the windows in the pursuer's premises, and inflicting other damage of the same description, and these the defenders have admitted the liability to repair, and have repaired, for the simple reason that, being in the position of landlord of the pursuer, they were bound to repair such damage, even if it had been the result of mere accident." And then he goes on to point out that "the present action is raised not to recover damage of that sort, but damage arising from injury done to the pursuer's business as a tavern-keeper during the progress of the defenders' operations." He then goes on to discuss that matter, and he comes to the conclusion that, where an action is not based upon any contract at all, but merely upon delinquency, you cannot say that it is delinquency on the part of a person to carry on ordinary building operations in a town if these operations are conducted in a perfectly proper and usual manner, even although the result of them must be a certain amount of inconvenience to the neighbours.

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Now, Lord Deas did not concur in that judgment, because he considered that the issue as framed did not exclude the idea of there being a liability in respect of the lease, and he put the question thus: "Does the landlord incur no liability to the tenant for loss and injury to his business, unless the tenant can prove that the landlord's operations were recklessly or negligently executed?" He says: "I cannot answer that question in the affirmative. The landlord stipulates for and gets a high rent for the shop, on the footing that it is suitable for carrying on a profitable business, and it is neither law nor justice, in my opinion, that he should be entitled, for his own advantage, to render the shop either temporarily or permanently unfit for the purpose for which it was let, and at the same time to exact his full rent. It is unnecessary for me to go into the question of redress in analogous circumstances between neighbours." Accordingly, reading the issue differently from the Lord President, Lord Deas really refused to consider the question as one between neighbours, but considered it entirely as one between landlord and tenant; what damages were due he could not say, because he was in the minority of the Court.

Lord Ardmillan, although indicating upon the general question of law that he agreed with Lord Deas, upon the reading of this particular issue agreed with the Lord President, and, accordingly, considered that the questions mooted by Lord Deas were not open before the Court—as undoubtedly they were not, because in a bill of exceptions the Court could, of course, only deal with the record as it stood with the issue. Accordingly, agreeing with the Lord Ordinary, Lord Ardmillan did not find it necessary to go into the question which Lord Deas discussed.

Lord Kinloch, agreeing with the Lord President in the result that his Lordship came to, undoubtedly went further, because he says at the end of his opinion: "I have only to add that I do not think the case is varied by the fact that the parties stood in the relation of landlord and tenant. The question is not one which, in any sound sense, arises out of the obligations of the lease, direct or implied. When a proprietor in burgh lets the lower floor of his house, and retains the floor above to himself, he therein retains all the rights competent to a proprietor to make alterations on the retained floor. He can only, as I think, be made liable in damage to his tenant, in

respect of such alterations, on the grounds applicable to every other pro- Mar. 20, 1912.
prietor."

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Now, when one comes to look narrowly at the opinions in *Laurent v. Ross*.
The Lord Advocate,¹ I do not think the case can really be held to have Ld. President.
decided the question for which undoubtedly it has often been quoted,
namely, that there is no difference between the position of a landlord
towards his tenant and the mutual relation of neighbours. I think that the
majority of the Court in that case went upon the form of the issue and the
form of the issue alone, and that the form of the issue as they construed it
excluded that question.

Accordingly, I am bound to say that I think the question is not, as the
Lord Ordinary thinks, concluded by *Laurent's* case,¹ but the question is an
open one. *Laurent's* case¹ being out of the way, authority on the matter
is almost non-existent in Scotland, because the case of *Cameron v. Fraser*,²
which was quoted, does not really add anything further. All that that case
did was to recognise that if a person conducted his operations in an unjusti-
fiable way he would be liable. That is a proposition which is equally true
whichever way you solve the question as between landlord and tenant.
But there undoubtedly exists, and there was quoted to us in an interesting
debate, a great deal of English authority. Now, while I am very willing
to go to the English authorities to see what guidance we can have, so far
as it rests upon principle, I am bound at once to sound a warning note
against a too strict adherence to English authority. I mean strict adherence
in the sense of arguing that, because on certain facts a certain result was
reached in England, the same result would necessarily be reached here;
for there are two differences between English and Scots law in this
matter, one of which to a certain extent, and the other to a greater extent,
go very deeply into these authorities. The first difference, about which I
shall say more presently, is that a good many of the English cases are
decided upon what is the true effect of an expressed covenant for quiet
enjoyment. Now the covenant for quiet enjoyment is a very ordinary
stipulation in an English lease, and is held as implied in many a lease even
when it is not expressed. It is not a covenant that is known to us in
Scotland. There is, of course, something not very far away from it, for
the obligation of warrandice is in some senses analogous; but there is no
covenant for quiet enjoyment upon which you have a set of decisions, as
in England. The other difference—and it goes a great deal deeper—is the
radical difference between Scots and English law upon the question of what
we call negative servitudes, and what they call easements without the
distinction of positive and negative. There is no question that in the
English law you can have what we call a negative servitude created by
implication in the grant. That is absolutely contrary to the Scots law,
and is not permissible. Our view of the freedom of property from burdens
has been strongly developed, not only upon the question of servitudes, but
upon the question of restrictions, and your Lordships know there is a whole
series of cases upon that. On the other hand, there is the doctrine of
ancient lights in the English law, which is firmly established, and which

¹ 7 Macph. 607.

² 9 R. 26.

Mar. 20, 1912. is absolutely repugnant to the law of Scotland. A large number of the cases cited will be found to depend to a great extent upon that principle.

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There is the case of *Tebb v. Cave*.¹ Now *Tebb v. Cave*¹ is a case in which I personally do not think we could have arrived at the same conclusion upon the facts according to the law of Scotland, for the reasons that I have already given. I think that the doctrine of negative servitude is involved in the decision. But none the less it is a very good case to cite for the discussion of the general principles which it contains, and, in particular, I should like to cite it, at the very first, for a remark of Buckley, J., at p. 646, where he says this: "The plaintiff's case has been put in two ways. It is said, first, that under the covenant for quiet enjoyment he is entitled to relief, because the acts which the defendant has done are an interference with the quiet enjoyment which he covenanted to give to his lessee; and, secondly, it is said that, apart from that, or in addition to it, the act which has been done has been done by the lessor in derogation of his grant, and that on that ground the plaintiff is entitled to relief. The cases which have been referred to on those two heads to some extent overlap each other; but I do not know that it is desirable or useful to keep them separate." I cite that for this reason that the principle of no derogation from the grant is quite good Scots law, and indeed it is interesting to note that whenever the English Judges begin to discuss this principle they start with a Scottish case,—a case in the House of Lords, but none the less a Scottish case—the well-known case of *The Caledonian Railway Company v. Sprot*,² and the principle of implied grant in England has also been applied in a long series of cases known as cases of servitudes of necessity, such as access, drainage, and so on.

Buckley, J., quotes with approval the judgment of Stirling, J., in the case of *Aldin v. Latimer Clark, Muirhead, & Company*,³ in which he puts the result of the whole of the English cases thus: "The result of these judgments appears to me to be that where a landlord demises part of his property for carrying on a particular business, he is bound to abstain from doing anything on the remaining portion which would render the demised premises unfit for carrying on such business in the way in which it is ordinarily carried on, but that this obligation does not extend to special branches of the business which call for extraordinary protection." Now, that is putting the proposition in a very general, and I think a very good, form: but here again, for the reasons that I have already stated, the application of that proposition would not be precisely the same in Scotland as in England, for wherever Judges in England are proceeding upon what may be called the "quiet enjoyment" part of the general principle, you there do not have any distinction, I think, between acts which the landlord does upon the property retained which have a physical effect upon the property demised, and acts upon the property retained which have no such physical effect. I think it is plain that where you are under the only principle which we recognise in our law, the principle of derogation from the grant, the thing the landlord does must have some sort of necessary physical effect upon the

¹ [1900] 1 Ch. 642.

² (1856) 19 D. (H. L.) 3, 2 Macq. 449.

³ [1894] 2 Ch. 437, at p. 444.

thing which he gave. The idea of derogating from a grant is that the thing which you gave will be made in some way less than the thing as you gave it; and I do not know that I can get a better illustration of what I mean than by saying—I do not do it as a matter of criticism, but it brings it out extraordinarily clearly—that the best example to the contrary is given by the illustration which the Lord Ordinary puts, and which I think is perfectly false. On page 4 of his note he puts the general proposition in very much the same words as Stirling, J., has put it; and then he goes on—“The case of a building next to a house, already let as a nursing home, being let as a manufactory (both nursing home and manufactory having the same landlord), would be an illustration. If the impossibility of use were only temporary, the same result would follow, unless the landlord was willing to find other premises temporarily for the nursing home, and to bear all incidental expenses.” That is to say, as he puts it: “In the event of a landlord letting premises to tenants who would necessarily make the adjoining premises of one of his existing tenants incapable of use for the special purpose for which they were let, the tenant last mentioned would be entitled either to an interdict or to cancel his lease and claim damages.” With great deference to the Lord Ordinary, I think that is perfectly unsound. I think the landlord would be entitled, according to the law of Scotland,—although he knew from the beginning that the house which he had let was to be used for the purpose of a nursing home,—to let the house which he retained, even if it were next door to it, as a manufactory, or a public-house, or Salvation Army premises, or a theatre of varieties, or anything else that he chose, which was so conducted as not to be a nuisance at common law, although at the same time it might be exceedingly disagreeable to the next-door neighbour. If it was not for that, I really do not know what would be the use of much of our code of law upon building restrictions. What is the meaning of binding yourself to put restrictions upon building lots retained, that they are only to be used for dwelling-houses and not as manufactories or anything of that sort, if it is already a matter of implication that, if you let or dispose for the purpose of residential occupation, then you may not use the ground retained in any way that the resident would object to in the occupation of his next-door neighbour? I think it is a very good illustration of the falsity of the general principle in Scots law. On the other hand, if you let a house as a nursing home, I have no doubt you would not be entitled to rig up next door a steam engine that made such vibration that it shook the patients in their beds, for there, I think, there would be physical interference.

Now, putting the doctrine for Scotland entirely upon implied grant, I think there are very valuable observations by Parker, J., in the case of *Browne v. Flower*.¹ He first of all has dealt with the covenant of quiet enjoyment, and then he says this,—“The plaintiffs next relied on the maxim that no one can be allowed to derogate from his own grant. This maxim is generally quoted as explaining certain implications which may arise from the fact that, or the circumstances under which, an owner of land grants or demises part of it, retaining the remainder in his own hands.

¹ [1911] 1 Ch. 219, at pp. 224, 225, 226.

Mar. 20, 1912. The real difficulty is in each case to ascertain how far such implications extend. It is well settled that such a grant or demise will (unless there be something in the terms of the grant or demise or in the circumstances of the particular case rebutting the implication) impliedly confer on the grantee or lessee, as appurtenant to the land granted or demised to him, easements over the land retained corresponding to the continuous or apparent quasi-easements enjoyed at the time of the grant or demise by the property granted or demised over the property retained." And then, curiously enough, although it is good Scots law so far as applying to positive servitudes, he goes on to give an illustration which undoubtedly would not be the law in Scotland. He says,—“For example, if the owner of a house with windows overlooking vacant land of the same owner grant or demise the house, the grant or demise will in general by implication confer on the grantee or lessee easements of light and support over or by the vacant land.” With us it would certainly not be so. Then after dealing with easements in a passage I need not read, he goes on to say this, and I think it is exceedingly valuable as explaining some of the English cases,—“But the implications usually explained by the maxim that no one can derogate from his own grant do not stop short with easements. Under certain circumstances there will be implied on the part of the grantor or lessor obligations which restrict the user of the land retained by him further than can be explained by the implication of any easement known to the law. Thus, if the grant or demise be made for a particular purpose, the grantor or lessor comes under an obligation not to use the land retained by him in such a way as to render the land granted or demised unfit or materially less fit for the particular purpose for which the grant or demise was made.” And then he quotes the case of *Aldin v. Latimer Clark, Muirhead, & Company*,¹ and the case of the *Grosvenor Hotel Company v. Hamilton*,² where there was vibration which did not amount to a legal nuisance, and then he goes on to say,—“In none of these cases would any easement be created, but the obligation implied on the part of the lessor or grantor would be analogous to that which arises from a restrictive covenant. It is to be observed that in the several cases to which I have referred the lessor had done or proposed to do something which rendered or would render the demised premises unfit or materially less fit to be used for the particular purpose for which the demise was made. I can find no case which extends the implied obligations of a grantor or lessor beyond this.”

Now, applying the general doctrine of these cases, under the necessity of remembering the great difference between the law of Scotland as regards servitudes and the law of England as regards easements, and also seeing that in Scotland the doctrine must be put upon implied grant without any reference to the covenant of quiet enjoyment, the general result I come to is that the proposition of Lord Kinloch in *Laurent v. The Lord Advocate*³ is too wide. I do not think it is possible to say that there may not be a distinction, and is not a distinction, between the case of the landlord and the case of the neighbour, but inasmuch as the obligation of the landlord other than that of the neighbour, which is a mere obligation of neighbour-

¹ [1894] 2 Ch. 437.

² [1894] 2 Q. B. 836.

³ 7 Macph. 607.

hood, rests upon the principle of not derogating from his own grant, I think that the cases in which derogation from the grant can be successfully pleaded must be limited to these: first of all, structural damage, which everyone admits—structural damage in the proper and strict sense of the term—and, secondly, I would also include any physical tangible injury which is done to the demised premises. Now, I use the word “physical” to begin with, because I think that injuries of the class which do not affect the premises but which might affect the nerves of those who live in the premises do not count. In the peculiar case before your Lordships I think vibration, which makes the premises completely unfit, while the working is going on, for the purposes of photography, is an injury to the premises. I think, on the other hand, that the class of injury which was spoken to, that many sitters were nervous ladies who shook when they were sitting, and would not come to be photographed, is a class of injury that would not fall within any definition of physical injury to the premises. I use the word “tangible” because in one sense you may say that noise is a physical interference with the demised premises, because noise, when you come to inquire what it really means, is a setting in motion of certain vibrations in the air which extend to the demised premises; but that is not tangible in the sense in which I use the word. There may be a better word, but I think it shows sufficiently what I mean. And in the same way, I think the injury must be material; and I think that excludes anything that is merely temporary, because it is quite evident that you may have injuries which are injurious for the moment, but are so immaterial and temporary that they cannot count at all. One of the most familiar illustrations of that is a right of passage. Supposing I have a house with a door entering into the opening of a wide “close,” and that my tenant has a house beyond. I am bound, of course, to give him (his only door being in the same “close” and further in) a right of passage. If my cart is at the door of my house, I temporarily block his road, but nobody supposes he has a right of action against me for obstruction: I am only temporarily obstructing him, in the ordinary manner. So again I do not think an interference with this photographer’s passage for half an hour or an hour would give him an action. On the other hand, I do think he is entitled to recover for injuries caused by vibration and by the actual dust that was put upon his premises to such an extent as really to interfere with his operations.

At the beginning of my opinion I said that I thought the Lord Ordinary had made a slip in not including the £40. I think it really does not matter much whether that was a slip or what I should hold to be an error of judgment. According to the views which I have stated, it is quite evident that, if by your building operations you crack a man’s sideboard or his photographic plates, you have to pay for that just as much as if you crack his wall; and on that ground I should be prepared to allow the whole £40.

The result is that the Lord Ordinary’s judgment stands as far as the £30 goes. I add to that the £40; and then as regards the £100, I think the parties must be allowed an opportunity of being heard upon the question as to how much of the £100 the pursuer is entitled to ask for, in the light of the views that I have expressed. It is quite clear that to a great deal of it he is not entitled, and to some of it he is; and I do not think our attention

Mar. 20, 1912. was sufficiently directed to the matter in the debate. I understand the majority of the Court agree with what I have said about the defender's liability in damages, and we shall give parties an opportunity to-morrow morning immediately after Single Bills of being heard upon the amount. We shall not consider the quantum of damages to the furniture and materials, because that is fixed at £40, and we see no reason for disturbing that sum. The question upon which we desire to hear counsel is as to how much of the £100 is allowable, and how much is not.

Huber v.
Ross.

Ld. President.

LORD KINNAR.—I concur.

LORD JOHNSTON.—I take the circumstances of this case as found by the Lord Ordinary. The missives of lease for seven years between the pursuer and the late James Paton in April 1907 disclose on the face of them that the premises were leased to the pursuer for the purpose of a photographic studio, and authorised the lessee to make at his own expense alterations for suiting them to that purpose. And these alterations cost the pursuer a substantial sum—between £150 and £200. The subjects of lease were the upper flat and attics on the west side of the common stair of 120 Princes Street, Edinburgh, and these with the flats immediately below were one property in Mr Paton's hands. I am not sure whether the basement and street floors were his or not. But it is immaterial. Mr Paton's property was acquired on his death by the defender, Mr A. M. Ross, who proceeded to alter them for his own purposes, in relation to other adjoining property to the east belonging to him, by cutting out the entire front wall below the level of the floor let to the pursuer and replacing it by steel pillars and girders and a glass front. As may be supposed, this was not done without racking the structure of the pursuer's premises, and besides causing actual structural damage to them, creating noise, vibration, and dirt, and also obstruction of access by the common stair. Given that these serious operations had to be done, it is not proved that they were not undertaken with reasonable care and skill. But they lasted for ten weeks, and interfered with the pursuer's conduct of his business, to his loss. Moreover, it will take from four to six weeks' time to repair the damage, with corresponding additional interruption of the pursuer's business.

The question is, was the pursuer bound to put up with this interference, as an incident to the occupation of urban property, the possibility of which he was bound to contemplate when entering into his lease. The defender admits that under his obligation as landlord to maintain the property in repair, he was bound to restore it structurally, but *quoad ultra* he maintains the positive of the above proposition. That what this contention means may be realised, I take the Lord Ordinary's findings. Premising that the contract of lease under which the pursuer holds runs with the property, and that the defender, Mr Ross, lies under every obligation incumbent on the original lessor, Mr Paton, what the Lord Ordinary tells us is:—

(1) That the structural damage to the subjects, by operations which lasted for ten consecutive weeks, cannot be remedied under an expenditure of £85, of which about £30 is required for the repair of the structure, and over £50 for painters' work.

(2) That the work of repair will take from four to six weeks, during Mar. 20, 1912. which the pursuer's loss of business may be estimated at £30.

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(3) That in the course of the ten weeks of the defender's operations the pursuer's furniture was damaged by the dust and other incidents of the defender's operations to the extent of £30, and his stock of photographic materials to the extent of £10 ; and

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(4) That in the course of the same time he suffered loss in or through interference with his business to the extent of £100.

It is possible that the Lord Ordinary may have exaggerated the 4th item, or damage for loss of business, but we had no serious argument on this aspect of the question, and having regard to the view which I understand to be entertained by your Lordships, I do not think I should detain the Court by considering it, but should confine myself to the question of law raised. The Lord Ordinary has discriminated. He has found the defender liable either to repair the structural damage to the premises by his operations, or to pay the pursuer £85 to enable him to do the repairs himself, and also to pay him £30 to recoup him for interference with his business during the six weeks which he estimates that it would take to perform the repairs. On the other hand, he finds him not liable to the pursuer for the damage done to furniture and photographic materials during the execution of the defender's operations, although he estimates that damage at £40, or to recompense him for the loss occasioned by disturbance of his business, although he estimates that loss at £100.

As to the damage to furniture and photographic materials, I think that the Lord Ordinary has inadvertently fallen into error. The same considerations which led him to give the pursuer the first two items of claim require that he be also awarded the third. The real question relates to the fourth item, or damage for loss of business.

The Lord Ordinary founds his discrimination upon the view that, while the landlord's obligation to maintain the premises let renders him liable for structural damage, he was perfectly entitled, as proprietor, to perform the work which he undertook on his own adjoining property and, provided that it is not proved that he did not execute the work with reasonable skill and care, that he is not liable for any incidental loss suffered by the pursuer. I cannot but say that it is a somewhat startling result that a landlord, who lets premises to a tenant for a special purpose, can for ten consecutive weeks of the period of let occupy himself in doing work of alteration on his own adjoining property for his own benefit, and, as a necessary consequence (for *ex hypothesi* he works with care and skill), can do structural damage to his tenant's premises, interfere with the use for which he let these premises, and can thus disorganise and damage his tenant's business ; and yet, though liable to repair the structural damage, should go scot free for the loss occasioned by, and during the period of, such operations to the business for the conduct of which he has let the premises. Further, I confess to some difficulty in understanding why, if the pursuer is not entitled to damage for business disturbance during the execution of the defender's operations, he is held entitled to such damage during the time requisite for executing repairs. The two appear to me to be *in pari casu*. When it is admitted that the damage done, and done on

Mar. 20, 1912. the defender's contention in exercise of his right as proprietor of property adjacent to the subjects let, is to cost £85 to repair and to take six weeks to effect the repair, the contention takes such an extravagant form that one is inclined to think that, if there be authority for it, there must be grounds for doubting that authority. For the result is, as *ex hypothesi* the work was done with all skill in the execution and all care for the interest of the tenant, that the law of neighbourhood entitles the lessor to damage the premises let if it be necessary for the advantage of his other adjoining property, and will only require him, after his operations are completed, to execute repairs which, though they cannot replace the subjects in the condition in which they were when let, will supply the next best substitute, but will leave the tenant to bear the incidental loss, even where such incidental loss, though consequential, was not remote but immediate.

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The basis of the Lord Ordinary's discrimination is that the law of neighbourhood requires a neighbour, for the general benefit, to put up with the inconvenience to him which necessarily accompanies the execution of such work as that in question; and, further, that in regard to this matter it makes no difference whether the relation of the neighbouring parties is that of independent proprietors or that of landlord and tenant.

Two things are, I think, disputable: first, whether even in a case of neighbouring proprietors the term "inconvenience" covers the damage which was done in the present case, and whether a proprietor is entitled to do such structural damage to his neighbour's property without being liable, not merely for its repair, but for concomitant incidental effects, though with this question we are not directly concerned; and, second, whether independent neighbouring proprietors and landlord and tenant are really *in pari casu*. This I am satisfied they are not. I think that there is an implication in the contract relation between landlord and tenant which is disregarded in the law, if it be law, which the Lord Ordinary has considered himself bound to apply. This law he finds in the case of *Laurent v. Lord Advocate*.¹ I do not think, after what your Lordship has said, that I should be justified in examining the details of that case. As an authority it is affected by the fact that it was sent to a jury on an issue which did not bring out the pursuer's real case, and was in these circumstances decided on a bill of exceptions. The judgment of the late Lord President (Inglis) must be read in relation, not to the actual facts of the case, but to the case as brought into Court in the way in which it was brought into Court. And, even then, the position he adopts is not accepted by Lord Deas and Lord Ardmillan.

In Scotland we are not in use to express a covenant for quiet enjoyment in a lease. But I think that there is no real difference between the English and the Scottish law on the subject. Where premises are let on lease, in neither country can the lessor do that which derogates from his grant. He lets the subjects in their then condition, and he lets them to be used in that condition. What will amount to derogation from his grant depends on the use for which the premises are let. But if he does derogate from his grant, he is, I think, liable for the loss which he inflicts on his tenants.

¹ 7 Macph. 607.

Deprivation of the use of the premises, to full advantage, for the purposes Mar. 20, 1912. for which they are let is a loss to the tenant. If inflicted by the act of the landlord, and none the less if inflicted in prosecution of his own advantage for the improvement of his other property, it is not on nuisance, it is not on delinquency, it is on breach of an implied term of the contract, that the lessor is liable. The question may not have been directly raised and authoritatively decided in Scotland. But I think that the principle which I have endeavoured to state was clearly recognised in *Blanc v. Greig*,¹ where the operation complained of would have been admissible as between independent proprietors, but was held preventible as between a proprietor and his tenant in adjoining premises. It is also very amply illustrated in the series of English cases to which we have been referred, a substantial section of which are not affected by the specialties to which your Lordship has referred.

But I may be permitted to revert to the term "inconvenience," to which I have already referred. I think a good deal of the difficulty and misconception in this matter has arisen from the use of the term. Inconvenience may be personal merely, but it may also lead to patrimonial loss. The circumstances of life, and particularly urban life, may require that even a tenant must put up with some personal inconvenience at the hands of his landlord, but not, I think, when the inconvenience involves patrimonial loss. And I may here with advantage refer to the *Manchester, Sheffield, and Lincolnshire Railway Company's* case, [1898] 2 Ch. 394. There the inconvenience was not only personal, but very temporary, and it did not interfere with the estate, or the title, or the possession, to use the words of Lord Lindley, then M.R., at p. 401. It was on that ground only held not to be a breach of the covenants of the lease.

This case is different—the inconvenience was not temporary, but of substantial continuance. It was not personal merely, but resulted directly in patrimonial loss. And I cannot discriminate as your Lordships do, between its causes, on the ground that dust and vibration are the result of physical disturbance of the subject let, and noise mere nervous affection of the occupants, whether the tenant or his customers, and interference with access a mere imaginary or sentimental consideration. Dust may have repelled customers, and spoiled plates. Vibration may have interfered with the obtaining of negatives. But I can understand a photographer's customer being equally repelled by the noise created by masons and joiners, and still more by the condition of the only stair of access during the progress of the work. These are all connected with the execution of the work of alteration and directly connected with it, and independent of the use to which the adjoining premises are to be put after alteration. The bearing of such items of interference is, I think, dependent on circumstances. In the circumstances of this case, though I do not say in every case, they all, I am satisfied, contributed directly to the pursuer's loss of business; and, subject to any question of amount, I think that the Lord Ordinary would rightly have awarded his fourth item of damage also, as well as his first three. And against the amount we have had no real attack. I should

¹ 18 D. 1315.

Mar. 20, 1912. therefore be for altering the Lord Ordinary's judgment in terms of the alternative findings of which he has given us the benefit.

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LORD MACKENZIE.—The items of damage now in dispute are thus referred to in the opinion of the Lord Ordinary:—"I have no doubt that the defender's operations resulted in injury to the pursuer's furniture and materials, and in loss of business, . . . the noise, vibration, and dust, and the interference with access, inseparable from such operations, however carefully conducted, must have substantially prejudiced the pursuer's moveable property, and his business, so far as it consisted of photographing sitters (especially women and children) on the premises, as distinguished from copying work, and from developing the photographs taken at his branch at Aberdour; and it is proved, both by the direct evidence of sitters and books, and by reasonable if not necessary inference, that it did so in point of fact." The Lord Ordinary, being of opinion that the defender's operations were conducted with all due care, disallows these items, but assesses the injury done under these heads, for the purpose of raising the question which has now been argued, as follows:—Injury to furniture £30, to materials £10, and loss of business £100. I am of opinion that such injury as was due to vibration and dust, being of the nature of physical interference with the premises, is recoverable; and that, therefore, the injury to furniture £30 and materials £10 should be allowed, and, to a certain extent, injury from loss of business. I am unable to hold that noise or interference with access constitute, in the present case, any breach of the obligations incumbent upon the landlord. It is not possible without further argument to say how much of this loss of business is due to these causes and how much to vibration and dust, and it is necessary that parties should be heard on this.

In my view the injury resulting from vibration and dust, though no negligence is proved, should be regarded as of the same nature as injury caused to the structure itself. The principle applicable is that, where a lease is granted for a special purpose which is known to the lessor, there is an implied obligation upon him not to do anything voluntarily to prevent the subject let from being used for the purpose for which it was let. This is the principle contained in *Caledonian Railway v. Sprot*,¹ that a grantor cannot derogate from his grant. There is an implied warrandice to this effect in a lease in Scotland. It appears that in England the purpose is frequently effected by what is termed a covenant for quiet enjoyment. Damages under such circumstances may be claimed by the tenant for something that is not a nuisance, for which no action would lie against a third party, and in respect of operations which have been conducted without negligence.

It was contended that a contrary view is laid down in the case of *Laurent*,² but this argument overlooks the form of the issue which was before the jury there. The issue was whether the lessor had "wrongfully" executed certain alterations or repairs upon premises belonging to him adjoining the subjects let to the pursuer as a public-house. It was held

¹ 2 Macq. 449.

² 7 Macph. 607.

that to entitle the pursuer to recover damages for loss of custom it was necessary for him to prove the landlord's operations to have been either illegal in themselves or negligently executed. The Lord President, whose opinion is founded on by the defender here, states distinctly that the issue raised no question as between landlord and tenant for breach of the contract of lease. That is the question raised in the present reclaiming note. The Lord President then says that the issue there was to try a claim of damages alleged to have arisen from a legal wrong or delinquency on the part of the defender. Upon the argument in this case no serious question of delinquency was raised. It was practically conceded that all reasonable care had been taken, but, upon that assumption, it was argued that there had been a breach of an implied term in the lease. It was pointed out in *Laurent*¹ that the defenders had admitted liability for structural damage, and Lord Kinloch's view was that there was the same liability for the destruction of the *ipsa corpora* of moveables. I think that, if a landlord is liable for damage to the structure, it is difficult to find a sufficient reason why he should not be liable for injury to moveables in the structure, if this is due to physical interference in consequence of his operations. On the same principle, if the vibration consequent on his alterations was so great as to shake the structure of the premises let, and thus make them temporarily unfit for taking or developing photographs, I think the landlord is liable—so also as regards dust, in so far as this constituted a physical interference with the photographer's apparatus.

Further than this I feel unable to go. I do not think that a landlord can be held to warrant that all his tenant's customers will have nerves which are proof against the noise caused by hammering, or to guarantee that none of them will turn back from a partially obstructed access. If there is a loss of business arising from such causes, then I think that, provided the inconvenience is temporary and does not render the premises useless for the time being, it is just what any dweller within burgh must submit to when his neighbour, whether his landlord or no, is lawfully engaged upon operations *in suo* for the purpose of altering or repairing his property.

Reference was made to a number of English cases upon breach of the covenant for quiet enjoyment, of which the latest is *Browne v. Flower*,² decided by Parker, J., who said,—“It appears to me that to constitute a breach of such a covenant there must be some physical interference with the enjoyment of the demised premises.” I think that in Scotland when the operations are temporary, and do not render the tenant's premises useless for the time being for the purpose for which they were let, there is no breach of the implied warrandice in the lease unless there is physical interference.

I am accordingly of opinion that the pursuer should be allowed the additional sums of £30, £10, and whatever part of the £100 may be fixed after hearing counsel.

On 20th March counsel were heard upon the extent to which the

¹ 7 Macph. 607.

² [1911] 1 Ch. 219.

Mar. 20, 1912. Lord Ordinary's assessment of damage to the pursuer's business during the defender's operations should be allowed to stand.
 Huber v. Ross. The Lord President delivered the opinion of the Court as follows:—

LORD PRESIDENT.—We have considered the arguments upon the amount of damages, sitting as a jury as it were, and the opinion of the Court is that the pursuer should be found entitled to £75 out of the £100. The other sums will, of course, remain as we fixed them yesterday.

THE COURT pronounced an interlocutor in the following terms:—
 "Recall said interlocutors" [viz., those of 25th April 1911 and 31st May 1911]: "Of new appoint the defender to restore the pursuer's premises to the condition in which they were prior to the commencement of the defender's operations, and that at the sight and to the satisfaction of Mr R. S. Lorimer, architect, Edinburgh: Further, decern against the defender for payment to the pursuer of the following sums, viz., (a) the sum of £30 sterling in name of damages to the pursuer's business during the period of said restoration; (b) the sum of £40 in name of damages to the furniture and materials in the pursuer's premises; and (c) the sum of £75 in name of damages to the pursuer's business by the defender's operations complained of in the summons: Find the pursuer entitled to expenses, modified to two-thirds of the amount thereof as taxed, and remit," &c.

T. F. WEIR & ROBERTSON, S.S.C.—DAVIDSON & SYME, W.S.—Agents.

No. 127. JAMES HOWDEN & COMPANY, LIMITED, Pursuers (Reclaimers).—
 Clyde, K.C.—H. P. Macmillan.
 Mar. 20, 1912. POWELL DUFFRYN STEAM COAL COMPANY, LIMITED, Defenders
 (Respondents).—Morison, K.C.—G. C. Steuart.
 James Howden & Co., Limited, v. Powell Duffryn Steam Coal Co., Limited. *Contract—Construction—Arbitration—Construction of arbitration clause—Proviso as to notice of dispute.*

A contract for the supply of certain machinery to a company by the manufacturers contained a clause referring disputes and differences to arbitration, with a proviso that no dispute or difference should be deemed to have arisen or to be referred to arbitration "unless one party has given notice in writing to the other of the existence of such dispute or difference within seven days after it arises." By a letter to the manufacturers the company's engineer gave notice of rejection of part of the machinery supplied. After more than seven days' interval the manufacturers wrote that they could not accept the rejection. No formal notice was given by either party of the existence of a dispute.

Objection having been taken to the application of the arbitration clause, in respect that no notice of the existence of a dispute had been timeously given—

Held that the proviso with regard to notice had been duly complied with and that the arbitration clause was applicable, in respect that no dispute had arisen until the manufacturers wrote refusing to accept the rejection, and that their letter of refusal itself constituted notice of the existence of a dispute.

Arbitration—Foreign—Jurisdiction—Forum conveniens—Contract—Construction. Mar. 20, 1912.

A Scottish company entered into a contract with an English company to be executed in Wales, which contained an arbitration clause providing for the settlement of disputes by arbitration within the meaning of the English Arbitration Act. The Scottish company, having used arrestments *ad fundandam jurisdictionem*, brought an action in Scotland against the English company, in which the question was raised whether the matters in dispute were covered by the arbitration clause. The defenders pleaded *forum non conveniens*, in respect that the contract was an English one to be implemented furth of Scotland, and that the arbitration clause demanded construction according to the law of England.

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Circumstances in which the Court, following *Hamlyn & Company v. Talisker Distillery*, (1894) 21 R. (H. L.) 21, *repelled* this plea, found that the matters in dispute fell to be determined by arbitration in terms of the contract, and *sisted* process *in hoc statu* until the matters should be so determined.

Contract—Construction—Condition—Condition precedent—Certificate of engineer that price payable.

A contract for the supply of machinery contained provisions for payment of the price by certain instalments, to be paid after production of the certificate of the purchasers' engineer that such instalments were due and payable. A portion of the machinery having been rejected by the purchasers, an action was brought by the sellers for the unpaid balance of the purchase price without production of the engineer's certificate that the balance sued for was due and payable.

Held, on a construction of the contract, that the production of a certificate from the engineer had not been made a condition precedent to the right to recover payment, and, accordingly, that the action was competent.

ON 2nd July 1910 James Howden & Company, Limited, engineers, Glasgow, having used arrestments *ad fundandam jurisdictionem*, brought an action against the Powell Duffryn Steam Coal Company, Limited, London, for payment of a balance of the price of certain machinery supplied by the pursuers under a contract entered into with the defenders.

1st DIVISION.
Lord Hunter.

The following narrative of the circumstances which gave rise to the action is quoted from the opinion of the Lord Ordinary (Hunter):—

"The pursuers in this action are a firm of engineers carrying on business in Glasgow. The defenders are a company registered under the Companies Acts, and having their registered office in London. The conclusion of the action is for payment of the balance of the price alleged to be payable to the pursuers by the defenders under two contracts between the parties, under which the pursuers undertook to supply and erect certain electric plant at the defenders' electric power station at Aberaman, South Wales. The first contract was dated 6th July 1907, and the second contract, which is substantially a duplicate of the first, was dated 23rd February 1909. In each case the plant to be so supplied and erected by the pursuers consisted of a turbine, alternator, and exciter, surface condenser, and atmospheric valve—small extras, that need not be referred to, creating a slight difference in the amount payable under the two contracts.

"The plant under the first contract was delivered by the pursuers to the defenders by 26th December 1907. It was erected in January

Mar. 20, 1912. 1908, and an official test took place on 1st March 1908. Under the second contract the machinery was delivered in the course of 1909. The engineer under the contracts, as appears from the correspondence, No. 27 of process, rejected the turbine under the first contract upon 12th August 1909, and the turbine under the second contract upon 15th March 1910.* The pursuers say that the turbines so

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* The letters referred to were in the following terms:—

1. LETTER, Mr Sparks (Defenders' Engineer) to the Pursuers, dated 12th August 1909.

"The Powell Duffryn Steam Coal Company, Limited, and Yourselfes."

"As engineer to the Powell Duffryn Steam Coal Company, Ltd., under contract of 6th July 1907, I hereby give you notice that the 2000 K. W. Zoelly turbine, erected by you at the electric power station of the Powell Duffryn Steam Coal Company, Limited, Aberaman, South Wales, is defective, and does not comply with the agreement, dated the 6th day of July 1907, and made between yourselves of the one part and the Powell Duffryn Steam Coal Company, Ltd., of the other part, and in exercise of the power conferred upon me by clause 4A of the said agreement, I hereby reject the same."

2. LETTER, the Pursuers to Mr Sparks, dated 25th August 1909.

"The Powell Duffryn Steam Coal Co., Ltd., and Ourselves."

No. (1) Turbine.

"Your letter of 12th inst., under the above heading, was duly received, but owing to its extraordinary character and the illness of our senior, who has been confined to his house at the coast for fully five weeks, we have delayed writing to you in reply thereto until to-day.

"We have now been able to talk over the matter with him, and we can only say at present that we are more than surprised at the contents of this letter, and the implied conception of unlimited power over us, as contractors, which you and the Powell Duffryn Company appear to take for granted you have, regardless of the time which the Company has worked this turbine, and the exceedingly damaging manner and conditions in which it has been used by them and their servants. . . .

"We maintain that what you may consider defective in the present condition of the turbine, apart from ordinary wear and tear, is entirely owing to the damage caused by the Company and their servants, the foul feed water which is also corrosive in character, and the imperfect foundations, the latter having been proved on opening up recently, and on other occasions to which we have called your attention, to be of unsound and unsatisfactory nature.

"We cannot therefore accept your right or power to reject this turbine under the conditions of our contract"

3. LETTER, Mr Sparks to the Pursuers, dated 15th March 1910.

"As engineer to the Powell Duffryn Steam Coal Company, Ltd., under the contract of the 23rd February 1909, I hereby give you notice that the 2000 K. W. 'Zoelly' turbine and 'Balck's' surface condenser and condensing plant, erected by you at the electric power station of the Powell Duffryn Steam Coal Company, Ltd., Aberaman, South Wales, failed to pass the specified tests on completion, and are defective, and do not comply with the agreement, dated the 23rd February 1909, and made between yourselves of the one part and the Powell Duffryn Steam Coal Company, Ltd., of the other part, and in exercise of the power conferred upon me by clause 4A of the said agreement I hereby reject the same."

4. LETTER, the Pursuers to Mr Sparks, dated 16th March 1910.

"With reference to your letter of yesterday, we do not understand the exact meaning of your notice. But if you mean to reject *in toto* the turbine we dispute entirely your right to do so."

rejected were conform to contract, and that the engineer was not justified in rejecting them. That, of course, is disputed by the defenders.

"The contract itself is No. 14 of process. The fourth clause provides for the erection of the plant under the supervision of the engineer, who is given power to make tests. By clause 4A the engineer has power to reject the whole or any part of the work, in which event certain options, among which is that of returning the work and recovering any sums paid or allowed on account thereof, are conferred upon the defenders.

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"Clause 5 of the contract is in the following terms:—'The P. D. Company shall pay to the contractors for the said machinery the contract price mentioned in the said schedule by three instalments as follows, namely, 70 per cent of the contract price on the said machinery being delivered on site, 20 per cent on the said machinery having been tested to the satisfaction of the engineer, and being in working order as required by this agreement to the satisfaction of the engineer, and 10 per cent, six calendar months after the previous instalment of 20 per cent, due on completion of test, has become payable (subject to the plant having worked satisfactorily); the said respective instalments shall be paid within fourteen days after the production of the certificate of the engineer that such instalments are respectively due and payable. In case the engineer shall at any time neglect or refuse, without reasonable cause, to give to the contractors his certificate in writing that any instalment is due and payable, when such instalment is due and payable, the matter in dispute shall be referred to arbitration as hereinafter provided. The certificates, other than the final certificate of the engineer, shall not be considered conclusive evidence as to the sufficiency of any work or materials to which they relate, nor shall they relieve contractors from any obligations under this contract. The engineer shall not be bound to give a final certificate if he is of opinion that the contractors have not performed all obligations under this contract, but any question arising under this clause as to whether the contractors have performed all their obligations, shall be subject to the provisions for arbitration herein contained.'

"In terms of this article of the contract, certain payments have been made by the defenders as set forth by the pursuers.

"Clause 18 of the contract is in the following terms:—'Any question hereby directed to be referred to arbitration (including clause 4), and any dispute or difference arising between the P. D. Company, or the engineer on their behalf, and the contractors as to the construction, meaning, or effect hereof, or any clause or thing herein contained, or the rights or liabilities of the parties hereto, or otherwise howsoever in relation to the premises, shall be referred to arbitration and determined by an engineer to be appointed by the president for the time being of the Institute of Electrical Engineers, as arbitrator, and such arbitration shall be deemed to be a submission to arbitration within the meaning of the Arbitration Act, 1889, and subsequent Acts, provided that no such dispute or difference shall be deemed to have arisen or be referred to arbitration hereunder, unless one party has given notice in writing to the other of the existence of such dispute or difference within seven days after it arises.'"

It is unnecessary for the purposes of this report to refer to the averments of parties on the merits of the case.

Mar. 20, 1912. The pursuers pleaded, *inter alia* ;—1. The defenders being due and resting owing to the pursuers the sum sued for, decree should be granted as craved. 2. The defences, being irrelevant, should be repelled. 3. The arbitration clause founded on by the defenders is inapplicable to the present disputes between the parties. . . . 4. The defenders not having been entitled in the circumstances descended on to reject the said turbines, the pursuers are entitled to decree as concluded for.

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The defenders pleaded, *inter alia* ;—1. *Forum non conveniens*, and *separatim* the action is premature. 2. The pursuers' averments being irrelevant and insufficient to support the conclusion of the summons, the present action should be dismissed. 3. The defenders having in terms of the first contract rejected turbine No. 1 and relative machinery, and the pursuers having accepted or acquiesced in the said rejection, are barred from taking any steps to recover the price thereof. 4. The matters in dispute between the pursuers and the defenders fall to be determined by arbitration in terms (1) of the contracts founded on; . . . and the present action should be dismissed or at least sisted to await the arbiter's decision. 5. The pursuers' averments, so far as material, being unfounded in fact, the defenders are entitled to decree of absolvitor. 6. The pursuers, being in breach of the contracts on which they found, are barred from enforcing the same against the defenders.

On 17th January 1912 the Lord Ordinary (Hunter) pronounced an interlocutor in the following terms:—"Repels the first plea in law for the defenders: Finds that the matters in dispute fall to be determined by arbitration, in terms of the contracts founded on, and accordingly sists process *in hoc statu* until these matters have been settled by arbitration, and reserves, meantime, the question of expenses: On the motion of the pursuers grants leave to reclaim." *

* "OPINION.—[After the narrative quoted above, the Lord Ordinary proceeded]—The defenders argued that I should *in limine* sustain their plea of *forum non conveniens* and dismiss the action. They do not dispute the jurisdiction of the Scots Courts, but found upon the circumstance that the jurisdiction is only constituted by arrestment in Scotland of property belonging to them. They say that certain of the witnesses are resident in London, where the defenders have their registered office, that the contract falls to be interpreted by English law, and that it would be more convenient for them to have the dispute settled in England.

"On the other hand, the pursuers argued that, as the Scots Courts were seized of the cause and had jurisdiction, no adequate reason had been given for sustaining this plea. It was pointed out that Scotland was more convenient for them and also for a number of the witnesses, *i.e.*, workmen employed by them at the erection of the plant who are resident in Scotland. They also argued that, although the contract was executed in England, it was expressed in familiar English language; that no relevant averment of English law being different from Scots law, so far as the interpreting of such a mercantile contract between an Englishman and a Scotsman is concerned, had been made; and that, as the place of fulfilment of the contract was Wales, it was at least doubtful whether London would not be as inconvenient as Edinburgh for a certain number of the witnesses who would require to be examined.

"Several cases were cited to me as bearing upon the plea of *forum non conveniens*; but I do not think it necessary to examine them in detail. It

The pursuers reclaimed, and the case was heard before the First Mar. 20, 1912. Division on 14th and 15th March 1912.

Argued for the reclaimers;—In order that any matter should be referred to arbitration in terms of the contract, the proviso attached to the arbitration clause made it necessary that notice should be given in writing of the existence of a dispute within seven days after it had arisen. No such notice had been given here. The dispute had arisen when the pursuers wrote repudiating the rejection of the machinery, and the defenders had given no notice within seven days thereafter. It could not be contended that the pursuers' letter was itself such a notice, for a notice to be valid must be a notice that clearly invoked the arbitration clause. That letter was nothing but a challenge to the defenders to invoke the arbitration clause, if they chose, by giving notice. Therefore, that clause not having been invoked, the present action was not excluded. In any case, the arbi-

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appears to me to be settled, as was said by Lord Kinnear in the case of *Sim v. Robinow*, 19 R. 665, at 668, that 'the plea can never be sustained unless the Court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice.' So put, the question cannot, I think, be answered by a mere balancing of the apparent considerations in favour of the Courts of another country as against the considerations in favour of the Courts of this country. Even upon this point I was by no means satisfied of the soundness of the defenders' contention. In the only cases, however, in which the plea has been sustained there have been exceptional circumstances such as I do not find in the present case. I shall therefore repel this plea.

"The next question that was argued was whether the action ought to be dismissed or, at all events, sisted in order that parties may have their disputes determined by arbitration. It was maintained by the defenders that, as parties contemplated and provided for the appointment of an arbiter under the English Arbitration Act, 1889, it was for an English Court to determine the scope of the reference clause, and that I should therefore either dismiss the action or, at all events, pronounce an interlocutor directing parties to prepare a case for submission to the English Courts in terms of the British Law Ascertainment Act, 1859, in the terms adopted by the Inner House in the case of *Johannesburg v. D. Stewart & Co.*, 1909 S. C. 860. There are, however, as it appears to me, no relevant averments of English law upon this point. I think what was said by the Lord President in the case of *Johannesburg* at the foot of p. 875 of 1909 S. C. is applicable to the present case, that 'where the whole question is one of the interpretation of the English language in an English contract, and no matter peculiar to the law of England enters into it, we are entitled to interpret that language—which we are supposed to know equally well with the English Judges.' I proceed, therefore, to consider the scope of reference.

"The first observation I make upon the clause of reference is that it is not a mere executory clause, but is a general clause which refers to an arbiter all questions which may properly arise either upon the import and meaning or upon the carrying out of the contract. Examples of such clauses are to be found in the cases of *Mackay v. Parochial Board of Barry*, (1883) 10 R. 1046, and *North British Railway Company v. Newburgh and North Fife Railway Company*, 1911 S. C. 710. The claim in the present case is for money said to be due under the contract. That is disputed. It seems to me that this is a question of liability of one of the parties under the contract and *prima facie*, at all events, falls to be determined by arbitration. The case for the defenders does not, however, rest upon a bald averment of not being liable. They found upon the rejection by the engineer of the

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tration provisions of the contract were clearly intended by the parties to apply only to matters requiring dispatch, and were inapplicable to questions raised by the defenders' rejection of the machinery after completion. The question whether there had been acquiescence by the pursuers in the defenders' rejection was not a question covered by the arbitration clause; and as there was no time limit within which it was open to the pursuers to repudiate the rejection, no acquiescence on their part could be pointed to as excluding inquiry into the propriety of the rejection. The time limit prescribed by the arbitration clause had no reference to acceptance or repudiation of rejection, but was a process limit for election between arbitration and litigation, and as the defenders had not given notice of a dispute within seven days of the pursuers' repudiation of the rejection, the propriety of that rejection could not now be referred to arbitration, and the present action was the appropriate process for trial of that

turbines, and maintain that, if the pursuers were dissatisfied with the rejection, it was their duty to go to arbitration. In any event, they say that an action cannot be maintained by the pursuers under the contract, unless they have got a final certificate from the engineer, or have got a finding from the arbiter that such certificate has been wrongfully withheld. No doubt the pursuers in reply say that a certificate is not necessary. That, however, appears to me to raise a question of construction of clause 5, and, if so, to be referred by clause 18 to the arbiter.

"It was strongly argued for the pursuers that the reference clause, being conditional upon notice in writing being given by one party to the other within seven days of the existence of a dispute or difference, could not be founded upon, with the result that the jurisdiction of the Court to deal with any matter of difference between the parties was restored. They say that the real question in dispute is whether the turbines were or were not conform to contract; that a dispute as to this existed upon their intimating to the defenders their repudiation of the engineer's rejection; that the defenders ought, within seven days from that date, to have intimated in writing to them the existence of such dispute, and that their failure to do so makes the reference clause inoperative. I do not accept this construction of the clause. I do not see why the defenders, who were satisfied with what the engineer had done, should have invoked arbitration. Suppose the question had been as to whether the engineer had rightly granted a final certificate, the pursuers' construction would apparently lead to this result, that if the defenders said they were dissatisfied with the granting of the certificate the pursuers would, after the lapse of seven days from existence of the dispute, not be in possession of a final certificate but would have to join issue with the defenders upon any question arising under the contract in a Court of law. That does not appear reasonable. In my opinion the proviso has not the effect, if the condition is not purified, of destroying the reference clause and restoring the jurisdiction of the Court, but operates within the reference to the effect, it may be, of curtailing the rights of one or other of the parties who must be held to have accepted the situation because he did not timeously give notice of the dispute. Apart from this consideration I do not see why the question as to the defenders' liability under the contract, and the plea that the pursuers ought to have a final certificate before suing for payment, ought not now to go to arbitration. The defenders say—and this is not disputed—that within five days after the service of the summons they wrote to the pursuers' agents requiring that the matters in dispute should be determined by arbitration in terms of the contract.—[His Lordship then dealt with questions with which this report is not concerned, and continued]—

"The defenders maintained that if, in my opinion, the arbitration clause

question. (2) The defenders' plea of *forum non conveniens* had, on Mar. 20, 1912, the authority of *Hamlyn*,¹ been rightly repelled. (3) The engineer's certificate was merely a method of ascertaining the date when an instalment fell due, and it would confer a right to interest on the sum due if not paid within fourteen days. In terms of section 5 of the contract the obtaining of such a certificate was not made a condition precedent to a demand for payment of sums due under the contract, and the defenders had no plea to this effect. The certificate of the engineer had not been asked for with reference to the sum now sued for; and indeed he could not be compelled to grant a certificate until the question as to the propriety of his rejection of the machinery was disposed of. If his rejection was found to be unjustified, and he then refused a certificate, a dispute would arise upon which an arbiter or the Court would be obliged to hold that he had acted wrongfully, and the pursuers would be found entitled to the sum sued for.

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Argued for the respondents;—In terms of the contract between the parties the question raised in this case, viz., as to the rejection of the machinery by the defenders' engineer, was covered by the arbitration clause, which was very wide in its terms.² That question could be considered only by an arbiter, not by the Court; and as the pursuers had not given the notice necessary to invoke arbitration their only remedy was gone, and the defenders should be assolized. The proviso as to notice in the arbitration clause was to be strictly interpreted, because the time limit was designed to guard against alteration of the *status quo*. Alternatively, if the Court held that sufficient notice had been given with regard to the first machine (as it admittedly had with regard to the second), the questions raised fell to be determined (as decided by the Lord Ordinary) by arbitration and not by the Court. It was the engineer and not the defenders who had a right to reject or to grant a certificate. He was the judge of first instance, with an appeal to the arbiter against his decision. (2) The parties here had clearly contracted to set up an English arbitration, to which the law of England applied, and the present action would really serve no good purpose, by reason of the difference between the law of England and the law of Scotland. Nothing done in the present process would deprive parties of their rights under the English law of arbitration, which permitted an appeal

applies, I ought to dismiss the action, because in an English arbitration nothing requires to be done in Court. Against this view it has to be observed that the jurisdiction of the Courts is not ousted by a reference clause, which remits to another tribunal the merits of the case. I propose to pronounce an interlocutor in the terms approved by the House of Lords in the case of *Hamlyn*, 21 R. (H. L.) 21, sisting procedure *in hoc statu* in order that the matters in dispute may be settled by arbitration in terms of the contract between the parties. As pointed out by Lord Watson in that case, 'Such an order will leave the parties at liberty in the course of the reference to avail themselves of the provisions of the Arbitration Act, 1889, and will enable the Court of Session, in the event of any lapse of the reference, to dispose of the merits of the case.' "

¹ *Hamlyn & Co. v. Talisker Distillery*, (1894) 21 R. (H. L.) 21.

² *Hohenzollern Actien Gesellschaft für Locomotivbau v. City of London Contract Corporation*, (1886) Hudson on Building Contracts, 3rd ed., ii. 96; *Robins v. Goddard*, [1905] 1 K. B. 294; *Chapman v. Edinburgh Prison Board*, (1844) 6 D. 1288.

Mar. 20, 1912. from an arbiter to the Court, and it would be highly inconvenient if, while an action was pending in Scotland, an appeal was taken to the English Courts in the course of an arbitration there. The plea of *forum non conveniens* therefore should be sustained upon this as well as upon the obvious ground of convenience to parties and witnesses. (3) Payment could not be enforced of any instalment of the price payable by the defenders without production of the certificate of the engineer that such instalment was due.¹ In terms of the contract he was made the judge of the sufficiency of the plant, and it was in exercise of the powers thereby conferred upon him that he had rejected the machinery on completion. As his rejection had not been submitted to arbitration it had now, for the reasons already stated, become final. It had therefore become impossible for the pursuers to satisfy the only condition upon which an action could proceed for recovery of the sum sued for, because the engineer's certificate that it was due could not now be obtained.

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At advising on 20th March 1912,—

LORD PRESIDENT.—The Powell Duffryn Steam Coal Company, Limited, of London entered into a contract with James Howden & Company, Limited, engineers, of Glasgow, for the supply by them of a 2000 kilowatt turbo-alternator. The agreement was made in a regular contract, and had, as all engineering contracts of this sort have, a schedule and specification attached. The whole details of the machine I need not enter into. There was also a subsequent contract made for another machine of the same class. Now, both the first and the second machines were erected in the Powell Duffryn Steam Coal Company's works at a place in South Wales. There were various disputes as to the working of the first machine after it was erected, all of which I need not go into, because I may pass at once to a critical communication which was made upon the 12th of August 1909 when the following letter was written by the engineer of the Powell Duffryn Steam Coal Company:—"Under contract of 6th July 1907, I hereby give you notice that the 2000 K. W. Zoelly turbine" in question "is defective and does not comply with the agreement" made between the parties "and in exercise of the power conferred upon me by clause 4A of the said agreement, I hereby reject the same." The letter was written upon the 12th of August, and we may assume that it was received on the 13th. It was not answered till the 25th, in a letter in which Howden & Company maintain that the machine was conform to contract; that anything that had gone wrong was due to the persons who had worked it; and they say, "We cannot therefore accept your right or power to reject this turbine under the conditions of our contract." A similar letter of rejection applicable to the second machine was written upon the 15th March 1910, and that letter was answered next day. Here, again, Howden & Company took up the same position and refused to recognise the rejection.

That being the state of affairs, this action has been raised by Howden & Company, they having founded jurisdiction against the Powell Duffryn Company, to recover the price of the two machines. Defences have been

¹ Chapman v. Edinburgh Prison Board, 6 D. 1288.

lodged by the Powell Duffryn Company in which they say that the machines were defective and therefore were properly rejected, and that they are not bound to pay for them. But they also plead that the matters in dispute fall to be determined by arbitration, and they have a plea of *forum non conveniens*.

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The Lord Ordinary, after having heard the parties, repelled the plea of *forum non conveniens*, and found that the matters in dispute fell to be determined by arbitration in terms of the contracts founded on, and accordingly sisted the process *in hoc statu* until these matters should be settled by arbitration, reserving the question of expenses. Against that interlocutor a reclaiming note was taken by the pursuers, and they moved for a proof. But the defenders took advantage of that reclaiming note, as they were entitled to do, and argued before your Lordships that, so far as the first contract was concerned, they should be assoilzied altogether, and this plea comes logically first, and must, I think, be disposed of before one goes further with the other portion of the case.

These matters depend upon the contract and upon the contract alone, and there are several clauses to which I shall have to call your Lordships' attention. The fourth clause deals with the erection of the machinery. I do not think I need to go through it, because I think it is quite clear (and I do not think really parties contended otherwise) that it has nothing to do with the machinery as a whole, but is only intended to give a power during the period of erection to reject what I may call improper bits. It is a clause which gives an engineer a right to say, "You shall not put in such a pulley, or such a piston, or so on, because of improper material." But the material clause is 4A, which says, "If the completed work or any portion thereof fails to pass the specified 'test on completion,' or be defective in any way, the engineer may reject such work or portion thereof," and the Powell Duffryn Company shall then have several options, which are set forth. And then comes the clause upon which the whole matters in argument really turn. It is the 18th, and is in these terms:—"Any question hereby directed to be referred to arbitration (including clause 4), and any dispute or difference arising between the P. D. Company, or the engineer on their behalf, and the contractors as to the construction, meaning, or effect hereof, or any clause or thing herein contained, or the rights or liabilities of the parties hereto, or otherwise howsoever in relation to the premises, shall be referred to arbitration and determined by an engineer to be appointed by the president for the time being of the Institute of Electrical Engineers, as arbitrator, and such arbitration shall be deemed to be a submission to arbitration within the meaning of the Arbitration Act, 1889, and subsequent Acts." And then comes a proviso with which I shall deal afterwards.

Now, I think that you cannot read that arbitration clause without seeing that it is of a very wide description, and that it was the expressed wish of the parties to this contract that any engineering dispute which arose should be decided by a professional engineer as arbiter appointed in terms of the clause, and not by the Courts of law. That is the initial view that I gather from this contract. But then comes this curious proviso which both parties seek to make use of: "Provided that no such dispute or difference shall be deemed to have arisen or be referred to arbitration hereunder, unless one

Mar. 20, 1912. party has given notice in writing to the other, of the existence of such dispute or difference within seven days after it arises." Now, the defenders, in taking advantage of the reclaiming note, seek, as I understand, to use this clause in this way. They say: "If you do not give intimation within seven days of the existence of the dispute, and say you are going to arbitration upon it, then the rejection by the engineer is a final rejection."

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I personally think that is an impossible construction. In the first place, the clause here does not provide that the parties shall say that they are going to arbitration. All it says is that they are to give notice of the existence of such dispute or difference within seven days after it arises. Well, now, I do not think a dispute can be held to have arisen until you have two parties to the dispute—it takes two to make a quarrel; and therefore I do not think that, when one party gives a notice to the other that they reject the machinery as being disconform to contract, that intimation by itself creates a dispute. The consequence is that, in my view, the letter of 12th August 1909 did not create a dispute. The letter of 25th August 1909 did show that a dispute had arisen, because it repudiated the view of the letter of the 12th August, and therefore there was a going dispute. But the letter that, so to speak, created the dispute also gave notice of it, and therefore, to my mind, the letter itself was a notice in terms of the clause. The clause does not require that you must necessarily say, "I propose to refer this to arbitration," and accordingly I reject the view of the defenders that the matter of the rejection of the machinery can no longer be called in question.

The defenders use the argument I have been discussing only with regard to the first contract, because their letter rejecting the machinery under the second contract was answered next day, that is, within seven days.

I think the argument which the pursuers use in order to get rid of this contention of the defenders really puts them out of Court upon the next question. Mr Macmillan argued that inasmuch as there had been no intimation of an intention to go to arbitration within seven days of the existence of the dispute which he said, and I think properly said, was matured upon the 25th August in the case of the first machine, then there could be no arbitration at all, and the parties were referred back to their rights in the Courts of the country. I think that is met by exactly the same reasoning which I have used to dispose of the plea of the defenders. I think, therefore, that there again that view is untenable.

It may be as well that I should say what I think the real meaning and use of the proviso is. I think, as I have already said, you cannot read the clause without seeing that the *voluntas* of the parties is arbitration. I think that proviso is put in solely in order to make it certain that there should not be arbitration upon disputes that were merely verbal. I think the meaning of the clause is this:—If there is a dispute which has not been reduced to writing at all, then neither side shall be listened to on that dispute unless within seven days the fact that there is a dispute is put in writing. I think the clause was really inserted with a view to meeting cases that arose during the execution of the contract, and that it has no application at all to the question which arises at the end of the day, whether the machinery is or is not in conformity with the contract.

Accordingly, upon the whole matter I think that the Lord Ordinary is right. The form of his interlocutor has been carefully modelled upon the interlocutor which the House of Lords pronounced in the case of *Hamlyn*,¹ and I may here add that it seems to me that that also disposes of the plea of *forum non conveniens*, because in *Hamlyn's* case,¹ as here, the contract was an English contract, and the arbitration was to be an English arbitration. Notwithstanding that, the House of Lords held that there was no reason whatsoever why the action should not remain in the Scottish Courts in order to get the benefit of the assistance of the Court, either in getting a decree more easily than it could be got from an arbitrator, or in the event of the arbitration breaking down for any reason.

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I should just mention one other matter, to show that I have not omitted it. There are certain provisions as to the prices being paid by instalments; they are to be paid, twenty per cent after test, and ten per cent six months afterwards. It is possible to phrase a contract so that the possession of an engineer's certificate should be made a condition precedent to any action whatsoever. All I can say is that that has not been done here. I think the action as an action is quite a good action, and, in other words, the case is just in the same position as *Hamlyn's* case.¹

I should like to add one word more as to what the pursuers, who are sent away from this Court, ought to do. They are in a position, I do not doubt, to invoke the arbiter on the question whether the rejection was proper or improper. The contract provides for the appointment of an arbiter in order that the *ipse dixit* of the engineer should not be final upon that matter. But I think it may be easier for the pursuers if they call upon the engineer formally to give them a final certificate. Of course he will refuse it: he is bound to refuse it in view of what he has done in the way of rejection. In that way the pursuers can bring the whole question before the arbiter, whether the rejection was a proper rejection or not. If it was, there the matter ends; and if it was not, then the pursuers will be able to say, "We are entitled to get our final certificate."

LORD KINNEAR.—I agree with your Lordship and with the Lord Ordinary.

LORD JOHNSTON.—I have come to the same conclusion from a slightly different point of view. I think that the last clause in section 18 of the contract really is executorial of the contract merely, and has a somewhat different effect from that which your Lordship has expressed. I regard it as properly intended to meet the case of some question arising while the contract is current, and to compel any question of that sort to be brought to a point and be determined incidentally so as not to interfere with the continuous execution of the contract as a whole. I do not think that it was intended to cover what comes at the end of the contract, the winding up of the relations between the contracting parties and a final settlement. There is no question that the rejection of either the whole machinery contracted for or of such a large and important part of it as is here in question raises in effect the matter of final payment. It certainly supports this

¹ 21 R. (H. L.) 21.

Mar. 20, 1912. view that if Mr Clyde's clients had desired arbitration, instead of resisting it, their tactics would have been simple. They would have demanded a final certificate notwithstanding the rejection; and—even though on their own reading of clause 18 they were too late to insist directly on taking the question of rejection to arbitration—on a final certificate of payment being refused they would have gone to arbitration, because, as I read section 5, its proviso as regards arbitration in the case of a disputed certificate for payment, whether interim or final, is not affected by the final clause of section 18.

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I therefore agree that the Lord Ordinary has come to a correct conclusion, as represented in the interlocutor he has pronounced.

LORD MACKENZIE.—The argument turns upon the construction to be put upon the arbitration clause in the contract. It is very wide in its terms, and there is not room for doubt that the dispute, as to whether there was a right to reject the turbines supplied, falls within the leading words of the clause. The contention is that there has not been compliance with the proviso. This, according to the defenders, entitles them to *absolvitor de plano*, the pursuers contending, on the other hand, that the clause cannot now be appealed to, and that they are entitled to a proof.

Neither of these contentions is, in my opinion, sound. The proviso is badly expressed. I cannot construe it as meaning that when a dispute has arisen notice must be given within seven days by the party desiring arbitration. The clause does not say so. Nor can I construe it as meaning that if one of the parties takes a step which he is entitled to under the contract, *e.g.*, as here, if he rejects the work under 4A, then it is to be held there is a conventional acquiescence unless within seven days thereafter the other party disputes the right to do so. This is what the defenders' first contention came to, the result being that the engineer becomes final. A dispute cannot arise between two parties unless there is disagreement. When the engineer of the Powell Duffryn Company rejected the work Howden & Company might have either agreed or disagreed with his view. If they agreed there was no dispute. Until they disagreed there neither was, nor could it be deemed that there was, a dispute or difference. It is therefore impossible, in my view, to say that, because the defenders did not write within seven days after the 12th of August 1909, on which date a dispute had not arisen, giving the pursuers notice that a dispute had then arisen, therefore recourse cannot now be had to arbitration. There was no dispute until the pursuers wrote on 25th August 1909 saying they could not accept the defenders' right to reject, and by writing they necessarily gave notice of the existence of the dispute within seven days after it arose. The proviso does not seem capable of any very intelligible meaning, but there is not, in my opinion, any reason for construing it so as to render the leading words of the clause nugatory.

The result is that I think the defenders' alternative argument in support of the conclusion reached by the Lord Ordinary should prevail.

THE COURT adhered.

J. & J. Ross, W.S.—MACKAY & YOUNG, W.S.—Agents.

COLONEL JOHN WINSTON THOMAS SPENCER AND OTHERS (Stuart Caradoc Munro's Trustees), First Parties.—*D. Anderson.*

ALMERIC STUART JOHN SPENCER, Second Party.—*D. Anderson.*

COLONEL JOHN WINSTON THOMAS SPENCER, Third Party.—*D.-F. Dickson—A. R. Brown.*

No. 128.

Mar. 20, 1912.

Munro's
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Spencer.

Succession—Destination—Condition—Use of testator's name.

A testator, by his trust-disposition and settlement, destined his estate of Teaninich in liferent and fee to a series of heirs, under the condition that the heirs taking benefit under the destination should "assume and constantly thereafter use as their surname, arms, and designation the surname, arms, and designation of Munro of Teaninich as their proper surname, arms, and designation in addition to their own surname, arms, and designation"; with a clause of forfeiture in the event of a contravention of the condition.

Held (diss. Lord Mackenzie) that, in the absence of express direction that the assumed surname should be the last, a beneficiary was entitled to prefix the surname Munro to his own surname of Spencer, and to design himself "Munro-Spencer of Teaninich."

Hunter v. Weston, (1882) 9 R. 492, followed.

ON 17th October 1911 a special case was brought with reference to a 1st Division. name and arms clause occurring in the trust-disposition and settlement of Stuart Caradoc Munro of Teaninich, which provided for the succession to the estate of Teaninich and others.

The trustees under the trust-disposition and settlement were the *first parties*, Almeric Stuart John Spencer, teaplanter, Ceylon, was the *second party*, and Colonel John Winston Thomas Spencer was the *third party*.

The case stated as follows:—

"2. The said trust-disposition and settlement provides that the trustees shall hold the trust-estate for the liferent use of the testator's nephew, Colonel John Winston Thomas Spencer, the third party hereto, during all the days of his life after the testator's death, and shall pay to him the free rents and income of the trust-estate, and that after the expiry of said liferent, the trustees shall hold the trust-estate for the liferent use of Almeric Stuart John Spencer, the second party hereto, son of the third party, in like manner. Subject to the said liferents, the trustees are directed to hold the trust-estate for behoof of the heirs-male of the body of the said Almeric Stuart John Spencer in fee, and failing an heir-male of his body, for behoof of certain other heirs and substitutes as therein mentioned.

"3. The said trust-disposition and settlement contains a name and arms clause and clause of devolution in the following terms:—'I expressly provide and declare it to be an essential condition of the beneficiaries hereunder whether liferenters or fiars taking the benefits hereinbefore conferred on them that they and the husbands of any of them who may be females shall, on their succeeding to said lands and others, whether in liferent or fee, assume and constantly thereafter use as their surname, arms, and designation the surname, arms, and designation of Munro of Teaninich as their proper surname, arms, and designation in addition to their own surname, arms, and designation, and a clause to that effect shall be inserted in the conveyance of the said estate and others to be granted by my trustees as above pro-

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vided to the heir entitled to succeed thereto, and should any of the said beneficiaries decline to accept this condition, or at any time after his or her succession contravene the same, his or her right under these presents shall thereupon cease and determine to the same effect as if he or she were dead.' . . .

"4. The said Stuart Caradoc Munro died on 27th May 1911, and the third party now proposes to comply with the provisions of the name and arms clause in said trust-disposition and settlement by prefixing the surname of 'Munro' to his surname of 'Spencer,' and calling himself 'John Winston Thomas Munro-Spencer of Teaninich.' . . .

"5. . . . The first parties have intimated to the third party that in the event of the latter carrying out his said proposal to style himself Munro-Spencer, they will decline to pay him any part of the income of the trust-estate until it has been determined by the Court that such proposal is a sufficient compliance with the provisions of the trust-disposition and settlement.

"6. The first and second parties contend that the words 'in addition to their own surname, arms, and designation,' render it a necessary and essential condition of the third party's right to the enjoyment of the liferent of the estate of the said Stuart Caradoc Munro under his said trust-disposition and settlement that the third party should use the surname of Munro by appending it to his existing surname and using it as a final surname. The third party contends that under said clause he is entitled to assume the name of Munro and use it as one of several surnames so that the assumed name need not necessarily be the last, and that accordingly his proposal to call himself 'Munro-Spencer' will constitute sufficient compliance with the clause in question as regards the assumption of the name of Munro."

The question of law was:—"Is the third party entitled, under the provisions of the trust-disposition and settlement of the late Stuart Caradoc Munro of Teaninich, relative to the assumption of a surname, to prefix the surname 'Munro' to his present surname of 'Spencer,' and to call himself John Winston Thomas Munro-Spencer of Teaninich?"

The case was heard before the First Division (without Lord Johnston) on 16th March 1912.

Argued for the third party;—The case was governed by the case of *Hunter v. Weston*.¹ In the absence of express provision to the contrary the surname "Munro" might be attached to the beneficiary's own surname in any order he chose.² This was all the more clear where, as in the present case, not only was there no restriction to the use of the surname Munro "only," but the beneficiary was expressly enjoined to assume it "in addition to" his own surname. The words "of Teaninich" were nothing but a designation, for the estate was not entailed and might be sold by a beneficiary.

Argued for the first and second parties;—The present case was distinguished from *Hunter v. Weston*¹ by the difference in the phraseology employed. In requiring Munro of Teaninich to be assumed as the "proper surname" of his beneficiaries, it was clearly the object of the truster that the combined name and designation

¹ (1882) 9 R. 492.

² Bell's Lectures on Conveyancing, 3rd ed., ii. 1025; *Mildmay v. Mildmay*, [1900] 1 Ch. 96; *Earl of Caithness v. Sinclair*, *supra*, p. 79.

"Munro of Teaninich" should be maintained, and that purpose would not be carried out by the proposal of the third party.¹ Mar. 20, 1912.

At advising on 20th March 1912,—

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LORD PRESIDENT.—The late Stuart Caradoc Munro of Teaninich in the county of Ross and Cromarty conveyed his estate of Teaninich to trustees, and he directed that certain persons were to enjoy the estate in a certain order as liferenters and fiars. The trust-disposition and settlement contained, *inter alia*, the following clause :—[His Lordship quoted the name and arms clause]—and the testator ordered a clause to that effect to be inserted in any conveyance to be granted by the trustees in favour of the beneficiary entitled to take.

The person presently entitled to the liferent of the estate is a certain Colonel John Winston Thomas Spencer. He wishes to prefix the surname of Munro to his present surname of Spencer, and to call himself John Winston Thomas Munro-Spencer of Teaninich, but the trustees are not satisfied that this is a proper compliance with the terms of the clause, and they suggest to the Court that the only proper compliance with the clause would be that he call himself John Winston Thomas Spencer-Munro of Teaninich.

As this is a voluntary gift, and as the person who takes it is a gratuitous taker, he is obviously bound by the condition attached to the testator's bounty, there being nothing against public policy or against good morals in the clause ; and I think it is the duty of the Court to find out what is the proper construction of the words used. It may be said to be largely a question of impression. I am in this peculiar position, that my opinion is one way and I think authority is the other. If I had to decide the matter for the first time, I should have held that the words used showed that the testator wished his heirs in the estate to be known as Munros of Teaninich, and I should have held that although they were entitled, no doubt, to keep their own surname, still, if an heir called himself Munro-Spencer of Teaninich, he would be not a Munro of Teaninich but a Spencer of Teaninich, whereas if he called himself Spencer-Munro of Teaninich he would be a Munro of Teaninich. But while that is my own opinion, and while I know there is a difference of opinion between my learned brethren in this matter, I am bound to say that I think the case is settled in this Court by the case of *Hunter v. Weston*,² because I cannot find any solid distinction between the two cases. In *Hunter's* case² all that was required of the heir by the entail was to assume the name of Hunter—to use, bear, and constantly retain the name of Hunter ; and nothing was said in that case as to using it in addition to his own name. I find that the late Lord President Inglis said, "The name may be assumed by the heir as his only surname, or it may be assumed in addition to another name, putting the assumed name last, or, finally, it may be assumed along with one or more surnames, putting these in some order in which the assumed name shall not be the last. But it rather appears to me that all these cases will fall under the general category of cases in which surnames are assumed."

Now, that was concurred in by the rest of the Court. I think it binds

¹ D'Eyncourt v. Gregory, (1875) 1 Ch. D. 441.

² 9 R. 492.

Mar. 20, 1912. me, and I think it binds me all the more because that judgment was pronounced in 1882, and this is a trust-disposition and settlement of 1910.

Munro's Trustees v. Spencer. I think Mr Caradoc Munro must be assumed, either through himself or his law-agent, to have known the law as laid down in *Hunter v. Weston*,¹

Ld. President. and if he desired that the name of Munro should come last, and nowhere else, he should have said so. Accordingly, I feel myself bound by authority, and I think that the question as put to us must be answered in the affirmative.

I do not think that we get any help from the English cases, which, of course, are not binding on us, because I find that the Master of the Rolls, Sir George Jessell, decided the case of *D'Eyncourt v. Gregory*² in accordance with my own impression, while the case of *Mildmay v. Mildmay*³ went the other way. That shows, again, how much these cases are a matter of impression.

LORD KINNEAR.—I agree in the result of your Lordship's opinion, and also in the view which you have expressed, that we are bound by the decision of this Court in the case of *Hunter v. Weston*.¹

I do not, however, entirely agree with your Lordship that if we had been free to decide this case without regard to previous authority we ought to have decided it in a different way. I confess I have the less hesitation in expressing a contrary opinion, because, while I respectfully differ from that which has been given by your Lordship, I with equal respect assent to the opinion of Lord President Inglis. The two cases are not exactly similar, because in the case of *Hunter v. Weston*¹ the condition was that the heir succeeding should be obliged to use, bear, and constantly retain in all time coming the surname and arms of Hunter of Hunterston. There was no express provision that he might also retain his own name, whatever that might be, along with the name of Hunter, and there I think that the two cases are distinguishable in this respect that the will now under construction expressly allows what the Court, in the case of *Hunter v. Weston*,¹ inferred from the silence of the testator alone to be permitted to the beneficiary. I think if *Hunter v. Weston*¹ had been decided the other way, the question would still have remained whether, when the testator expressly permits the beneficiary whom he requires to take a particular surname to retain his own surname also, the condition is not sufficiently purified if the beneficiary takes both names in whatever order he thinks fit. But I do not think it is necessary to consider that question, because the general rule is laid down by Lord President Inglis, and I think it comes to this, that when the maker of an entail requires his heirs to assume a particular surname without saying that it is to be the only surname, or that it must come last, it may be assumed in addition to another surname, and the old and the new may be put in any order the heirs think fit. The principle seems to be that the heir must do what he is required to do by the entailer; but if he does all that he is expressly required to do, it is not for a Court of construction to impose farther or more precise restrictions than the entailer has thought necessary. This is in accordance with the rule of

¹ 9 R. 492.² 1 Ch. D. 441.³ [1900] 1 Ch. 96.

practice laid down by Professor Bell in his Lectures on Conveyancing, Mar. 20, 1912. where he gives the appropriate form of words for restricting the heir to the use of the entailer's name. I, of course, agree with your Lordship that as this gentleman is a gratuitous beneficiary he must take the benefit subject to the condition which the testator has imposed; but the question is what is the condition, and I apprehend that is to be found in the express language of the will, and not in our own notions about what the testator would probably have desired if he had foreseen the question which has been raised. I am therefore of opinion, for the reasons I have given, and especially because of the decision in *Hunter v. Weston*,¹ that the third party to this case sufficiently performs the condition when he undertakes to call himself Munro-Spencer. The testator allows the names to be conjoined. He has not expressed any preference for one order over another; and I find nothing in the will which can empower the Court to impose, under the sanction of a forfeiture, a restriction which he has not imposed.

The point as to the designation "of Teaninich" seems to me to leave the question just where it was. If the question had been whether the name of Munro alone was to be borne, there might have been some force in the argument. But if both names are to be used, the designation will be equally effective in whatever order they come. At all events, it is a point as to which people's notions may differ; and if we could conjecture more confidently than I think reasonable that the testator would have differed from the third party, we should still be unable to make a new will for him in order to carry out his object better than he has done for himself.

LORD MACKENZIE.—The question in this special case is in regard to the condition upon which the third party, Colonel Spencer, is to be allowed to enjoy a gratuitous benefit provided to him under the trust-disposition and settlement of his uncle. The opening words of the settlement are:—"I, Stuart Caradoc Munro of Teaninich, in the county of Ross and Cromarty, being desirous to provide for the succession to my estate of Teaninich, and others after mentioned, after my death." The testator then conveys the estate, including certain moveables thereon, to trustees, whom he nominates his executors so far as regards the personal estate conveyed. They are directed to hold the trust-estate for the liferent use of the testator's nephew, Colonel John Winston Thomas Spencer, in liferent, and on the expiry of that liferent for the liferent use of his son, Almeric Stuart John Spencer, and, subject to these liferents, for behoof of the heir-male of the body of Almeric Stuart John Spencer in fee, and failing an heir-male of his body, for behoof of certain other heirs and substitutes as therein mentioned. The settlement contains a name and arms clause and clause of devolution in the terms which have been already quoted.

It is stated in the case that the third party now proposes to comply with the provisions of the name and arms clause by prefixing the surname of "Munro" to his surname of "Spencer," and calling himself "John Winston Thomas Munro-Spencer of Teaninich." The question is whether this is compliance with the provision of the settlement. In my opinion it is not.

¹ 9 R. 492.

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kenzie.

The Court is not here dealing with a deed of entail. In such a case the principle of strict interpretation would be applicable, which means, in the words of Mr Duff (*Feudal Conveyancing*, p. 339), "not merely that without direct words limitations cannot be imposed on the members of tailzie from presumed or implied intention; but that, even where there are words within the deed having a certain tendency to indicate the intention of the entailer, they may, under the strict rule of construction, fail of effect either from want of technical precision, or from error in the form and manner in which they are introduced." This was the rule of construction which was, according to Lord Deas, applied in *Hunter v. Weston*,¹—"I have no doubt that the irritancy clause upon which the pursuer founds is to be construed just as stringently as in the case of any other irritancy arising under a deed of entail." The deed to be construed here is a testamentary settlement not subject to any such rule of construction. The intention of the testator is what has to be ascertained from the language used, and this intention must be given effect to unless there be any decided case which prevents this. It is made an essential condition of Colonel Spencer having the liferent of Teaninich that he shall (to read short the language used by the truster) assume and constantly thereafter use as his surname and designation the surname and designation of Munro of Teaninich as his proper surname and designation in addition to his own surname and designation. (I omit the provision as to arms, about which there is no dispute.) This seems to me clearly to indicate that the name Munro was intended to come last. In common parlance the testator intended that the beneficiary should become a Munro. According to the proposal the liferenter of the estate will not be Munro of Teaninich, but Munro-Spencer of Teaninich. To show how far the argument of the third party can be carried, reference may be made to the case of one of the possible liferenters under this settlement, Alexander Redmond Bewley Warrand. The first is a Christian name, the others are properly speaking surnames. According to the argument for the third party and the judgment of your Lordships it would be compliance with the condition prescribed by the testator if the beneficiary called himself Alexander Munro Redmond Bewley Warrand of Teaninich. It appears to me this would be altogether inconsistent with the intention of the testator as expressed in his settlement.

It is maintained that the testator's intention cannot receive effect because of the case of *Hunter v. Weston*.² That case was different from the present. The question there as put by the Lord President was this,—“Whether the entailer has required more than that the name of Hunter shall be assumed, there being no further or more precise condition inserted in the deed and the whole words of it being that the heir ‘shall be obliged to use, bear, and constantly retain . . . the surname of Hunter.’” The answer was in the negative. Here the addition of the words “of Teaninich,” and the provision that Munro is to be the beneficiary's “proper surname,” are, in my opinion, further and more precise conditions, which make the decision not an authority in favour of Colonel Spencer's view.

The case of *D'Eyncourt v. Gregory*,³ a judgment of Jessel, M.R., as it is

¹ 9 R. 492, at p. 499.

² 9 R. 492.

³ 1 Ch. D. 441.

inconsistent with *Hunter's* case,¹ cannot be effectively cited against the third party here. In *Mildmay v. Mildmay*,² where Byrne, J., held that the prescribed name could be used either before or after the devisee's family name, the direction was merely to use the former "alone or together" with the latter. In the judgment some weight was attached to the fact that in the books on English conveyancing practice a form of clause is given prescribing which surname should come last. In the present case I am of opinion there is sufficient in the terms of the settlement to show which surname the testator intended should stand last. The third party being a liferenter, the condition can be effectively enforced against him, and it is unnecessary to consider what a fiar could do after he got the estate.

I am unable therefore to take the same view as your Lordships. I do not think the case of *Hunter v. Weston*¹ is sufficient to defeat the intention of the testator, and am of opinion that the question should be answered in the negative.

THE COURT answered the question of law in the affirmative.

SKENE, EDWARDS, & GARSON, W.S.—ELDER & AIKMAN, W.S.—Agents.

ANDREW DRYBROUGH (Andrew Drybrough's Trustee), First Party.— No. 129.
Murray, K.C.—J. R. Dickson.

HOPE PARK, S.S.C. (Andrew Drybrough Junior's Trustee) AND Mar. 20, 1912.
ANOTHER, Second and Fourth Parties.—*Macphail, K.C.—Kirkland.*
WILLIAM CHARLES DRYBROUGH AND OTHERS, Third Parties.—*Drybrough's*
Constable, K.C.—Maitland. Trustee v.
Drybrough's

JOHN ROBERT DRYBROUGH AND OTHERS, Fifth and Sixth Parties.—*Trustee.*
M'Kechnie, K.C.—Wylie.

Succession—Accretion—Alimentary annuity—Right of children to share which parent would have taken jure accrescendi.

Where an alimentary annuity was settled by a father on his children and the survivor or survivors—

Held (diss. Lord Dundas) that a share of the annuity, set free by the death of one of the children without issue, did not accresce to the issue of another deceased child, there being nothing in the deed to indicate that the issue of a deceased child were to take the share which would have accrued to their parent if he had survived.

Succession—Liferent and Fee—Liferenter born after date of deed—Right to fee—Whether annuitant a liferenter—Entail Amendment Act, 1848 (11 and 12 Vict. cap. 36), secs. 47 and 48—Entail Amendment Act, 1868 (31 and 32 Vict. cap. 84), sec. 17.

The Entail Amendment Act, 1848, secs. 47 and 48, and the Entail Amendment Act, 1868, sec. 17, provide that where, under deeds executed after 1848 and 1868 respectively, a party of full age and born after the date of the deed is in possession of land or estate subject to conditions restricting his enjoyment thereof, or where estate, heritable or moveable, is held in liferent by or for behoof of such a party, he shall be deemed the absolute proprietor thereof.

Held that these provisions had no application to the case of an annuity.

¹ 9 R. 492.

² [1900] 1 Ch. 96.

Mar. 20, 1912. **ANDREW DRYBROUGH**, in contemplation of his marriage with Miss Catharine Clark, granted a bond of annuity dated 3rd June 1862, whereby he bound himself to pay an annuity of £200 to trustees, and in security of his obligation conveyed to them certain heritable estate. By subsequent arrangement a capital sum of £6000 was substituted for this estate and held by the trustees for the purposes of the bond.

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The bond provided, *inter alia*:—“(First) That the said trustees shall in all time coming during the subsistence of the trust hereby created hold the said annuity in trust for behoof of my said intended wife and the child or children that may be born of our said intended marriage and the survivors and survivor of them, as an alimentary provision for them, exclusive of all rights competent to me therein, whether of *jus mariti*, administration, or otherwise, all which as regards the said annuity are hereby renounced, or, if necessary, assigned to the said trustees and their foresaids: Declaring the said annuity not to be liable for my debts or deeds, nor to the diligence of my creditors.” *

* The remaining provisions of the bond, so far as material to this report, were as follows:—“(Second) During the subsistence of the said intended marriage between me and the said Miss Catharine Clark, the said trustees shall pay over to her for behoof of herself and the said child or children, the foresaid annuity, and her receipt for the same shall be a complete discharge therefor: (Third) In the event of the said Miss Catharine Clark surviving me, then my said trustees shall pay over the said annuity to her while she remains my widow, for behoof of herself and such of our children as shall continue to live in family with her and shall not have been forisfamiated or otherwise provided for, she, however, having the absolute power of disposal of the said annuity without being answerable to any of her children thereanent: (Fourth) In case the said Miss Catharine Clark shall after my death marry a second husband, it is hereby provided and declared that the annuity hereby created in her favour shall be restricted to the sum of £100 per annum, payable at the terms and with interest and penalty if incurred as aforesaid, and in the event of there being a child or children of our said intended marriage, or the issue of such child or children, alive at the time, the remaining half of the said annuity shall be paid over or applied by my said trustees to or for behoof of the said child or children, and that in such manner as to my said trustees shall seem most judicious, but in the event of there being no child or children of said intended marriage or the issue of such child or children, the foresaid subjects hereby conveyed in security as aforesaid shall to the extent of £100 be freed and disburdened of the said sum of £100, . . . (Fifth) In case I shall be the survivor of the said intended spouses, there being a child or children of the said intended marriage born and surviving at the time or the issue of such child or children, the said trustees shall pay over the said annuity of £200 to me during my life for the use and behoof of such child or children, or survivors or survivor of them, as shall continue to live in family with me and shall not then have been forisfamiated: (Sixth) In case a child or children shall be born of the said intended marriage and shall survive us or leave issue, the said trustees shall, after the death of the longest liver of me and the said Miss Catharine Clark, pay over the said annuity during the non-redemption thereof equally amongst the said children if there be more than one, and if there be only one such child . . . the foresaid subjects shall belong to such one child freed and disburdened of the said whole annuity, . . . (Seventh) In case there shall be no child of the said intended marriage or the lawful issue of any such child alive at the death of the said Miss Catharine Clark, then my said trustees . . . shall . . . grant a discharge and renunciation of the foresaid annuity.”

Andrew Drybrough died in 1883, leaving a trust-disposition and settlement, the terms of which, however, do not affect the questions here reported. His wife died in 1907. There were three children of the marriage, Andrew, Robert, and William Charles. Andrew died in 1910, without issue. Robert died in 1908, leaving three children, namely John Robert (born 24th February 1890), Ralph Melville, and Frederick William. William Charles, who still survived, had two children, namely Catharine Margaret and Charles Henry.

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In 1909, after Robert Drybrough's death, a special case was presented to the Court of Session,¹ in which the Court decided that the trustees under the bond of annuity were bound to hold the trust fund until at least the death of the longest liver of the granter's sons, and that the children of the deceased Robert Drybrough were entitled equally among them to receive payment of one-third of the annuity.

After the death of Andrew Drybrough junior in 1910, a further question arose with regard to the disposal of his share of the annuity, for the determination of which, *inter alia*, this special case was presented for the opinion of the Court.

The *first party* was the trustee under the bond of annuity granted by Andrew Drybrough in 1862; the *second party* was Andrew Drybrough junior's testamentary trustee; the *third parties* were William Charles Drybrough and his children; the *fourth party* was Robert Drybrough's executor-dative; the *fifth party* was John Robert, Robert Drybrough's eldest son, who had attained majority; and the *sixth parties* were Ralph Melville and Frederick William, Robert Drybrough's remaining children.

The contentions of parties, so far as material to this report, were as follows:—

The fifth party maintained that, upon the death of Andrew Drybrough junior, he and the parties of the sixth part became entitled to payment of one-half of the annuity of £200 equally among them. He further maintained that, in virtue of the Entail Amendment Act, 1848, sections 47 and 48, and the Entail Amendment Act, 1868, section 17,* he was entitled to receive payment from the first party as

¹ Not reported.

* The Entail Amendment Act, 1848 (11 and 12 Vict. cap. 36), enacts:—

Sec. 47. “. . . Where any land or estate in Scotland shall, by virtue of any trust-disposition or settlement or other deed of trust whatsoever dated on or after the first day of August one thousand eight hundred and forty-eight, be in the lawful possession, either directly or through any trustees for his behoof, of a party of full age born after the date of such trust-disposition or settlement or other deed of trust, such party shall not be in any way affected by any prohibitions, conditions, restrictions, or limitations which may be contained in such trust-disposition or settlement or other deed of trust, or by which the same or the interest of such party therein may bear to be qualified, such prohibitions, conditions, restrictions, or limitations being of the nature of prohibitions, conditions, restrictions, or limitations of entail, or intended to regulate the succession of such party, or to limit, restrict, or abridge his possession or enjoyment of such land or estate in favour of any future heir, and such party shall be deemed and taken to be the fee-simple proprietor of such land or estate. . . . Provided always that the rights of the superior of such lands or estate, and of all parties holding securities thereon, and all rights which are held indepen-

Mar. 20, 1912. from 24th February 1911, the date when he attained majority, of a proportion of the trust fund corresponding to the share of said annuity to which he should be found entitled.

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The sixth parties concurred in the contentions of the fifth party so far as they had right and title to do so.

The third parties maintained that William Charles Drybrough was entitled to payment of two-thirds of the annuity of £200 as an alimentary provision for himself, and that the remaining third fell to be paid to the fifth and sixth parties. They concurred in the contention of the fifth party that he was entitled, in virtue of the Entail Amendment Acts, to receive payment as from 24th February 1911 of a proportion of the capital of the trust fund corresponding to one-third of the share of the annuity to which the children of the deceased Robert Drybrough might be found entitled.

The second and fourth parties maintained that the Entail Amendment Acts were not applicable to the interest enjoyed by the fifth party in the trust funds.

The following questions of law were, *inter alia*, stated for the opinion and judgment of the Court:—“(1) Does said annuity, from and after the death of the said deceased Andrew Drybrough junior, and during the survivance of the said William Charles Drybrough, fall to be paid over as follows:—(a) One-half thereof to the said William Charles Drybrough, and one-half thereof to the children of the said deceased Robert Drybrough, or (b) Two-thirds thereof to the said William Charles Drybrough, and one-third thereof to the children of the said deceased Robert Drybrough? (2) Is the said John Robert Drybrough entitled, in virtue of the said Entail Amendment Acts, to receive payment from the first parties as and from 24th February 1911 (date of majority), of a proportion of the capital of the trust fund corresponding to one-third of the share of said annuity falling to the children of the said deceased Robert Drybrough?”

The case was heard before the Second Division on 22nd and 23rd February 1912.

dently of such trust-disposition or settlement, or other deed of trust, shall be as they are hereby reserved entire.”

Sec. 48. “. . . Where any land or estate in Scotland shall, by virtue of any deed dated on or after the said first day of August one thousand eight hundred and forty-eight, be held in liferent by a party of full age, born after the date of such deed, such party shall not be in any way affected by any prohibitions, conditions, restrictions, or limitations which may be contained in such deed, or by which the same or the interest of such party therein may bear to be qualified, and such party shall be deemed and taken to be the fee-simple proprietor of such estate, . . . Provided always that the rights of the superior of such lands or estate, and of all parties holding securities thereon, and all rights which shall be held independently of the deed by which such liferent is constituted, shall be as they are hereby reserved entire.

The Entail Amendment Act, 1868 (31 and 32 Vict. cap. 84), enacts:—
Sec. 17. “. . . Where any moveable or personal estate in Scotland shall, by virtue of any deed dated after the passing of this Act (and the date of any testamentary or *mortis causa* deed shall be taken to be date of the death of the grantor, and the date of any contract of marriage shall be taken to be the date of the dissolution of the marriage) be held in liferent by or for behoof of a party of full age born after the date of such deed, such moveable or personal estate shall belong absolutely to such party. . . .”

Argued for the fifth and sixth parties ;—1. (On the first question)—**Mar. 20, 1912.** The share of the annuity enjoyed by the deceased Andrew Drybrough junior accresced in equal portions to his surviving brother, William Charles, and to the children of his deceased brother, Robert. It was clear from the terms of the deed, and it had been decided in the previous special case, that these parties were entitled to the share of the annuity originally possessed by their father. They were equally entitled to the share which would have fallen to him by accretion had he survived. The rule of law relied on by the third parties was not absolute, and a destination to "children" had been construed as including the issue of the children.¹ The rule in question had only been applied in the case of a bequest of capital and never in the case of an annuity,² and it should not be extended.³ Apart from the question of accretion, on a sound construction of the bond it appeared that the granter intended the annuity to be divided equally *per stirpes* among his children and their descendants. 2. (On the second question)—The fifth party was either a person "in possession," through trustees, of land or estate, within the meaning of section 47 of the Entail Act, 1848, or a person having a "liferent" interest, within the meaning of section 48 of the Entail Act, 1848, and section 17 of the Entail Act, 1868. On either view he was entitled to immediate payment of a share of the capital.⁴ The under-noted authorities were also referred to.⁵

Argued for the third parties ;—1. (On the first question)—Andrew Drybrough's share of the annuity accresced wholly to his surviving brother, William Charles, and the children of Robert had no claim to any portion of it. The general rule was well settled that, where by express provision or by the operation of the *conditio si sine liberis* children of a predeceasing legatee took their parent's share, that share was limited to the original share provided to the parent, and did not extend to or include any share which would have accrued to the parent if he had survived.⁶ There was no distinction in principle between the case of a bequest of a capital sum and the bequest of a liferent.⁷ The cases of *Neville*¹ and *Burnett*⁸ were distinguishable in respect that in each there was an indication of the testator's intention that the representative of the deceased legatee should take *jure accrescendi*. In the present case there was no such indication. 2.

¹ *Neville v. Shepherd*, (1895) 23 R. 351.

² *Young v. Robertson* (2nd appeal), (1862) 4 Macq. 337 ; *Henderson v. Hendersons*, (1890) 17 R. 293.

³ *Burnett v. Burnett's Trustees*, (1894) 21 R. 1040, *per* Lord Kyllachy, at p. 1042.

⁴ *Baxter v. Baxter*, 1909 S. C. 1027 ; *M'Laren on Wills* (3rd edition), vol. 1, p. 304.

⁵ *Macculloch v. M'Culloch's Trustees*, (1903) 6 F. (H. L.) 3 ; *Shiell's Trustees v. Shiell's Trustees*, (1906) 8 F. 848 ; *Baker v. Baker*, (1858) 6 H. L. C. 616.

⁶ *Young v. Robertson* (2nd appeal), 4 Macq. 337 ; *M'Nish v. Donald's Trustees*, (1879) 7 R. 96 ; *Henderson v. Hendersons*, 17 R. 293 ; *Cumming's Trustees v. White*, (1893) 20 R. 454.

⁷ *Fergus and Others*, (1872) 10 Macph. 968 ; *Paxton's Trustees v. Cowie*, (1886) 13 R. 1191 ; *Wilson's Trustees v. Wilson's Trustees*, (1894) 22 R. 62.

⁸ 21 R. 1040.

Mar. 20, 1912. [On the second question these parties concurred in the argument for the fifth and sixth parties.]

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Argued for the second and fourth parties;—1. [On the first question these parties offered no argument.] 2. (On the second question) —The Entail Acts had no application in the circumstances. Section 47 of the Act of 1848 only applied to the case of land or estate on which infestment could be taken, and infestment could not be taken on an annuity. Section 48 of the Act of 1848, and section 17 of the Act of 1868 only applied to "liferent" interests. An annuity was not a liferent, the main distinction, as pointed out by Lord President Inglis in the case of *Kinmond's Trustees v. Kinmond*,¹ being the power to encroach on capital, if necessary, in the case of an annuity.

At advising on 20th March 1912,—

LORD SALVESEN.—[After a narrative of the facts of the case]—The eldest son, Andrew, has now died without issue, and the first question in the case is as to what the trustees are to do with his share of the annuity. It is claimed by the surviving son, William, who, if his claim is sustained, will be entitled to two-thirds of the alimentary annuity. On the other hand, the issue of Robert maintain that they are entitled to an equal share with William, in which case one half of the annuity would be payable to them and one half to William, the surviving son of the testator.

It is settled by a series of cases of which that of *Henderson*² is typical, that "where by express provision . . . children of a predeceasing legatee take their parent's share, that share is merely the original share provided to the parent, and does not cover any part of a legacy, which, by virtue of another clause in the deed, would have accrued, on the failure of the person first instituted to it, to the parent, if he or she had survived." This is a rule of construction merely, and must, of course, yield to the intention of the testator whether actually expressed or only clearly implied. We were referred on behalf of Robert's issue to the case of *Neville*,³ in which it was held that the issue were entitled to succeed to the half of the residue which would have fallen to their mother had she survived the term of payment; although, if their claim had depended merely on the *conditio si sine liberis*, they would only have been entitled to the sixth share originally destined to their mother. This result was arrived at, however, on a construction of the particular trust-deed, which the Court read as plainly implying that the issue of a predeceasing legatee were to take the parent's share whether original or by accretion; and it does not conflict in any way with the prior authorities. The question here is, therefore, whether we can find in the antenuptial bond of annuity any provision from which a similar intention can be inferred.

I have studied the complicated clauses of this bond with some care; but I am unable to find any expression of intention on the part of the testator that his grandchildren were to take any benefit except from the share originally destined to their parent. The main purpose of the trust was to secure an alimentary allowance for his children and the survivors and survivor of

¹ (1873) 11 Macph. 381, at p. 383; Bell's Prin. sec. 1037.

² 17 R. 293.

³ 23 R. 351.

them; and while by later clauses it is made reasonably clear that the issue of a child were to take their parent's place as regards his share (as indeed the Court have already decided), I see no ground for inferring that these grandchildren were to have the same rights as a surviving child of the testator in shares that lapsed by the predecease of other children. It is true that in this particular case we are dealing with the share of an annuity and not with a share of capital as in all the previous cases, but I am unable to see that this makes any difference in the application of the general principle to which I have already referred. I am therefore for answering the first branch of the first question of law in the negative and the second in the affirmative.

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The second question is raised because of a claim made on behalf of the eldest son of the deceased Robert Drybrough to a proportion of the trust fund corresponding to one-third of the share of said annuity falling to the children of Robert Drybrough. This claim is made in virtue of the Entail Amendment Acts, and especially sections 47 and 48 of the Act of 1848, and section 17 of the Act of 1868. In my opinion these sections have no application. The right of the issue of Robert Drybrough is not a right in a liferent interest, but to a share of an annuity. Now a liferent interest and an annuity are two totally different things. A proper liferenter is entitled to the income of the subject liferented and to no more; an annuitant is entitled to have the capital on which the annuity is secured encroached upon if the income is insufficient to meet it; and, on the other hand, he is not entitled to receive any surplus income if the income is more than sufficient to meet the annuity. The Entail Amendment Acts, I think, clearly do not apply to a right of this nature. I propose, therefore, that we should answer the second question in the negative. [His Lordship then dealt with questions with which this report is not concerned.]

LORD DUNDAS.—I do not think there is any great room for doubt as to the manner in which we ought to answer the questions put to us in this special case, except the first. I shall therefore postpone consideration of that question until I have dealt with the other and simpler matters.

Question 2 must, in my opinion, be answered in the negative, upon the plain ground that the Entail Acts referred to have no application in the circumstances. It seems to me that Robert Drybrough's right to share in the annuity can by no reasonable stretch of language be described as a liferent interest. The point is, in my judgment, so clear that I think it is unnecessary to refer to the various cases cited to us where the sections of the Entails Acts have been construed or commented on. The characteristic differences between a liferent and an annuity are perhaps nowhere more pointedly explained than by Lord President Inglis in *Kinmond's Trustees*.¹ [His Lordship then dealt with questions with which this report is not concerned.]

I now revert to the first question. At the close of the discussion I had formed an impression, which subsequent study of the case has ripened into a distinct opinion, that we ought to answer head (a) in the affirmative, and

¹ 11 Macph. 381.

Mar. 20, 1912. head (b) in the negative. The question must depend, primarily at least, upon the intention of Mr Drybrough, as it may be ascertained from the language of the bond of annuity. I am of opinion, as matter of construction, that Mr Drybrough's intention must be held to have been that the annuity was to be paid during its currency (after the death of his wife, who survived him) for behoof of the "children" of the marriage, including in that term the children of deceased children, equally among them *per stirpes*. [His Lordship then referred to the views expressed by the Court in the previous special case as to the construction to be put upon the terms of this particular deed, and continued]—Apart, however, from our previous judgment, my opinion as to the proper construction of this bond, in relation to the state of facts now existing, is that which I have indicated. It seems to me a probable and feasible idea that the annuity should be intended to be applied for behoof of the children and grandchildren *per stirpes*—the *stirpes* receiving benefits throughout in equal proportions; and, as matter of construction, I think the bond is to be read as expressing that idea, though its language is far from perfect.

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If this view is well founded, there seems to me to be an end of the matter. None of the decided cases can afford much, or indeed any, aid to us in arriving at the true meaning and intention of this infelicitously expressed deed; and the principles or, as I should rather call them, rules which have been laid down in certain well-known cases do not, in my judgment, come here into play at all. It is, no doubt, settled that where by express provision, or by the operation of the *conditio*, children of a predeceasing legatee take their parent's share, that share is limited to the original share provided to the parent, and does not extend to or include any share which would have accrued to the parent, if he or she had survived. But if my construction of this particular deed is correct, there is no room or occasion for the application of this rule. There is not anywhere, so far as I see, a direction that grandchildren are to take their parent's share; they are, as I read that document, entitled to participate in the annuity among the "children" of the grantor as a *stirps*, equally with other subsisting *stirpes*—their surviving uncles, or (as matters now stand) their surviving uncle. For the reasons stated, I am for answering the first question in the manner I have indicated.

I should like to add that the principle or rule of law to which I have alluded is one which will not, I apprehend, be readily extended by the Court; and I am not, as at present advised, clear whether or how far it would be held applicable in the case of an annuity, especially an alimentary annuity such as we have here. It has never yet, so far as I am aware, been so extended; and I desire to reserve my opinion upon this point until a case comes before us which raises the matter for decision. I am sorry to find that, as regards question 1, I stand in a minority among your Lordships. But my regret is lessened when I reflect that the matter, as I view it, involves no question of general application or interest; though, of course, its decision may be of importance to the parties concerned.

LORD GUTHRIE.—I agree with what I understand is the opinion of all your Lordships in regard to question 2. As to the first query, whether

half of the proportion of the annuity payable to the deceased Andrew Dry-
brough, the testator's eldest son, accresced to the issue of the deceased
Robert Drybrough, the testator's second son, I agree with the opinion of
Lord Salvesen. I think that accretion did not operate in favour of Robert's
children, who are, in my opinion, entitled only to Robert's original share of
the annuity.

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Lord Guthrie.

This question was not directly before the Court in the last special case dealing with this estate, and the reasoning of the learned Judges, as it appears to me, is directly applicable only to the question of the right of Robert's children to their father's share. Reading Lord Ardwall's opinion as a whole, it seems to me that in the sentence "There is, I think, throughout the deed sufficient indication that the granter intended that there should be equality of provision among the children and the issue of predeceasing children *per stirpes*," his Lordship had only in view an original, and not an accresced, share. On a question of that kind the Court will be easy to satisfy, whereas if grandchildren are to take an accresced share this can only be done where there is express statement or necessary inference.

The question in the last special case turned, as I think, on the sound construction of the sixth clause; the question in the present case seems to me turn on the sound construction of the first clause. That clause runs as follows:—" (First) That the said trustees shall in all time coming during the subsistence of the trust hereby created hold the said annuity in trust for behoof of my said intended wife and the child or children that may be born of our said intended marriage and the survivors and survivor of them, as an alimentary provision for them, exclusive of all rights competent to me therein, whether of *jus mariti*, administration, or otherwise, all which as regards the said annuity are hereby renounced, or, if necessary, assigned to the said trustees and their foresaids: Declaring the said annuity not to be liable for my debts or deeds, nor to the diligence of my creditors." That clause was referred to, but does not seem to me to have been founded on as a ground of judgment in the opinions delivered in the previous special case, on the question there raised for decision as to predeceasers' original shares. Clauses two and three were not dealt with at all. The clauses which were founded on were clauses four, five, and six. So far as issue of children are concerned, these six clauses stand thus. In the first three clauses there is no express reference to issue; in the last three, issue are expressly mentioned. In the latter clauses, on which the Court proceeded, the only question was whether issue being expressly mentioned in the preamble of each of these clauses, the word must not be read in the later and executorial part of each clause; and the Court had no difficulty, on obvious grounds, in coming to the conclusion that issue of children were intended in each case to come in their father's place. When the first three clauses are considered the contrast is striking. As already mentioned, there is no mention in any of them of issue of predeceasing children. The subject-matter of clauses two and three is not applicable, in my opinion, to grandchildren. Clause two operates during the subsistence of the marriage, and provides that the trustees shall pay the annuity to the truster's wife "for behoof of herself and the said child or children." It seems clear that the truster did not contemplate his wife supporting his grandchildren. Then, according to clause three, which

Mar. 20, 1912. operates after the dissolution of the marriage, the trustees are to pay the annuity to the widow "for behoof of herself and such of our children as shall continue to live in family with her, and shall not have been forisfamiliated or otherwise provided for." The reference to children "who shall continue to live in family with her" and to the forisfamiliation of children seems to exclude grandchildren. Clause one remains for consideration. Are the words "or their issue" to be read in after the words "child or children." I say no, first, because, where the truster meant issue of children to come in, he indicated his intention by mentioning issue in each clause where a provision was made in their favour, although the expression was not always repeated, as it should have been, in other parts of the clause; second, because this clause, the first in the deed, occurs immediately before two other clauses from the operation of which issue of predeceasing children are excluded; third, because, if I am right in thinking that the second clause does not cover the case of issue of predeceasing children, that clause explains the scope of the first clause, inasmuch as the "child or children" in the first clause are expressly stated to be the same as the child or children in the second clause, by the use in that clause of the expression "the said child or children," that is to say, the child or children covered by the first clause; and fourth, because if child or children in the first clause covers grandchildren, I do not see how the operation of the clause can be limited to them.

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—
Lord Guthrie.

LORD JUSTICE-CLERK.—I concur in the opinion of Lord Salvesen.

THE COURT answered head (a) of the first question in the negative and head (b) in the affirmative, and the second question in the negative.

FINLAY & WILSON, S.S.C.—THOMAS WHITE & PARK, W.S.—MURRAY, BEITH, & MURRAY, W.S.—T. RANKIN WILSON, W.S.—Agents.

No. 130. GEORGE HERBERT AND OTHERS (Trustees of the deceased George Herbert), Appellants.—*Clyde, K.C.—Hon. W. Watson.*
April 18, 1912. THE COMMISSIONERS OF INLAND REVENUE, Respondents.—*Morison, K.C.—J. A. T. Robertson.*
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Revenue. *Revenue—Duties on land values—Valuation—"Assessable site value"—Minus value—Finance (1909-10) Act, 1910 (10 Edw. VII. cap. 8), sec. 25 (4).*

Held that under sec. 25 (4) of the Finance (1909-10) Act, 1910, the "assessable site value" of land can never be a minus quantity.

Lands Valua-
tion Appeal
Court.
Ld. Johnston.
Lord Salvesen.
Lord Cullen. GEORGE HERBERT AND OTHERS, being the testamentary trustees of the deceased George Herbert, Heathcote, Milngavie, and as such the proprietors of subjects situated at 57/69 Westend Park Street, Glasgow, appealed to the referee (Thomas Binnie junior) appointed in terms of section 34 of the Finance (1909-10) Act, 1910, against a provisional valuation of these subjects made by the Commissioners of Inland Revenue for the purposes of the Duties on Land Values imposed by that Act.

The provisional valuation was as follows :—

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“ III.—PROVISIONAL VALUATION.

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Description of Property	Houses			
Situation	County. City of Glasgow	Parish or Place. Glasgow	No. of Property. 57/69 Westend Park Street	
Name of Occupier . .	Andrew Craig and Others			
Extent	Acres	Roods	Poles	Yards 847 (Nett)
1. Original Gross Value, £			4828	

“ Deductions from Gross Value.

(a) To arrive at Full Site Value.			(b) To arrive at Total Value.		
2	Difference between gross value and value of the fee-simple of the land divested of buildings, trees, &c. .	£4320	3	Feu-duty, ground-annual, or tack-duty	Fixed Charges. 1053
			4	Other perpetual rent or annuity	
			5	Teind, stipend, or other payment in lieu of teind	
			6	Burden or charge arising by operation of law or imposed by Act of Parliament.	
			7	Public rights of way or user .	
			8	Rights of common	
			9	Servitudes.	
			10	Restrictions under covenant or agreement	
			Total deductions		1053
Original full site value 508			Original total value . . .		£3775

“ Deductions from Total Value to arrive at Assessable Site Value.

11. Deductions from gross value to arrive at full site value (as above)	£4320
12. Work executed	
13. Capital expenditure	
14. Appropriation of land for streets, roads, open spaces, &c. .	
15. Redemption of land tax or fixed charge	
16. Release of restrictive covenants	
17. Goodwill or personal elements	
18. Cost of clearing site	
Total deductions	4320
Original assessable site value	Minus £545”

April 18, 1912. The referee refused the appeal, and fixed the original assessable site value (the point in dispute) at minus £545.*

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* The Finance (1909-10) Act, 1910 (10 Edw. VII. cap. 8), enacts:—

“PART I.

“DUTIES ON LAND VALUES.

“*Increment Value Duty.*

“1. Subject to the provisions of this part of this Act, there shall be charged, levied, and paid on the increment value of any land a duty, called increment value duty, at the rate of . . .

“2. (1) For the purposes of this part of this Act the increment value of any land shall be deemed to be the amount (if any) by which the site value of the land, on the occasion on which increment value duty is to be collected as ascertained in accordance with this section, exceeds the original site value of the land as ascertained in accordance with the general provisions of this part of this Act as to valuation. . . .

“Sec. 3. . . . (5) For the purpose of the collection of duty on the increment value of any land under this section, the increment value shall be deemed to be reduced on the first occasion for the collection of increment value duty by an amount equal to ten per cent of the original site value of the land. . . .

“*Undeveloped Land Duty.*

“Sec. 16 (1). Subject to the provisions of this part of this Act there shall be charged, levied, and paid for the financial year ending the thirty-first day of March Nineteen hundred and ten, and every subsequent financial year, in respect of the site value of undeveloped land a duty called undeveloped land duty, at the rate of one halfpenny for every twenty shillings of that site value.

“*Valuation for purposes of Duties on Land Values.*

“Sec. 25 (1). For the purposes of this part of this Act, the gross value of land means the amount which the fee simple of the land, if sold at the time in the open market by a willing seller in its then condition, free from incumbrances, and from any burden, charge, or restriction (other than rates or taxes) might be expected to realise.

“(2) The full site value of land means the amount which remains after deducting from the gross value of the land the difference (if any) between that value and the value which the fee simple of the land, if sold at the time in the open market by a willing seller, might be expected to realise if the land were divested of any buildings and of any other structures (including fixed or attached machinery) on, in, or under the surface, which are appurtenant to or used in connection with any such buildings, and of all growing timber, fruit trees, fruit bushes, and other things growing thereon.

“(3) The total value of land means the gross value after deducting the amount by which the gross value would be diminished if the land were sold subject to any fixed charges and to any public rights of way or any public rights of user, and to any right of common and to any easements affecting the land, and to any covenant or agreement restricting the use of the land entered into or made before the thirtieth day of April Nineteen hundred and nine, and to any covenant or agreement restricting the use of the land entered into, or made on or after that date, if, in the opinion of the Commissioners, the restraint imposed by the covenant or agreement so entered into or made on or after that date was when imposed desirable in the interests of the public, or in view of the character and surroundings of the neighbourhood,

Herbert's trustees appealed under sec. 33 (1) and sec. 42 of the Act to the Judges of the Court of Session named for the purpose of hearing appeals under the Valuation of Lands (Scotland) Acts.

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The referee stated a case which set forth:—

“ DECISION OF REFEREE ON APPEAL.

“ The decision on the appeal is as follows:—

“ I fix and determine—

“ (First)—That the original assessable site value of the land forming the subject of this appeal, being the property Nos. 57 to 69 Westend Park Street, Glasgow, is minus Five hundred and forty-five pounds.

“ But if it should be decided by a competent Court of law that a minus original assessable site value is illegal under the Act above cited, then I alternatively fix and determine—

“ (Second)—That the original assessable site value of the land in question is nothing (or nil).

and the opinion of the Commissioners shall in this case be subject to an appeal to the referee, whose decision shall be final.

“ (4) The assessable site value of land means the total value after deducting—

“ (a) The same amount as is to be deducted for the purpose of arriving at full site value from gross value; and

“ (b) Any part of the total value which is proved to the Commissioners to be directly attributable to works executed, or expenditure of a capital nature (including any expenses of advertisement) incurred *bona fide* by or on behalf of or solely in the interests of any person interested in the land for the purpose of improving the value of the land as building land, or for the purpose of any business, trade, or industry other than agriculture; and

“ (c) Any part of the total value which is proved to the Commissioners to be directly attributable to the appropriation of any land or to the gift of any land by any person interested in the land for the purpose of streets, roads, paths, squares, gardens, or other open spaces for the use of the public; and

“ (d) Any part of the total value which is proved to the Commissioners to be directly attributable to the expenditure of money on the redemption of any land tax, or any fixed charge, or on the enfranchisement of copyhold land or customary freeholds, or on effecting the release of any covenant or agreement restricting the use of land which may be taken into account in ascertaining the total value of the land, or to goodwill or any other matter which is personal to the owner, occupier, or other person interested for the time being in the land; and

“ (e) Any sums which, in the opinion of the Commissioners, it would be necessary to expend in order to divest the land of buildings, timber, trees, or other things of which it is to be taken to be divested for the purpose of arriving at the full site value from the gross value of the land and of which it would be necessary to divest the land for the purpose of realising the full site value.

“ Where any works executed or expenditure incurred for the purpose of improving the value of the land for agriculture have actually improved the value of the land as building land, or for the purpose of any business, trade, or industry other than agriculture, the works or expenditure shall, for the purpose of this provision, be treated as having been executed or incurred also for the latter purposes.

“ Any reference in this Act to site value (other than the reference to the

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ing of the expression "value," which admittedly was used in certain sections of the Act in an artificial and non-natural way, a way inconsistent with ordinary usage. The Act, in fact, created a "statutory value," which had nothing to do with the popular idea of value, and the provisions of the Act for ascertaining that statutory value led logically to the result that in some cases it must be a minus quantity. The object of the Act in imposing increment duty was to tax increase in site value. The value of a site might be something, nothing, or less than nothing. A site was worth less than nothing if, as sometimes occurred owing to burdens and other encumbrances, its owner would willingly pay someone to take it from him. But it was perfectly obvious that there might be degrees of value in the last of these categories. The owner of a site might in one year be prepared to pay £100 to get rid of his site, and in the next year only £50, showing that the site had increased in value by £50; and it was on this increase in value that the Act imposed a tax. On the appellants' view it was impossible to give a consistent construction to the Act, and their position was nothing more nor less than a refusal, based upon preconceived ideas, to follow the expressed purpose of the Act to its logical conclusion. Increment duty was not a tax upon land as the appellants appeared to assume. It was expressly stated that the duty was "a debt due to the Crown from the transferor or lessor."¹ It was a debt to be paid to the Crown, as representing the community, in respect of an increase in the value of a special and technical interest in land, on the theory that that increase had been brought about by the community.

The Court issued its judgment on 18th April 1912.

LORD JOHNSTON—This case raises a general question, of great importance in the administration of the Finance (1909-10) Act, 1910, in regard to the ascertainment of increment value for the assessment of increment value duty. That question is, whether the general provisions of the Act are consistent with a literal, or rather an algebraic, application of its 25th section, by which, in many cases, assessable site value, which is the basis for the calculation of increment value, would be found to be mathematically a minus quantity.

I am not surprised that Mr Binnie, the referee, regarding only the directions of section 25, and holding the interpretation of an Act of Parliament to be beyond his province, considered that his only duty was to apply literally the formula of section 25, and if that application gave a minus result, speaking mathematically, to set down the assessable site value at a minus quantity. But this Court is bound to look deeper, and to consider whether it was the real intention of the statute that this should be a possible result in any case.

It is easy to say that, in talking of value in the ordinary acceptation of that term, a thing may be shown to be worth nothing, but that it is impossible that it should be worth less than nothing. But there is such an appearance of artificiality about the Finance Act, 1910, that the above observation, though not without weight, has not the same effect as it would have in reference to a scheme of legislation which was based less on theoretical

¹ Sec. 4 (4).

considerations. It is in accordance with this that counsel for the Crown April 18, 1912. maintained that "value" as used in the Act never, or perhaps I should say seldom (for words are not always used in the Act with the same meaning), means value as ordinarily understood, but is a mere symbol. In fact, they maintained the purely algebraic interpretation of the Act, and particularly of its 25th section, though I think they found themselves in difficulty when asked to carry this contention to its full logical conclusion.

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The broad question is thus, I think, whether the statute invents and enacts a mere empirical formula, which must be applied literally or mathematically, with no relation to the object of the statute or to its subject-matter. Though, as I have said, on a surface view of the statute, and particularly of section 25, there is some support for the affirmative of this proposition, I have come to be satisfied that when the statute is fully examined there is really no foundation for it, and that this question must be answered in the negative, in accordance both with the intention of the enactment and with ordinary business methods and acceptance of terms.

Before I proceed to consider this question, however, I think it proper to say—inasmuch as it was common ground to the parties, and by no means veiled from your Lordships, that your judgment was, in any event, to be taken before a higher tribunal—that I had at first some difficulty in entertaining the case owing to its statement that the parties were agreed as to the items of value in the provisional valuation. Having regard to the matter in dispute, I should have expected no agreement between or concession by the parties, because it is difficult at first sight to see that agreement on the figures does not involve agreement in the result. But I was satisfied by the explanation of Mr Clyde for the appellants, not contradicted for the Crown, that the meaning of the parties and of the case was, assuming the figures in question to be correctly arrived at in terms of the 25th section of the Act, to ask the Court to determine whether the Act required the referee, in applying these figures, to come to the result he did, and did not entitle and require him to come to the alternative result which he has stated. And it is on this footing that I entertain and propose to consider the case.

I have no hesitation in saying that the question at issue cannot be determined by attention confined to any one section of the statute in question, but that the scope and object of the statute and its whole provisions must be regarded. And I am all the more impressed with this, that the section to which we are asked by the Crown to confine attention and which we are asked to apply literally, is a section providing merely the machinery for ascertaining a certain value which is required to give effect to the provisions of the assessing clauses, and is not itself an assessing clause.

The first observation, then, that occurs to me is, that the statute is a taxing Act, intended to raise revenue by the assessment of something which I may describe generally as the increase of the value of an interest in land. I use the word interest advisedly, because it is not property in any ordinary sense, but a statutory interest—that is, an interest carved by the statute out of property and hitherto unknown in practice and to the law—the increase in value of which is to be assessed. I think that this observation is true generally, though there are differences in detail between (1) increment value duty; (2) reversion duty; and (3) undeveloped land duty.

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I have no hesitation in saying that the question at issue cannot be determined by attention confined to any one section of the statute in question, but that the scope and object of the statute and its whole provisions must be regarded. And I am all the more impressed with this, that the section to which we are asked by the Crown to confine attention and which we are asked to apply literally, is a section providing merely the machinery for ascertaining a certain value which is required to give effect to the provisions of the assessing clauses, and is not itself an assessing clause.

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April 18, 1912. Increase of value is in ordinary acceptation the increase of something actual and therefore positive, and not of something theoretical and therefore possibly mathematically negative. The statute intends to provide that the State shall have in cash a share of an increase which would otherwise go actually or potentially into the pocket of the statutory owner. The tax is made applicable to a special interest in property. And it is the increment of this special interest in property which is for the future to be the subject of this taxation. I think, having regard to the whole scope of the statute, that its plain intention was to assess something real, which on a fair interpretation of the Act could be assumed as capable of producing the tax, and not to assess an algebraic symbol of no real value, with the result of extracting the tax from funds derived from totally different sources. Though, until I examine the statute in detail, it is difficult to define the conception which is designated assessable site value, it may conduce to make my meaning more distinct if I say that I think it will be found to be the interest of the statutory "owner" in the bare land.

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As the Act is so entirely evolved out of theory, it may not be inappropriate, in approaching its interpretation, to consider what that theory appears to have been, and its bearing. I think it was (and I deduce this solely from a consideration of the statute itself and not from outside information) very much this, that the value of bare land, or of land divested of the results of human labour and expenditure, is increased, not by the action of the owner, but by the action of circumstances, and that therefore the State may, without injustice, exact a share of the increase. But this postulates something which could be shared, and therefore something positive. I find it difficult to conceive of the State sharing in an increase which could only be measured by how much the value of a thing which was worth less than nothing approached more nearly to be worth something, though still worth less than nothing. And if it is maintained that this was the intention and effect of the statute, it must, I think, be established by very express enactment or irresistible implication.

I was struck with the comparison instituted by Mr Clyde between credit and value, though I prefer to use it in my own way. If a man's liabilities exceed his assets, he is insolvent. The value of his estate is nil, and his credit exhausted. If the value of his assets improves, his credit, though it may not be good for much, has, eliminating the personal equation, certainly risen, yet his estate may still be worth nothing, inasmuch as an increase in value is an increase in positive value, and not an increase in the personal credit of the owner. And so it seems to me, unless we are tied up by the statutory use of symbols having an artificial and not a real meaning, that that which has no positive value is, in the estimation of the statute, worth nothing, and that until it comes to have a positive value it is still worth nothing or is of no value. As it cannot be itself assessed to derive from it a productive tax, so its theoretical approach to a positive value cannot be assessed to derive from it a productive tax.

How, then, do the provisions of the statute stand? Do they square with the practical or the theoretical—with value as a fact or value as a symbol? Confining attention meantime to increment value duty only, the Act

(section 1) enacts that there is to be charged "on the increment value of April 18, 1912. any land a duty called increment value duty" (1) on the transfer on sale or on the grant on lease of the land, (2) on its transmission by death, and (3) on its conventional periodic transmission, when it is held by a body having continuity of existence. It is unfortunate that the word "land" throughout the Act has seldom the same meaning in two consecutive paragraphs, and that the interpretation clauses (sections 41 and 42) studiously avoid defining what it is, and content themselves with saying what it is not. I take, therefore, the word as it is found in the Act, and do not attempt to discriminate, where the Act has not done so. The Act (section 2 (1)) defines what is meant by "the increment value" of any land. It "shall be deemed to be the amount, (if any) by which the site value of the land, on the occasion on which increment value duty is to be collected as ascertained in accordance with this section, exceeds the original site value of the land as ascertained in accordance with the general provisions" of section 25. For convenience the site value on the occasion when increment value duty is to be exacted may be termed "occasional site value" to distinguish it from "original site value," and site value throughout the Act is (section 25) short for assessable site value. I do not think that the definition of increment value in section 2 (1) can be fairly read without concluding that the statute contemplates, in speaking of "exceeds," an excess of value at one point of time over value at another point of time of an actual and practical nature, and not an excess of value of a theoretical or purely mathematical nature. And this is confirmed so far by the fact that section 2 (2), which provides how occasional site value is to be ascertained, makes the basis of that value (in the case of actual transmission at any rate) real value, either actual consideration for transfer on sale or lease, or actual valuation at death, through subjecting that real value to the same deductions as are to be made under section 25 for the purpose of arriving at original site value.

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The next inquiry is whether section 25, which provides for the ascertainment of original site value, and affects, by reference, the ascertainment of occasional site value, compels us to the conclusion that though both occasional site value and original site value may be themselves nil, there may yet be an assessable increase of occasional site value over original site value by reason that the site value has approached more nearly to being worth something, though it is still worth nothing.

Turning, then, to section 25, it is found, unfortunately, to be couched in words which conceal rather than disclose its meaning. Gross value, full site value, total value, assessable site value, in themselves convey no certain meaning. And indeed they may at first sight be not unreasonably regarded as mere symbols, giving colour to the contention that the section sets to the Commissioners a problem, to be worked out algebraically and to an algebraical result. But when the subsections are examined more carefully, it is found that gross value, full site value, total value, and even assessable site value, to the ascertainment of which the first three lead up, really mean, though they do not express, something definite and perfectly intelligible, and that a something which is always based on a real or positive value as understood when ordinary language is used, as thus :—

April 18, 1912. Section 25 (1) begins with "gross value." I think this will be found to be simply hypothetical market value, in the eyes of a buyer who looks on the subject as it presents itself to him, and knows nothing of its encumbrances, burdens, and restrictions. It is a hypothetical quantity indeed, and entirely dependent on the valuer's frame of mind, for no subject ever enters the market on these terms. But it contemplates value in the ordinary acceptance of the term.

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Section 25 (2) proceeds to "full site value." This is a mysterious term. But I think it is really meant to describe the present value of the bare land, still disregarding encumbrances, burdens, and restrictions. It is made of no subsequent use in itself, but only for the amount of the deduction from gross value which is required to be made in order to arrive at it. What it really is, stripped of its verbal disguise, is the present value of the site, still regarded as unencumbered, unburdened, and unrestricted, but also as divested of the result of man's labour and expenditure of capital. I do not think I go far wrong in saying that this would be popularly, and at the same time correctly, and more briefly described, as the present prairie value. And I venture to accept counsel's expression for it, divested value. That, again, must be something positive, something based on real value. For though there may be pieces of land in this country worth nothing, there is not conceivably any such worth less than nothing.

But the way full site value is got at requires to be noticed. It is defined, to read the subsection short, as gross value minus the difference between gross value and divested value, that is, as divested value. But, as will be afterwards seen, it is not divested value that is afterwards wanted or used, but (though a roundabout way is taken to get at it) gross value minus divested value, or the proportion of the gross value of the subject which is attributable to man's labour and expenditure, and not to the mere present prairie value of the land. Still both full site value, that is, divested value, and gross value minus full site value, that is, the added value which is the result of man's handiwork, are real values, and if they be not nil, as one or other or both may possibly be, must be positive values. But the section appears to me to put the cart before the horse. The valuer cannot possibly estimate directly what addition to bare site value has been made by man's exertions. The valuer must in practice first apply himself to find out, according to his own estimate, the full site or divested value, and then the difference between gross value and full site value is a mere question of subtraction.

Then comes section 25 (3), "total value," in itself expressive of nothing, but intended to mean, though it does not describe, nothing more nor less than real market value, *i.e.*, the market value of the subject as it would go into the market at the time with its title-burdens and restrictions, but with such enhancement as man's labour and expenditure may have effected. For it is defined to be gross value as diminished by the incidence of fixed burdens and restrictions. That, again, contemplates a real tangible value. And though it may not be a positive value, it can never conceivably be less than nil.

For gross value, according to the definition (section 25 (1)) is *ex hypothesi* a market value. Total value is gross value after deducting the amount by

which gross value would be diminished if the subject were sold subject to April 18, 1912. fixed charges and restrictions, and is therefore real market value, as that would be found in practice. I could conceive a case in which gross value was substantial, but in which total value might be nil, owing to the incidence of intolerable burdens and restrictions. But I cannot conceive of total value, which is just real market value, being stated as a minus quantity. Market value may be nil, but it cannot be minus anything. We were reminded of a case recently before the Division of the Court in which I usually sit—that of *Stirling Crawford of Milton*. It is not reported, as the Court found that there was no proper contradictor, and that they could not *ex proprio motu* decide an important point which the papers appeared to raise. But the circumstances are useful as illustrating the matter under consideration. They may indeed at first sight be used as indicating that real market value may be a minus quantity. For £5000 was paid to get rid of the property with its fixed burdens. But this is only at first sight, and was not really the position. The property was overburdened with its fixed charges, but was not thereby worth minus £5000. It was simply worth nil, and the £5000 was paid for release from the personal obligation which the holders had incurred for the fixed charges. But in applying this statute, and particularly sections 2, 3, and 25, the element of personal obligation is entirely disregarded. The reference to the case, therefore, only illustrates the self-evident proposition that property in land subject to an excessive fixed charge, though it may be worth nothing, cannot *per se* be worth less than nothing. A thing is only worth what the market will give for it, and it will give nothing for a property which is overburdened. If it is worth a minus quantity, it must be on the hypothesis that the owner must pay something to get rid of it. But under the Scottish system of land laws, with which alone we are concerned, a man will pay nothing to get rid of the property, though he may pay something to get rid of a personal obligation connected with the property which he has undertaken. If a property worth £1000 is burdened with a feu-duty of £100, it is overburdened by at least £60 a year. It is therefore valueless. No one will give a sixpence for it. But unless the owner, by the form of and completion of his title, has come under a personal obligation for that feu-duty, he need not and will not pay to be rid of the property, and with it of his obligation. It is only by mixing up the real and the personal element in relation to the subject that the conception of a minus value can be reached. And in interpreting the statute we have nothing to do with the personal obligation resulting from contract or completed title. The total value of land, then, as defined by the statute, or the true market value, can never be stated as a minus quantity, though it may sometimes be nil.

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The provisions already considered were believed to be necessary to arrive at assessable site value, whether original or occasional. But let me recapitulate what they really mean. (1) Gross value is nothing but the hypothetical market value of a property neither encumbered, burdened under its title, nor restricted. (2) Full site value is nothing but the present value of the bare site, unencumbered, unburdened, and unrestricted. (3) Total value is market value in its ordinary acceptation.

I think that assessable site value will also be found to be equally suscep-

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Before approaching section 25 (4) there are two things to note. The first and most important appears to be the use of the term "assessable" as qualifying "site value." Though site value is an artificial conception, the phrase "assessable site value" clearly indicates that the site has a value which is assessable, and a minus value never can be that. The assessable value may be nil, but if there is any virtue in the use of words, it can never be a minus quantity. It is true that the tax is not to be laid on the assessable value simply. It is to be laid on the excess (if any) of the occasional assessable site value over the original assessable site value. If the original cannot be a minus quantity, still less can the occasional site value be so. For if one turns back to section 2 (2) of the Act, it will be found that the occasional site value is to be ascertained in the same way as the original, but by substituting real values, where available, for the estimated values of section 25. The difference between the two may be nil, but if neither of them can be a negative quantity, the difference between them cannot be a negative quantity.

Another thing is this, the Act has been drafted with reference to English law and the English system of land tenure, and it has been thought sufficient in applying it to Scotland to insert a Scottish interpretation clause (section 42). But there is a practice in dealing with land in Scotland, which, as it appears to me, considerably affects the aim of the framers of this Act in its application. Something of the same sort may occur in England, but I know too little about the English system to venture the assertion. In Scotland in a great many feuing transactions, the fixed burdens in the nature of feu-duty or ground-annual are not laid on the bare land as at the time the feu is taken nor have they any relation to the then value of that bare land. They are laid on after buildings are erected, and they bear a relation, not to the bare land as originally taken up, but to the land and buildings, a relation which is one of the arcana of the building trade, but of which it may generally be said that the feu-duty, &c., as laid on, are as much as the land and buildings will carry, and yet allow the builder to get a price which will refund him his outlay in building. His profit is in the enhanced feu-duty, &c., which is a saleable asset to him. I think that this fact disturbs somewhat the result of applying the scheme of the Act to Scotland, and not improbably accounts for the referee having on a literal application of section 25 brought out a minus result. It is clear that a large half of the actual feu-duty in the present case is not secured by the site.

In considering now section 25 (4), which defines assessable site value, I think it convenient to assume a very simple case such as the present, where the only fixed charge is a feu-duty of £52, 13s. 9d., which, taken by the referee at twenty years' purchase, gives the capital value of £1053, as stated in the case. There appear to be no factors in relation to this property which call for the application of the many other detailed deductions which complicate section 25 (4). But for determination of the question of principle involved in this case, the present simple instance is as good as the most complicated.

It will be found, I think, that assessable site value is really, divested of its statutory trappings, just the value of the interest in the bare land of the statutory "owner." For the statutory definition of "owner," see sections 41 and 42. Assessable site value for the purposes of this case is defined, section 25 (4) (a), as the total value of the land after deducting from the total value, in the first place, the same amount as is to be deducted from gross value to arrive at full site value, and after deducting, in the second place, other items which when examined are found to be of the same character as the items which go to make up the said amount, for the deductions under section 25 (4) (b), (c), and (d) are all, like the deduction under section 25 (4) (a), allowances in respect of man's labour or expenditure. The deduction, section 25 (4) (e), the parties were agreed, is in practice negligible. When in the definition of assessable site value in section 25 (4), their real meanings are substituted for "total value," and for the amount "to be deducted from gross value to arrive at full site value," a simple result, notwithstanding the complexity and circuitry of the statutory definitions, is arrived at in the present case, and equally, I think, in every case. For original assessable site value is found to be full site value under deduction of the value of the title-burdens, or the present value of the bare site under deduction of the present value of the title-burdens, and that is, as I have said, just the value of the statutory owner's interest in the bare site. When divested of the nomenclature with which the statute has clothed it, that is really the result. If there are other deductions to be made under section 25 (4) (b), (c), and (d), they only go still further to reduce the assessable site value by further deductions from the full site value. But this result seems to be the key to what was the idea at the root of the statutory scheme.

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That scheme recognises that the title-burdens or fixed charges as by way of feu-duty, &c., are really an estate in the land, which belongs to someone other than the "owner" as defined by the Act (sections 41 and 42). It aims at assessing the increment of site value in the hands of the "owner," on the assumption that you can really sever the value of land from that of buildings or improvements on it, after the land has been built upon or improved. But it firstly recognises, and consistently, that the site value in the hands of the "owner" is only so much of the value of the bare site as remains after deducting therefrom the value of the interest in the bare site of the holder of the title-burdens or fixed charges—that is, in the present case, of the superior. Accordingly the site value is just the value of the "owner's" interest in the site. That may be nil, but it cannot be a minus quantity. It is conceived of as an assessable value. An assessable value must be a positive and not a negative value. Though the definition of site value is more complicated than that of gross value, full site value, and total value, it is seen, when bared, to represent an idea, just like those involved in gross value, full site value, and total value, which requires the term value to be used in its ordinary acceptation. Now, it may be that as here the value of the owner's interest in the site is reduced to nil by reason of the predominating value of the title-burdens or fixed charges. It may in time come nearer to meeting the fixed charges and yet still be nil. But I cannot find ground in the intention and scope of the statute for the

April 18, 1912. implication that the value of the owner's interest is here to be stated not at its true value, viz., nil, but at the amount of the deficiency to meet the fixed charges or at a minus quantity.

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To call such minus quantity an assessable value, and subsequently to assess the difference between two such minus quantities, would not be to extract revenue from site value, but from man's development of the site by his expenditure of labour and capital. This would be entirely against the conception of the Act. To reach such conclusion I see no warrant for giving to value a symbolic meaning, involving a purely mathematical conception, and for departing from its ordinary acceptance.

If anything was wanted to show that the statute never contemplated a minus value, it is sufficient to refer to one of the provisions for collection of increment duty (section 3 (5)). As a relief to the owner, the increment value, as otherwise ascertained under the statute, is to abate by ten per cent of the original site value. Working mathematically, with minus values, the fantastic result would be attained of an increase instead of an abatement.

I have confined attention hitherto to increment value duty, but it is not out of place to refer to the provision (section 16) regarding undeveloped land duty. That duty is to be levied "in respect of the site value of undeveloped land" "at the rate of one halfpenny for every twenty shillings of that site value." It is not conceivable that the expression contemplates anything but a positive value. And it does not detract from this inference that, in a subsequent section (17 (1)), exemption from the duty is provided where the site value of the land does not exceed £50 per acre.

I conclude, therefore, that according to the true intent and meaning of the Act the assessable site value of the appellants' "land" in the sense of the statute is not a minus quantity, but nil, as representing its real value.

LORD SALVESEN.—I agree that we must sustain the appeal. I proceed mainly on the ground that the language of the statute must be construed according to the ordinary and popular meaning of the words used; and that the word "value" cannot, according to this rule of construction, include a minus quantity. If the simple case be taken of a piece of ground having been feued at a rate which, when capitalised in the ordinary way, largely exceeds the market value of the land as at the date when the Act comes into operation, it would follow that if twenty years later the value of the land had increased, but still not to an extent sufficient to cover the burdens upon it, the owner of the land would escape taxation on this increment. But I cannot see that there is any injustice in this, because, during the whole period, he must have been meeting a large part of the annual burdens out of his personal estate; and the effect of applying the provisions of the Act to his case would be to impose upon him a further charge in respect of an increment in the value of the land from which he had taken no actual benefit. The Act appears to me to be opposed to the notion of so dealing with the owner of an overburdened estate. The idea that underlies all its provisions is that an increment of value, which arises not from any expenditure on the part of the owner but from the requirements or increased prosperity of the community of the district, shall be shared in by the State

to the extent of one-fifth ; but this proceeds on the assumption that the owner has actually or potentially put money in his pocket. Had it been intended that the word "value" should include a minus quantity, and that the valuers appointed by the Act were to proceed as the valuator in this case has done, I think this ought to have been clearly stated ; but I cannot gather from the sections cited any intention that the word "value" as therein used was to have a mathematical or technical meaning as distinguished from its ordinary signification. On the contrary, I think it is assumed throughout that the owner of the land from whom increment value duty is to be collected on the occasion of a transfer is receiving some consideration on the transfer ; whereas if the contention of the Crown were sound he would be liable to be taxed although he was actually paying a sum to get rid of the personal obligation which he has undertaken to the previous owner.

April 18, 1912.
 Herbert's
 Trustees v.
 Inland
 Revenue.
 Lord Salvesen.

I content myself by stating thus shortly the main ground on which I agree with the decision that your Lordship has proposed ; and I think it unnecessary, in view of the exhaustive examination you have made of the general scheme of the Act, to do more than express my general concurrence in your Lordship's criticisms.

LORD CULLEN.—By the Finance (1909-10) Act, 1910, the Commissioners of Inland Revenue are directed to "cause a valuation to be made of all land in the United Kingdom showing separately the total value and the site value respectively of the land," &c. What is meant by "total value" and by "site value" respectively is defined in the 25th section of the Act. Two other values are defined in that section, viz., "gross value" and "full site value," but neither of these falls to be shown by the Commissioners' valuation.

"Total value" may be said to represent the market value of the land as it stands, that is to say, as enhanced in value (or otherwise) by buildings or other heritable accessions to the *solum*, and burdened with any fixed charges and restrictions which may affect it. "Full site value" is the value of the *solum per se*, regarded as divested of any buildings or other heritable accessions to it, and also as free from any encumbrances, fixed charges, or restrictions which may affect it. "Assessable site value" is the value of the *solum*, regarded as divested of buildings or other heritable accessions, but as burdened with its fixed charges and restrictions, if any.

The "assessable site value," therefore, where there is a burden of fixed charges on the land, is not the value of the land in itself, but the value, if any, of the land as so burdened. In many cases there will be a net residual value. But in others there will be none. This may happen where the fixed charges have been laid on the land as enhanced in value by buildings erected upon it and are such as the enhanced value will carry. If the value of the enhancement is eliminated, as section 25 directs, while the fixed charges are treated as remaining to their full amount as a burden on the divested site, it will often happen that the amount of the charges is greater than the actual value of the divested site, as in the case of a feuing stance of which the actual feuing value is, say, £100 per annum, but which in the statutory calculation of "assessable site value" falls to be viewed as

April 18, 1912. **Herbert's Trustees v. Inland Revenue.**
Lord Cullen. burdened with a feu-duty of £150 per annum. This fixed charge, if regarded as a charge only on the divested site, could never have a greater value than that of the site carrying it. But the terms of section 25 involve that, in the process of fixing "assessable site value," such a charge is to be taken at its value as secured on the undivested site. The estimate of "total value" is to allow for the burden of the fixed charge as so secured. And then there falls to be deducted from total value, in order to arrive at "assessable site value," any depreciation arising from a supposed divesting of the site. Thus, in the present case, the value of the feu-duty is stated at £1053, while the value of the divested site (full site value) is stated at £508, showing a difference of £545, being the deficiency in the value of the land *per se* to meet the feu-duty so estimated.

Applying the definitions in section 25, the valuer in the present case is put to do a sum in subtraction, the upper figure being £3775 of total value, while the lower is £4320, representing the statutory deductions from total value. The difference is the said sum of £545. The question is whether the intendment of the statute is that the resulting valuation shall be written down simply as nil, or shall be written down as a minus quantity (minus £545), being the amount by which the statutory deductions, as estimated by the valuer, exceed the total value, or, to state it otherwise, the amount by which the value of the land in itself falls short of its burden of feu-duty. Either mode will show an absence of any positive value in the "assessable site value." The latter will show how far the "assessable site value" falls short of positive value.

I am not aware of any other statutory system of land valuing for the purposes of taxation in which valuation at minus quantities holds place. It may be, however, that the purposes of the present statute require the use of minus quantities. The respondents so contend. They say that the increment value duty is imposed in respect of appreciation in the value of "any land" (section 1); that "land" here means the land *per se*; that land overloaded with a feu-duty or other fixed charges (as estimated in terms of the statute) may appreciate in value while the assessable site value, although progressing upwards, continues to be of no positive worth; and that if, in such cases, the original assessable site value be stated simply as nil, the appreciation of the land *per se* will not be disclosed. This is true, assuming the respondents to be right in saying that the intendment of the statute is to tax a landowner on the appreciation of the value of his land site *per se*, whatever its burden of fixed charges whereby it may be and remain a valueless asset in his hands. The statute does not contain any definition of the word "land" as used in section 1. It does not direct that where the total value is less than the deductions to be made from it in reaching "assessable site value" the resulting valuation is to be stated as a minus quantity; and while the respondents say that, mathematically, this is the necessary result of a direction to subtract a larger amount from a smaller, and while the referee agrees with them, I have not been able to satisfy myself that this view is in accordance with the intendment of the statute.

While the word "land," as used in section 1, is not defined, it is clear that liability for increment value duty is to be ascertained by comparing

the original "assessable site value" with what may be called the "occasional site value" as ascertained at a subsequent period. Now, if the intendment of the statute were that the incidence of the increment value duty should be determined by comparing the value of the land *per se* as originally ascertained with its value *per se* as ascertained subsequently, I do not clearly see why the factor for the purposes of comparison should not have been the statutory "full site value." For that is the value of the land *per se*, regarding it as divested of buildings or other heritable accessions and as free from all incumbrances, charges, or restrictions. To illustrate this by reference to the figures in the present case,—if, by appreciation in the value of the land *per se* to the extent of £100 the referee's minus quantity were to rise from minus £545 to minus £445, the full site value, were it available for purposes of comparison, would show a similar increase. As it is, however, the statutory factor for comparison is not the value of the land *per se* (full site value) but the assessable site value. This represents the position in point of value of the loaded site. The Commissioners' Valuation-roll is not to be a roll showing the value of the land in itself. And it is the loaded site, apparently, which has to appreciate in value before increment value duty becomes exigible. Now, if words are to be used in their ordinary sense, I do not very well see how, in the hands of the landowner who is to be taxed, the loaded site can be said to appreciate in "value" until it comes to have, at least, some positive value. Until then, any appreciation in the value of the land *per se* will accrue to the holder of the excessive feu-duty or other fixed charge by enhancing the value of his security, and, consequently, the value of the fixed charge. The site owner, *qua* site owner, will continue bankrupt. The holder of the feu-duty or other fixed charge is not, however, brought under taxation by the statute in respect of such a betterment of his property. The respondents' contention is that the owner of the site falls to pay for the betterment, which does not provide him with a valuable asset but only goes to relieve, to some extent, his bankrupt state. This is, *a priori*, an improbable scheme of taxation, inasmuch as it involves that one man shall be taxed in respect of an increment in the value of property which, so far as any positive worth goes, accrues wholly to another. And while I am sensible that the construction of the statute under consideration is attended with much difficulty, I have been unable to extract from it this anomalous result.

I accordingly agree in the conclusion at which your Lordships have arrived.

THE COURT recalled the first decision of the referee which fixed the original site value of the subjects at minus £545, and affirmed the second or alternative decision fixing it at nil.

CONNELL & CAMPBELL, S.S.C.—SIR PHILIP J. HAMILTON GRIERSON,
Solicitor of Inland Revenue—Agents.

April 18, 1912.
Herbert's
Trustees v.
Inland
Revenue.
—
Lord Cullen.

No. 131.

MRS AGNES EASTON OR EUMAN, Pursuer (Respondent).—

T. G. Robertson.

May 14, 1912.

JAMES DALZIEL & COMPANY, Defenders (Appellants).—

*W. J. Robertson.*Euman v.
Dalziel & Co.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), Second Schedule, (17) (b)—A. S., 26th June 1907, sec. 17 (h)—Stated case—Refusal of arbitrator to state a case—Accident arising out of and in the course of the employment—Form of question of law.

In arbitration proceedings under the Workmen's Compensation Act, 1906, the arbitrator found that a workman's death resulted from injuries sustained by him owing to a fall from a ladder, and awarded compensation. A medical certificate which was produced stated the cause of death to have been appendicitis-peritonitis. The arbitrator refused a minute for the employers craving him to state a case for the opinion of the Court on the question whether the death of the deceased "was the result of an accident arising out of and in the course of his employment," on the ground that the question was one of fact and not of law.

Held that the proper question was "whether there was evidence upon which it could competently be found that the death of the workman was the result of an accident arising out of and in the course of his employment"; and case *remitted* to the arbitrator to state a case on this question.

1ST DIVISION.
Sheriff of the
Lothians and
Peebles.

ON 14th May 1912 James Dalziel & Company, manufacturers Walkerburn, presented a note to the Court in which they prayed for an order on Mrs Agnes Easton or Euman to show cause why a case should not be stated by the Sheriff-substitute of the Lothians at Peebles (Orphoot) on appeal from a judgment which he had delivered as arbitrator in proceedings under the Workmen's Compensation Act, 1906, in which Mrs Euman claimed compensation in respect of the death of her husband while in the employment of the appellants.

The appellants set forth that it had been admitted or proved in the arbitration proceedings, *inter alia*, that, on 18th July 1911, Euman, whilst engaged in their employment, fell from a ladder, sustained certain injuries, and was found to be suffering from general shock and from a local injury known as "staved ankle"; that he was confined to bed for three weeks; and that in the fourth week on 15th August, he died, the cause of death being certified to be appendicitis-peritonitis.

On 12th January 1912 the Sheriff-substitute pronounced certain findings, which included the following:—"(1) That on 18th July 1911 Robert Euman, mill foreman, Walkerburn, was in the employment of the defenders as a millworker in their mills at Walkerburn when he met with an accident arising out of and in the course of his said employment, through a ladder on which he was standing accidentally slipping, whereby he was thrown to the ground and injured; (2) that the said Robert Euman died at Walkerburn on 15th August 1911; (3) that his death resulted from the injuries he received by said accident"; and awarded compensation.

The employers lodged a minute craving the Sheriff to state a case for the Court of Session on the following question of law:—"Whether the death of the said Robert Euman was the result of an accident

arising out of and in the course of his employment within the mean- May 14, 1912.
ing of the Workmen's Compensation Act, 1906?"

They also caused a draft stated case to be presented to the Sheriff- Euman v.
substitute for his signature containing the following questions of law : Dalziel & Co.
—" (1) Whether the arbitrator was entitled to draw from the facts stated the inference that the peritonitis which caused the death of the deceased was the result of his being confined to bed with a staved ankle? (2) Whether the death of the deceased was caused by personal injury by accident arising out of and in the course of his employment?"

The Sheriff-substitute refused to state a case or sign the draft case, and certified the following reasons for his refusal:—" (1) That the questions of law stated in the draft stated case submitted to me are not raised by the admissions made or the facts proved before me; (2) that the only question raised in this arbitration is, Did the death of Robert Euman, husband of the pursuer, on 15th August 1911, result from personal injuries sustained by him in the accident which happened to him on 18th July 1911? and (3) that that question is a question of fact."

The employers craved the Court to pronounce the required order for these reasons:—

"Because the question whether the death of the deceased did or did not result from injury by accident arising out of and in the course of his employment, under the conditions found proved as above, is a question of law and not of fact.

"Because there was no evidence that the death of the deceased resulted from the injuries he received by the accident on 18th July aforesaid."

The case was heard before the First Division (consisting of the Lord President, Lord Johnston, and Lord Skerrington) on 14th May 1912.

Argued for the respondent;—The Sheriff-substitute had rightly refused to state a case on the question whether the death of the deceased was the result of an accident arising out of and in the course of the employment, as this was a question of fact, not of law. If the appellants desired to raise the question whether there was evidence before the Sheriff-substitute to support his findings, the question should have been in the form suggested by Lord Atkinson in the House of Lords in the case of *Jackson v. General Steam Fishing Company*,¹ viz., "Was there evidence before the Sheriff-substitute upon which he might reasonably have found that the accident by which the deceased met his death arose out of and in the course of his employment." This was quite a different question from that which had been proposed to the Sheriff-substitute, and the Court should not now direct him to state a case on a question which had not been raised before him.²

Argued for the appellants;—It was the duty of the respondent to establish, either by direct evidence or by legitimate inference from the facts proved, that the death resulted from an accident arising out of and in the course of the employment.³ This duty had not been

¹ 1909 S. C. (H. L.) 37, at p. 41.

² *Rae v. Fraser*, (1899) 1 F. 1017; *Hobbs & Samuels v. Bradley*, (1900) 2 F. 744.

³ *Hawkins v. Powell Tillery Steam Coal Co., Limited*, [1911] 1 K. B. 988, *per Cosens Hardy*, M.R., at p. 991.

May 14, 1912. discharged. The question which was raised in the present case was whether the facts proved could reasonably support the findings of the arbitrator, and this was a question of law on which the appellants were entitled to have the opinion of the Court. Though the question had not been put in this precise form to the Sheriff it was his duty to have adjusted the stated case so as to bring out the true question. Even in the form proposed to the Sheriff the question was not incompetent, for questions in that form had been admitted and considered by the Court in previous cases.¹

Euman v.
Dalziel & Co.

LORD PRESIDENT.—This is an application to us to ordain the Sheriff to state a case. He has refused to state a case when asked, and the application is made in accordance with the provisions of the Act of Sederunt of 26th June 1907 which deal with that matter.

The claim is at the instance of the widow of a workman who died. He died, it seems, of peritonitis—appendicitis-peritonitis, I think, is the form of the certificate, which I suppose means that the cause of death was appendicitis, or otherwise inflammation of the appendix, and that that inflammation had spread to the peritoneum so that there was inflammation of the peritoneum as well as of the appendix. Now, the accident which he had met with—using the word “accident” in the popular sense of the word—was that he had fallen from a ladder; and one can see easily enough that the question that is really raised between the parties is whether the death was due to the accident or was not. The Sheriff-substitute, acting as arbitrator, disposed of the matter by the following findings:—(1) That the workman “met with an accident arising out of and in the course of his employment, through a ladder on which he was standing accidentally slipping, whereby he was thrown to the ground and injured; (2) that the said Robert Euman died at Walkerburn on 15th August 1911; and (3) that his death resulted from the injuries he received by said accident”—and that is all that the interlocutor tells us about the accident; the rest of the case concerns the adjustment of the compensation.

Now, as your Lordships well know, it has been conclusively settled by decisions of the House of Lords and of this Court, that, although such appeals are by statute limited to questions of law, nevertheless they are competent when the question is whether such findings as these can be supported upon the evidence submitted, for that has been held to be a question of law. The criterion is whether anyone could reasonably have come to that conclusion. It has been said more than once that this criterion is, if not exactly the same, at least strictly analogous to the criterion we are in use to apply where we are asked to direct a new trial on the ground that the verdict of a jury is contrary to evidence. It is not a question of whether the decision is right or wrong, but a question of whether there was evidence led upon which the decision can be supported. I think as soon as that position is laid down, it is quite impossible for us to direct our minds intelligently to the question unless we have before us a stated

¹ Coe v. Fife Coal Co., Limited, 1909 S. C. 393; Blakey v. Robson, Eckford, & Co., Limited, *supra*, p. 334. The Lord President referred to Millar v. Refuge Assurance Co., Limited, *supra*, p. 37.

case which will give us a description of what the evidence that was led May 14, 1912. was. Accordingly, we have more than once insisted either upon cases ^{Euman v.} being stated, or upon cases being modified which were inadequate in their ^{Dalziel & Co.} statement, so as to enable us to apply our minds intelligently to the ques- ^{Ld. President.} tion before us. I can give a very recent illustration of that in the case of *Millar v. Refuge Assurance Company*,¹ where, after a case was stated, we sent it back in order that it should be modified. Here I do not think there can be any doubt that the respondents had a right to have the question raised which they wished decided, namely, whether these findings of the Sheriff can reasonably be supported on the evidence given.

Now, the only difficulty that I have had at all in this case is owing to the terms of the minute in which the respondents made their original crave. The minute is lodged also in terms of the Act of Sederunt, and runs thus: "Oliver for the defenders respectfully craved the Court to state a case for the decision of the First Division of the Court of Session upon the following question of law, viz., whether the death of the said Robert Euman was the result of an accident arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act, 1906." Now, strictly speaking, I think that question is wrongly put, because that is not a question for us. That would be simply asking us to reply to a question of fact upon the merits. The question is, as I have said, whether the evidence as led before the Sheriff could support the finding that he made. But although that is so, and although I think it should be made clear that the proper form of the question is as I have said, I think it would be treating the appellants too harshly if we refused to allow a case to be stated upon the ground that they phrased their question in that form, in view of the fact that there are many cases in the books where we have gone into the question of whether the evidence did support the findings in a reasonable sense upon a question phrased exactly as this question is phrased. As recently as the case of *Robson, Eckford, & Company*² (23rd December 1911) the question was phrased in that way. I think the proper form of the question is the form that is given in *Millar v. Refuge Assurance Company*¹: "Whether there was evidence upon which it could be competently found that the said James Millar sustained an accident arising out of and in the course of his employment on 9th May 1910?"

I think that is the form in which the question ought to be put. To refuse this note because it is put in a different form would, I think, be treating the appellants too hardly. I think, therefore, the case should go back to the Sheriff in order that he may state the facts proved before him upon which he found that the death was the result of an accident arising out of and in the course of the employment.

LORD JOHNSTON.—I think that in the minute presented to the Sheriff, and equally in the draft special case laid before him; the question put to him was one on which he was not bound to prepare a special case, and I cannot say he did wrong in refusing to do so. But now that the parties desiring to appeal have learned what the question ought to have been, I

¹ *Supra*, p. 37.

² *Supra*, p. 334.

No. 131.

MRS AGNES EASTON OR EUMAN, Pursuer (Respondent).—

T. G. Robertson.

May 14, 1912.

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*W. J. Robertson.*Euman v.
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In arbitration proceedings under the Workmen's Compensation Act, 1906, the arbitrator found that a workman's death resulted from injuries sustained by him owing to a fall from a ladder, and awarded compensation. A medical certificate which was produced stated the cause of death to have been appendicitis-peritonitis. The arbitrator refused a minute for the employers craving him to state a case for the opinion of the Court on the question whether the death of the deceased "was the result of an accident arising out of and in the course of his employment," on the ground that the question was one of fact and not of law.

Held that the proper question was "whether there was evidence upon which it could competently be found that the death of the workman was the result of an accident arising out of and in the course of his employment"; and case *remitted* to the arbitrator to state a case on this question.

1ST DIVISION. ON 14th May 1912 James Dalziel & Company, manufacturers, Sheriff of the Lothians and Peebles. Walkerburn, presented a note to the Court in which they prayed for an order on Mrs Agnes Easton or Euman to show cause why a case should not be stated by the Sheriff-substitute of the Lothians at Peebles (Orphoot) on appeal from a judgment which he had delivered as arbitrator in proceedings under the Workmen's Compensation Act, 1906, in which Mrs Euman claimed compensation in respect of the death of her husband while in the employment of the appellants.

The appellants set forth that it had been admitted or proved in the arbitration proceedings, *inter alia*, that, on 18th July 1911, Euman, whilst engaged in their employment, fell from a ladder, sustained certain injuries, and was found to be suffering from general shock and from a local injury known as "staved ankle"; that he was confined to bed for three weeks; and that in the fourth week, on 15th August, he died, the cause of death being certified to be appendicitis-peritonitis.

On 12th January 1912 the Sheriff-substitute pronounced certain findings, which included the following:—"(1) That on 18th July 1911 Robert Euman, mill foreman, Walkerburn, was in the employment of the defenders as a millworker in their mills at Walkerburn, when he met with an accident arising out of and in the course of his said employment, through a ladder on which he was standing accidentally slipping, whereby he was thrown to the ground and injured; (2) that the said Robert Euman died at Walkerburn on 15th August 1911; (3) that his death resulted from the injuries he received by said accident"; and awarded compensation.

The employers lodged a minute craving the Sheriff to state a case for the Court of Session on the following question of law:—"Whether the death of the said Robert Euman was the result of an accident

arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act, 1906?" May 14, 1912.

They also caused a draft stated case to be presented to the Sheriff-substitute for his signature containing the following questions of law: —“(1) Whether the arbitrator was entitled to draw from the facts stated the inference that the peritonitis which caused the death of the deceased was the result of his being confined to bed with a staved ankle? (2) Whether the death of the deceased was caused by personal injury by accident arising out of and in the course of his employment?” Euman v. Dalziel & Co.

The Sheriff-substitute refused to state a case or sign the draft case, and certified the following reasons for his refusal:—“(1) That the questions of law stated in the draft stated case submitted to me are not raised by the admissions made or the facts proved before me; (2) that the only question raised in this arbitration is, Did the death of Robert Euman, husband of the pursuer, on 15th August 1911, result from personal injuries sustained by him in the accident which happened to him on 18th July 1911? and (3) that that question is a question of fact.”

The employers craved the Court to pronounce the required order for these reasons:—

“Because the question whether the death of the deceased did or did not result from injury by accident arising out of and in the course of his employment, under the conditions found proved as above, is a question of law and not of fact.

“Because there was no evidence that the death of the deceased resulted from the injuries he received by the accident on 18th July aforesaid.”

The case was heard before the First Division (consisting of the Lord President, Lord Johnston, and Lord Skerrington) on 14th May 1912.

Argued for the respondent;—The Sheriff-substitute had rightly refused to state a case on the question whether the death of the deceased was the result of an accident arising out of and in the course of the employment, as this was a question of fact, not of law. If the appellants desired to raise the question whether there was evidence before the Sheriff-substitute to support his findings, the question should have been in the form suggested by Lord Atkinson in the House of Lords in the case of *Jackson v. General Steam Fishing Company*,¹ viz., “Was there evidence before the Sheriff-substitute upon which he might reasonably have found that the accident by which the deceased met his death arose out of and in the course of his employment.” This was quite a different question from that which had been proposed to the Sheriff-substitute, and the Court should not now direct him to state a case on a question which had not been raised before him.²

Argued for the appellants;—It was the duty of the respondent to establish, either by direct evidence or by legitimate inference from the facts proved, that the death resulted from an accident arising out of and in the course of the employment.³ This duty had not been

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May 14, 1912. discharged. The question which was raised in the present case was whether the facts proved could reasonably support the findings of the arbitrator, and this was a question of law on which the appellants were entitled to have the opinion of the Court. Though the question had not been put in this precise form to the Sheriff it was his duty to have adjusted the stated case so as to bring out the true question. Even in the form proposed to the Sheriff the question was not incompetent, for questions in that form had been admitted and considered by the Court in previous cases.¹

Euman v.
Dalziel & Co.

LORD PRESIDENT.—This is an application to us to ordain the Sheriff to state a case. He has refused to state a case when asked, and the application is made in accordance with the provisions of the Act of Sederunt of 26th June 1907 which deal with that matter.

The claim is at the instance of the widow of a workman who died. He died, it seems, of peritonitis—appendicitis-peritonitis, I think, is the form of the certificate, which I suppose means that the cause of death was appendicitis, or otherwise inflammation of the appendix, and that that inflammation had spread to the peritoneum so that there was inflammation of the peritoneum as well as of the appendix. Now, the accident which he had met with—using the word “accident” in the popular sense of the word—was that he had fallen from a ladder; and one can see easily enough that the question that is really raised between the parties is whether the death was due to the accident or was not. The Sheriff-substitute, acting as arbitrator, disposed of the matter by the following findings:—(1) That the workman “met with an accident arising out of and in the course of his employment, through a ladder on which he was standing accidentally slipping, whereby he was thrown to the ground and injured; (2) that the said Robert Euman died at Walkerburn on 15th August 1911; and (3) that his death resulted from the injuries he received by said accident”:—and that is all that the interlocutor tells us about the accident; the rest of the case concerns the adjustment of the compensation.

Now, as your Lordships well know, it has been conclusively settled by decisions of the House of Lords and of this Court, that, although such appeals are by statute limited to questions of law, nevertheless they are competent when the question is whether such findings as these can be supported upon the evidence submitted, for that has been held to be a question of law. The criterion is whether anyone could reasonably have come to that conclusion. It has been said more than once that this criterion is, if not exactly the same, at least strictly analogous to the criterion we are in use to apply where we are asked to direct a new trial on the ground that the verdict of a jury is contrary to evidence. It is not a question of whether the decision is right or wrong, but a question of whether there was evidence led upon which the decision can be supported. I think as soon as that position is laid down, it is quite impossible for us to direct our minds intelligently to the question unless we have before us a stated

¹ Coe v. Fife Coal Co., Limited, 1909 S. C. 393; Blakey v. Robson, Eckford, & Co., Limited, *supra*, p. 334. The Lord President referred to Millar v. Refuge Assurance Co., Limited, *supra*, p. 37.

case which will give us a description of what the evidence that was led May 14, 1912. was. Accordingly, we have more than once insisted either upon cases ^{Euman v.} being stated, or upon cases being modified which were inadequate in their ^{Dalziel & Co.} statement, so as to enable us to apply our minds intelligently to the ques- ^{Ld. President.} tion before us. I can give a very recent illustration of that in the case of *Millar v. Refuge Assurance Company*,¹ where, after a case was stated, we sent it back in order that it should be modified. Here I do not think there can be any doubt that the respondents had a right to have the question raised which they wished decided, namely, whether these findings of the Sheriff can reasonably be supported on the evidence given.

Now, the only difficulty that I have had at all in this case is owing to the terms of the minute in which the respondents made their original crave. The minute is lodged also in terms of the Act of Sederunt, and runs thus: "Oliver for the defenders respectfully craved the Court to state a case for the decision of the First Division of the Court of Session upon the following question of law, viz., whether the death of the said Robert Euman was the result of an accident arising out of and in the course of his employment within the meaning of the Workmen's Compensation Act, 1906." Now, strictly speaking, I think that question is wrongly put, because that is not a question for us. That would be simply asking us to reply to a question of fact upon the merits. The question is, as I have said, whether the evidence as led before the Sheriff could support the finding that he made. But although that is so, and although I think it should be made clear that the proper form of the question is as I have said, I think it would be treating the appellants too harshly if we refused to allow a case to be stated upon the ground that they phrased their question in that form, in view of the fact that there are many cases in the books where we have gone into the question of whether the evidence did support the findings in a reasonable sense upon a question phrased exactly as this question is phrased. As recently as the case of *Robson, Eckford, & Company*² (23rd December 1911) the question was phrased in that way. I think the proper form of the question is the form that is given in *Millar v. Refuge Assurance Company*¹: "Whether there was evidence upon which it could be competently found that the said James Millar sustained an accident arising out of and in the course of his employment on 9th May 1910?"

I think that is the form in which the question ought to be put. To refuse this note because it is put in a different form would, I think, be treating the appellants too hardly. I think, therefore, the case should go back to the Sheriff in order that he may state the facts proved before him upon which he found that the death was the result of an accident arising out of and in the course of the employment.

LORD JOHNSTON.—I think that in the minute presented to the Sheriff, and equally in the draft special case laid before him; the question put to him was one on which he was not bound to prepare a special case, and I cannot say he did wrong in refusing to do so. But now that the parties desiring to appeal have learned what the question ought to have been, I

¹ *Supra*, p. 37.

² *Supra*, p. 334.

May 14, 1912. agree that it would be too stringent to refuse to let them have a case in proper form. I do so, however, with reluctance. For I think, in the interest of the Sheriff as arbitrator, it is imperative that he should know precisely what the question is to which he has got to apply his mind, and to meet which he has got to prepare a case. I think that if the proper form of question were more consistently adopted, we should not have so much difficulty in determining whether cases coming here really present the *species facti* which the Sheriff ought to have stated, and doubtless would have stated, had his mind been properly directed to the precise question which the case was intended to raise. And, further, the competency or incompetency of such cases would be much more easily determined. While, therefore, allowing in the circumstances a case to be stated, I should be inclined to mark this case in some such way as to indicate that as originally prepared it was incompetent.

LORD SKERRINGTON.—I agree.

THE COURT pronounced this interlocutor :—"Remit to the Sheriff-substitute as arbitrator to state a case upon the following question of law, viz., whether there was evidence upon which it could competently be found that the death of Robert Euman was the result of an accident arising out of and in the course of his employment: Find the pursuer and respondent entitled to expenses since 12th January 1912, and remit, &c."

J. & J. GALLETLY, S.S.C.—STEEDMAN, RAMAGE, & Co., W.S.—Agents.

No. 132.

DAVID ALLEN & SONS BILLPOSTING, LIMITED, Pursuers
(Respondents).—*Gentles*.

May 17, 1912.

THE DUNDEE AND DISTRICT BILLPOSTING COMPANY, LIMITED,
Defenders (Appellants).—*J. D. Johnston*.

David Allen &
Sons Billpost-
ing, Limited,
v. Dundee and
District Bill-
posting Co.,
Limited.

Process—Appeal—Competency—Value of cause—Action concluding for interdict and for £50 damages—Question of interdict exhausted prior to appeal—Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. cap. 51), sec. 28.

The pursuers in an action in the Sheriff Court sought to interdict the defenders from interfering with subjects of which the pursuers were tenants, and claimed the sum of £50 in respect of damages sustained or to be sustained by them through such interference. Interim interdict was granted; but before judgment was pronounced on the merits the pursuers' tenancy of the subjects expired. The Sheriff-substitute accordingly recalled the interim interdict; but, on the pecuniary conclusion, found the defenders liable in the sum sued for.

The defenders having appealed to the Court of Session, objection was taken to the competency of the appeal on the ground that the value of the cause did not exceed £50.

Held that, as all that now remained in the action was the pecuniary conclusion which was below the statutory limit, the appeal was incompetent.

1ST DIVISION.
Sheriff of
Forfarshire.

ON 2nd December 1911 David Allen & Sons Billposting, Limited, brought an action of interdict and damages in the Sheriff Court of Forfarshire at Dundee against the Dundee and District Billposting Company, Limited.

The pursuers sought to interdict the defenders from interfering

with a billposting stance and hoarding affixed to subjects of which May 17, 1912. they, the pursuers, were tenants, and claimed payment of the sum of £50 as the measure of damages sustained or to be sustained by them through the defenders covering advertisements displayed thereon by the pursuers with advertisements of their own. The question whether the hoarding was a trade fixture which the pursuers were entitled to remove at the end of their lease was also raised incidentally in the case, but there were no conclusions affecting this question.

David Allen &
Sons Billpost-
ing, Limited,
v. Dundee and
District Bill-
posting Co.,
Limited.

Interim interdict was granted by the Sheriff-substitute (Campbell Smith) on 2nd December 1911 and, on 8th December 1911, the Sheriff (Ferguson) refused an appeal against this interlocutor.

On 7th March 1912 the Sheriff-substitute (Neish), after proof, issued an interlocutor in which he found, *inter alia*, that the pursuers' tenancy of the subjects had expired and that the defenders had become tenants in succession to them on 28th December 1911, and accordingly he recalled the interim interdict. He further found that the pursuers were entitled to damages in respect of the defenders' actings prior to the termination of the lease, and decerned against them for the sum sued for.

The defenders appealed to the Court of Session.

When the case was called in Single Bills of the First Division (consisting of the Lord President, Lord Johnston, and Lord Skerrington), on 17th May 1912, counsel for the respondents objected to the competency of the appeal in respect that the value of the cause did not exceed £50, and argued;—The question of interdict had been finally disposed of, and was no longer a living question, as the defenders had become tenants of the stance. The only question that remained to be determined was that of damages and, as these were only laid at £50, the value of the cause was not sufficient to allow appeal.¹

Argued for the appellants;—The value of the cause fell to be ascertained as at the date when the initial writ was presented, not at that of the appeal. As the action at that date contained conclusions for interdict as well as for £50 of damages the appeal was competent.²

LORD PRESIDENT.—This case, as it was originally presented in the Sheriff Court, was an action of interdict and damages raised by a tenant of a hoarding against a tenant who succeeded him when his term of tenancy was over, upon an averment that this incoming tenant had, so to speak, assumed possession too soon, and had put his bills upon the hoarding and obliterated the bills of the prior occupant. The Sheriff-substitute granted interim interdict. At the time that he came to pronounce judgment on the question of damages the period of the pursuers' lease had expired, and therefore there was no longer room for any pronouncement upon the matter of interdict. Accordingly, the Sheriff-substitute recalled the interim interdict previously granted, and found damages due and assessed them at £50. An appeal was taken to this Court, and the respondents objected that it was incompetent, because the value of the action does not exceed £50.

I am of opinion that that is a good objection. No doubt the action, as it was originally raised, contained a conclusion for interdict, and if there

¹ Sheriff Courts (Scotland) Act, 1907, secs. 7 and 28.

² Thomson v. Barclay, (1883) 10 R. 694. Lord Johnston referred to Duke of Argyll v. Muir, 1910 S. C. 96.

No. 134. DUNCAN HARVEY, Pursuer (Appellant).—*G. Watt, K.C.—Paton.*
 May 18, 1912. ALEXANDER STURGEON AND ANOTHER, Defenders (Respondents).—*Duffes.*

Harvey v.
Sturgeon.

Reparation—Wrongous Apprehension—Police-Constable—Privilege—Issue—Whether malice and want of probable cause to be put in issue.

In an action of damages for wrongous apprehension, directed against two police-constables who had apprehended the pursuer without a warrant, the Court *held* that, in the circumstances of the case, it was unnecessary to insert malice and want of probable cause in the issue, in respect that the pursuer's averments disclosed a case of such wrongful and unreasonable conduct on the part of the defenders that their actings could not be regarded as privileged.

2D DIVISION.
Sheriff of
Lanarkshire.

DUNCAN HARVEY brought an action in the Sheriff Court at Glasgow against Alexander Sturgeon and Andrew Stirling, police-constables, concluding for £500 in name of damages for wrongous apprehension.

The pursuer averred that he was a partner of the firm of D. Harvey & Company, coppersmiths and brassfounders, carrying on business at 6 Eglinton Lane, Glasgow, and that he had been a partner of the firm for about eight years. The defenders were police constables attached to the Southern Division of the police force in Glasgow.

The pursuer further averred:—(Cond. 2) "On an evening in or about the beginning of February 1910 the pursuer was proceeding about 5.30 P.M. from his business premises at Eglinton Lane to a metal refinery business which is carried on by his brothers at Salkeld Street. On his arrival there he was accosted by the defenders, who maliciously and without probable cause proceeded to search his clothing, and declared that he had something concealed under his overcoat. The pursuer remonstrated with the defenders as to their conduct, and informed them of his identity. The defenders, for some reason unknown to the pursuer, had made up their minds to arrest him, and they were obviously disappointed when they discovered nothing of an incriminating nature upon him. After the defenders had got pursuer's name and address and had satisfied themselves that he had nothing to conceal they allowed him to go, but they intimated they would watch him in future. Said proceedings were wholly unjustifiable, and pursuer, who was a respectable and law-abiding citizen, was greatly annoyed at what had occurred and spoke pretty strongly to the defenders about their conduct. In consequence thereof pursuer believes and avers defenders conceived a feeling of ill-will towards him which they determined to gratify by bringing another unfounded charge against him." (Cond. 3) "On or about 25th October 1910 the pursuer left his premises before named about 5.35 P.M. and walked down Eglinton Street, his intention being to call at Salkeld Street to leave a message. At that time he was carrying a parcel containing an alarm clock which belonged to his mother, and which he was taking to a jeweller's for the purpose of being repaired. As he approached Salkeld Street he observed that the premises there were closed up. He thereupon retraced his steps along Bedford Street, and proceeded along Apsley Place, when he was arrested by the defenders, who were in plain clothes. Defender Sturgeon crept up behind him and caught hold of the said parcel. The pursuer resented the defender Sturgeon's interference, with the

result that pursuer was thrown heavily against some iron railings. May 18, 1912.
Thereafter defender Sturgeon took him by the arm and the defenders
marched him down through the public streets to the Southern Police- Harvey v.
station, the pursuer walking between the defenders and held by Sturgeon.
On arrival there the defenders falsely, maliciously, and
without probable cause stated to the official in charge that they had
arrested the pursuer on the ground that he had refused to disclose
the contents of his parcel and also give his name and address. The
parcel was taken by the defenders from the pursuer and handed to
the lieutenant in charge, who examined the same and found it to
contain an alarm clock as aforesaid. The pursuer objected to being
searched, but notwithstanding his remonstrance the defenders searched
his person, and the contents of the various pockets were laid upon
the counter of the police-station. Prior to that, however, he informed
the lieutenant who he was, and stated that the defenders were all
along aware of his identity. Although he was well known to the
defenders, they refused to concur in his identity." (Cond. 4) "When
the defenders were in the act of searching the pursuer, Detective
M'Bride, who was attached to the Southern Division, came out from
the detectives' room, and on realising what was taking place he
informed the lieutenant that there must be some mistake, as the pur-
suer was a most respectable man. Notwithstanding this information
the pursuer was detained in custody until said detective was sent by
the lieutenant in charge to the pursuer's mother's house to verify the
information both as to his identity, and as to the proprietorship of
the alarm clock in question. On said statements being verified he
was thereupon liberated." (Cond. 5) " . . . The arrest and
charge against the pursuer was made maliciously and without pro-
bable or any cause, and was made for the purpose of injuring the pur-
suer in his reputation, feelings, and business. Since the incident in
February 1910 the defenders have known perfectly well who the
pursuer was. They have seen him frequently in the streets, and
they knew he was a brother of Archibald Harvey, who is a partner in
the Salkeld Street business."

It was admitted that the pursuer was arrested without a warrant.

The defenders' averments were to the effect that the pursuer was
proceeding in the dark, with a parcel under his arm, towards premises
which they had reason to suspect were resorted to by thieves for the
purpose of disposing of stolen metal, and which were being watched
by detectives; and that they had acted reasonably in insisting on
ascertaining the contents of his parcel.

The pursuer pleaded;—(1) The pursuer having been wrongfully
arrested by the defenders without a warrant, and on a charge which
was false, and having been detained in prison, is entitled to repara-
tion for the loss thereby caused, and for the injury to his feelings
and reputation. (2) The actings of the defenders having been mali-
cious and without probable cause, he is entitled to decree as craved,
with expenses.

The defenders pleaded, *inter alia*;—(1) The action is irrelevant.
(2) The defenders' whole actings towards pursuer being in the *bona*
fide execution of their duty as police-constables, without malice and
with probable cause, are privileged.

On 12th May 1911 the Sheriff-substitute (Boyd) sustained the first
plea in law for the defenders, and dismissed the action as irrelevant,
holding that the defenders' conduct had been reasonable, and was

May 18, 1912. accordingly privileged, and that no sufficient facts from which malice could be inferred were stated on record.

Harvey v.
Sturgeon.

The pursuer appealed to the Sheriff (Millar), who, on 12th February 1912, recalled the interlocutor appealed against, and allowed a proof before answer.

On the requirement of the pursuer, the case was remitted to the Court of Session.

The case was heard before the Second Division (without Lord Dundas) on 18th May 1912, when the pursuer proposed the following issue for the trial of the cause:—"Whether, on or about 25th October 1910, the defenders wrongfully and illegally apprehended the pursuer in Apsley Place, Glasgow, and conveyed him to the Southern Police Office in Glasgow, to the loss, injury, and damage of the pursuer?"

The defenders objected to the form of the issue, and argued;—The pursuer's averments disclosed a case of privilege, and malice and want of probable cause should be inserted in the issue. This was not, as in the case of *Wood*,¹ an action directed against private persons. The defenders were police-constables exercising a public duty. In such circumstances the presumption was that they were acting honestly, and the onus was on the pursuer to displace that presumption by showing that in point of fact they were acting maliciously.² The action of the defenders in arresting the pursuer without a warrant was justified by section 88 of the Glasgow Police Act, 1866.³

Counsel for the pursuer was not called upon.

LORD SALVESEN.—I am of the same opinion as the Sheriff. The only point where I differ from him is when he says that this is a difficult case. I think it is a very plain case.

The pursuer here avers that he is a law-abiding citizen of Glasgow, and a partner of a firm of brassfounders; that on a certain day he was carrying a parcel containing a clock belonging to his mother, which he was taking to be repaired; and that he was suddenly pounced upon by two police-officers in plain clothes, and carried off to the police-office.

Now, it is quite true that under section 88 of the Glasgow Police Act of 1866, even such an apparently unjustifiable proceeding may be justified if the police-officers are able to show that they acted with reasonable cause, having reasonable grounds of suspicion against the person whom they treated in that way. But *prima facie* what they did, on the pursuer's statement, which is the only one we can consider just now, was a wrongful thing; and, accordingly, it appears to me that the pursuer is entitled to an issue in the form which has been proposed by his counsel.

If at the trial the defenders are able to persuade the jury that they acted reasonably and within the powers conferred upon them by the Glasgow

¹ *Wood v. North British Railway Co.*, (1899) 1 F. 562.

² *Hill v. Campbell*, (1905) 8 F. 220, *per* Lord Kinnear, at p. 225; *Young v. Magistrates of Glasgow*, (1891) 18 R. 825.

³ 29 and 30 Vict. cap. cclxxiii., sec. 88, authorises any constable to "take into custody, and convey to the police-office any person who is either accused or reasonably suspected of having committed" certain classes of offences, "or any police offence where the name and residence of such person are unknown to the constable and cannot be readily ascertained by him."

Police Act, then a case of privilege will arise, and it will be the duty of May 18, 1912. the presiding Judge to tell the jury that if they take that view they must find for the defenders unless they are of opinion that the defenders acted maliciously. But that will arise at the trial. In the meantime I see no ground for putting malice into the issue, or assuming, in the face of the pursuer's averments to the contrary, that the defenders acted reasonably in taking him to the police-office.

Harvey v.
Sturgeon.

Lord Salvesen.

LORD GUTHRIE.—The Sheriffs have differed in this case; but I rather think the difference has arisen from the fact that the Sheriff-substitute has not only looked at the defenders' averments, which the Court may be entitled to do, but has substantially assumed that they were correct.

It is quite clear that whatever view may be taken of the opinions of the House of Lords in *Pringle v. Bremner and Stirling*,¹ any such proceeding is quite unwarranted. In that case, as the Sheriff brings out, there appears to have been a difference of opinion as to whether the defenders' averments could be even looked at; but I take it that Lord Colonsay when he expressed the opinion—which the Sheriff seems to read as differing from those of the other Judges—that “In judging of cases of this kind we are accustomed to examine the whole record, consisting of the statements of the pursuer, the statements of the defenders, and the answer of the pursuer,” certainly never intended that the Court should do what the Sheriff-substitute has here done, namely, not merely examine the whole record and look at the averments, but also assume, without any evidence, that the defenders' averments are correct. I think the Sheriff has taken the right view, and I agree with him.

LORD JUSTICE-CLERK.—I am entirely of the same opinion. In recent times, when there is so much publicity, very large discretionary powers have been given to police-officers which would not have been tolerated in former times. That makes it all the more necessary that, while such officers are allowed a certain margin as regards dealing with persons upon suspicion, their powers should not be stretched beyond what is reasonable, and that, when these powers are conferred by statute, they should not be stretched beyond what the statute provides or what may be reasonably inferred from its terms.

I find it difficult to imagine anything more unreasonable and more wrong on the part of police-constables than that, when a person is going along the street with a parcel under his arm, they should, because they think he may be going to some place on a suspicious errand, seize his parcel and insist upon him going to the police-office with them to answer to some charge or other which they are going to make. As a matter of fact they made no charge against him, but they tried to make out that he was arrested in what they call the execution of their duty. I cannot conceive that it should be held to be reasonable by any Magistrate or Judge that it is within the powers of the police to arrest a private citizen going along a street with a parcel under his arm, he having done nothing, not even having gone into a shop, but simply carrying the parcel under his arm.

¹ (1867) 5 Macph. (H. L.) 55.

May 18, 1912.

Harvey v.
Sturgeon.Lord Justice-
Clerk.

If the police had had a warrant to arrest the pursuer it would have been a different thing altogether, and they would have had a good excuse for arresting a law-abiding citizen in such circumstances. If they were entitled to do this to him without a warrant, they were entitled to do it to everybody who went along the street with a parcel under his arm, under the idea that he was going to some shop for an illegal purpose. I think it would be very bad practice indeed to insist in such circumstances that the general privilege which a police-constable has, viz., that he is presumed to be acting honestly in the execution of his duty, should preclude the pursuer from taking an issue that he wrongfully and illegally made this arrest.

I must say I think it is a great pity that the Sheriff-substitute has stated the case as he has done in his note. He says:—"I think it was a reasonable wish" on the part of the police-officers "to see the contents of the parcel, and I think also it would have been reasonable for the pursuer to disclose the contents at once, and had he done so, it is likely the matter would have ended there." That is all upon the assumption that the defenders' statements are true, which is not an assumption that ought to be made in considering relevancy. It is also upon the assumption that if he chose not to show them the contents of his parcel they were entitled then to arrest him. A law-abiding citizen is not to be called upon to allow himself, on the public street, to be subjected to a search by the police of any parcel he may be carrying, and his refusal to allow a search would never justify arrest. It does not give just ground for any suspicion, and cannot give reasonable ground for taking into custody. Such an idea seems most extraordinary, and it is one which can have no countenance from this Court. I must say I think this a most unfortunate case.

It may turn out when the case comes to trial that the statements of the pursuer are not substantiated as he states them, and that the statements which the defenders make are substantiated. In that case the question of malice may arise at the trial; but I see no ground whatever for interfering with the issue proposed, and I am for approving of the issue as it stands.

THE COURT approved of the issue.

REID & MILNE, W.S.—W. CARTER RUTHERFORD, S.S.C.—Agents.

No. 135.

WILLIAM SMART TAYLOR, Pursuer (Respondent).—

Blackburn, K.C.—J. A. Christie.

May 21, 1912.

WYLIE & LOCHHEAD, LIMITED, Defenders (Reclaimers).—

*Horne, K.C.—T. G. Robertson.*Taylor v.
Wylie &
Lochhead,
Limited.

Contract—Construction—Sale—Hire-purchase agreement—Character of instalments—Appropriation of instalments as between capital and interest.

An agreement for the hire-purchase of certain furniture had endorsed on it an inventory of the furniture hired with cash prices annexed, the summation of which amounted to £7543. The agreement stipulated for payment by the hirer of annual sums of varying amount, the total of which was £8649; and further provided that the hirer might at any time become the purchaser of the furniture "by payment in cash of the hereon endorsed price, under deduction of the whole sums previously paid by the hirer to the owners."

The hirer, who had in the course of several years paid in terms of

the agreement sums amounting *in cumulo* to £4966, desiring to become the purchaser of the furniture, tendered to the owners the sum of £2577, being the difference between the sums so paid and £7543, the "endorsed price."

Taylor v.
Wylie &
Lochhead,
Limited.

On a construction of the agreement, *held* (rev. judgment of Lord Cullen) that in view of the fact that in a contract of hire-purchase the instalments are calculated so as to provide for interest on so much of the capital as remains unpaid, the expression "whole sums previously paid" must refer to the portion of the sums paid attributable to capital, to the exclusion of the portion attributable to interest; and, accordingly, that the pursuer was not entitled to become the purchaser of the furniture on payment of the sum tendered.

ON 19th May 1911 William Smart Taylor, an hotel-keeper in Glasgow, brought an action against Wylie & Lochhead, Limited, furniture dealers there, in which he sought declarator that certain articles of furniture, the subject of an agreement of hire-purchase entered into between the parties, were now the absolute property of the pursuer. The summons also contained conclusions for interdicting the defenders from interfering with the pursuer in his possession and enjoyment of the furniture in question.

1st DIVISION.
Lord Cullen.

The agreement above referred to, which was dated 15th and 20th June 1906, set forth that the defenders had agreed to let to the pursuer "on a yearly hiring, the furniture and other plenishing enumerated in the inventory annexed and subscribed as relative hereto, and, in consideration thereof, the parties hereto have agreed and hereby agree as follows, viz. :—First. The hirer agrees to pay the owners an advance hire of the sum of One thousand pounds sterling on fifteenth May, Nineteen hundred and six, notwithstanding the date hereof, and thereafter to pay the owners as follows" :—

1. At 15th May 1907	£650	0	0
2. At 15th May 1908	£1044	13	10
3. At 15th May 1909	£1107	3	10
4. At 15th May 1910	£1164	13	10
5. At 15th May 1911	£1217	3	10
6. At 15th May 1912	£1264	13	10
7. At 15th May 1913	£1201	0	4

The cumulo amount of these payments was £8649, 9s. 6d.

The seventh article of the agreement was in these terms:—“(Seventh) The owners agree that the hirer may terminate the hiring by delivering up to the owners the furniture and plenishings, and that the hirer may at any time become the purchaser of said furniture and plenishings by payment in cash of the hereon endorsed price, under deduction of the whole sums previously paid by the hirer to the owners.” Annexed to the agreement was an account or inventory, signed by the parties as relative thereto, giving details of the furniture hired, with the price of each individual article. The summation of these prices was £7543, 16s. 6d.*

* The import of articles 2 to 6 of the agreement was summarised thus by the Lord Ordinary :—“ Articles 2 and 3 relate to obligations of the pursuer as to the mode of keeping the hired furniture, &c. Article 4 provides that if the hirer do not duly perform the agreement, the defenders may (without prejudice to any right they may have to recover arrears of rent and damages for breach) summarily terminate the hiring and take back the furniture. Article 5 provides that, if the hiring is terminated otherwise than by pur-

May 21, 1912.

Taylor v.
Wylie &
Lochhead,
Limited.

The pursuer averred (Cond. 4) that he had up to the date of the action paid the sums due under the agreement at their proper dates, amounting in all to £4966, 11s. 6d.; that he had intimated to the defenders his desire to become purchaser of the furniture in terms of article 7 of the agreement "by payment in cash of the thereon endorsed price under deduction of the whole sums previously paid by the pursuer to the defenders"; that he had tendered to them payment of the sum of £7543, 16s. 0d. (*sic*), being the price endorsed on the agreement, under deduction of the sum of £4966, 11s. 6d. already paid, but that the defenders had refused to accept the difference, being £2577, 4s. 6d. The pursuer accordingly had lodged this sum in bank, and brought the present action.

The defenders' fourth answer was in these terms:—"Explained that the net or cash price of said furniture and plenishings was £7543, 16s. 6d., but the pursuer, not being in a position to purchase same on a cash basis, arranged with the defenders to acquire them on the hire-purchase system by graduated payments, in instalments, with interest at the rate of 5 per cent on said price from and after the termination of the first year, all as stipulated for in article first of said agreement. The instalments agreed on, including interest at 5 per cent, are set forth in article first of the agreement, and the total price amounts to £8649, 9s. 6d., which is the price referred to in article seventh. The following account was adjusted between the parties, and the figures therein arrived at are embodied in article first of said agreement":—
[Then followed a detailed account, showing how each instalment was made up of a payment towards capital and of interest on the unpaid balance; the interest due at 15th May 1911 being £167, 3s. 10d.; at 15th May 1912, £114, 13s. 10d.; and at 15th May 1913 (the date of the final payment), £57, 3s. 10d.] "The pursuer has paid the instalments of principal and interest to 15th May 1910 as follows:— . . . Principal, £4200; interest, £766, 11s. 6d. To enable him to become purchaser at Whitsunday 1911, there is due the balance as follows:—

Principal sum,	£7543 16 6
Paid to account,	4200 0 0
	<hr/>
	£3343 16 6
Interest due at Whitsunday 1911,	167 3 10
	<hr/>
Total balance due at Whitsunday 1911,	£3511 0 4

The pursuer is thus relieved of the interest which has not yet accrued, and this is deducted from the total price and interest as follows:—

Total price, including interest,	£8649 9 6
Paid to account,	4966 11 6
	<hr/>
	£3682 18 0
Less Interest to Whitsunday 1912, £114 13 10	
Interest to Whitsunday 1913, 57 3 10	
	<hr/>
	171 17 8
	<hr/>
	£3511 0 4

chase, as provided for under the seventh article, the hirer shall not be entitled to any allowance, credit, return, or set-off for payments previously made. Article 6 provides for possible giving of time, &c., by the defenders."

If the pursuer elects to become purchaser as at Whitsunday 1911, he should accordingly pay to the defenders the sum of £3511, 0s. 4d., with interest at 5 per cent thereafter. If he should not elect to become purchaser, he is due to the defenders the instalment of £1217, 3s. 10d. payable at Whitsunday 1911." Taylor v.
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The pursuer pleaded;—(1) The pursuer having the right under said agreement to become purchaser of said furniture and plenishings on payment of the sum of £2577, 4s. 6d., is entitled to decree of declarator as craved for, with expenses. (2) The defences are irrelevant.

The defenders pleaded, *inter alia*;—(2) The pursuer not having right under said agreement to become purchaser of said furniture and plenishings as at Whitsunday 1911, except on a payment of £3511, 0s. 4d., the decree of declarator and interdict concluded for should be refused. (3) Interest on the price of said goods at 5 per cent having been agreed to and paid, as condescended on, the pursuer is not entitled to become purchaser except upon payment of the sum of £3511, 0s. 4d., and the defenders should be assoilzied from the conclusions of the summons, with expenses.

On 27th July 1911 the Lord Ordinary (Cullen) granted decree in terms of the conclusions of the summons.*

* "OPINION.—[After narrating the terms of the agreement]—The parties are agreed that the words 'the hereon endorsed price' refer to the £7543, 16s. 6d., which is the summation of the prices in the inventory annexed to the agreement.

"The pursuer made the payments stipulated for in article 1 up to 15th May 1910, amounting to £4966, 11s. 6d. He thereafter intimated his intention to purchase the furniture in exercise of his right under article 7, and tendered to the defenders the difference between this sum and the £7543, 16s. 6d. (as the 'hereon endorsed price'), being £2577, 4s. 6d. This is *prima facie* in accordance with the terms of the agreement. It provides for a sum being paid annually as hire, and then gives the hirer right to purchase on paying the £7543, 16s. 6d. under deduction of the 'whole sums previously paid' by him. And these can only be the sums for hire which he had paid under article 1. No other sums are mentioned in the agreement.

"The defenders refuse to accept the £2557, 4s. 6d. tendered by the pursuer, and maintain that the sum which he is bound to pay on purchase is £3511, 0s. 4d. Now, this is a sum which cannot be arrived at within the four walls of the agreement. It is not the amount of the annual sums payable as for hire after 15th May 1910. These come to £3682, 18s. What the defenders say is that the annual sums for hire under article 1 include (1) instalments of the price of £7543, 16s. 6d., and (2) interest at 5 per cent running on the price, as reduced from time to time by the annual payments, so far as these payments are attributable to price and not to interest on it already accrued. They aver that the figures in article 1 were adjusted on this basis with the pursuer prior to being embodied in the agreement. Now, this may very well be so. Indeed, one would expect that a hire-purchase agreement would probably proceed on such lines. The difficulty is that the agreement, which supersedes any prior communings, does not express such a bargain as the defenders maintain. The payments stipulated for in article 1 are stated simply as lump payments for hire, and nothing is said as to how they are arrived at, or as to their including interest, and if so, how the interest was calculated. Under article 7, what falls to be deducted from the total cash price is 'the whole sums previously paid by the hirer to the owners.' These can only be the whole sums paid under article

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The defenders reclaimed, and the case was heard before the First Division (consisting of the Lord President, Lord Johnston, and Lord Skerrington) on 16th May 1912.

Argued for the reclaimers;—The terms of article 7 of the agreement were ambiguous, and it was therefore necessary for their interpretation to refer to other parts of the deed. Such reference showed that the words “sums previously paid” must refer to sums paid to capital, to the exclusion of those paid to interest. This ambiguity was patent when one considered that circumstances might arise in which the “whole sums paid” by the hirer would amount to more than the invoiced value from which they fell to be deducted. But, assuming the actual terms of article 7 not to be in themselves ambiguous, the Court was still entitled to restrain its express terms where to allow their literal effect would lead to an inequitable result which was contrary to the obvious intention of the parties.¹ A contract of hire-purchase was a form of contract in which it was well known that the payments were so adjusted that each one should represent a payment towards capital, plus a further sum representing interest upon the balance of capital still outstanding. It must be taken that the intention of the parties was to regulate the payments in accordance with this well-established rule. Here the amounts of the instalments stipulated for in article 1 appeared quite clearly, from an examination of the figures themselves, to be calculated according to this rule (interest being allowed for at the rate of five per cent), and were capable of no other explanation. The Court therefore should restrain the expression “sums previously paid” by interpreting it as if the words “towards capital,” or words to a like effect, had been added.

Argued for the respondent;—The provision in article 7 was perfectly clear and free from ambiguity. The circumstances to which the reclaimers pointed in support of their contention to the contrary were evidence only that they had made a bad bargain. The “whole sums previously paid” could only mean those paid under article 1; and there was no reference, either there or elsewhere in the agreement, to the apportionment of any part of these payments towards interest. That being so, the Court could not seek a construction outside the

1. The defenders say it is not the whole sums paid under article 1 which fall to be deducted, but only the portions thereof ascribable to the principal of the price, and exclusive of interest on the unpaid balances of the price, according to the calculations which, they allege, preceded the agreement, whereby the sums in article 1 were arrived at. This may have been what they intended to bargain for. But, unfortunately, it is not what is said in the agreement, which is the only repository of the meaning of the contracting parties. The words of the seventh article, ‘whole sums previously paid by the hirer,’ seem to me plainly and unambiguously to refer to the whole sums paid by him under article 1. There are no other sums defined in the agreement to which they can be referred. The defenders’ argument, I think, really implies that the agreement, as it stands, does not truly express the bargain which the parties intended to make. That may be so, but I can only construe the agreement as it stands, and cannot reform it.

“Following these views, I shall grant decree in terms of the conclusions of the summons.”

¹ Dickson on Evidence, 3rd ed., sec. 1041; Pollok on Contracts, 8th ed., p. 268; Marquis of Queensberry v. Scottish Union Insurance Co., (1839) 1 D. 1203, *affd.* (1842) 1 Bell’s App. 183; Lee v. Alexander (1883) 10 R. (H. L.) 91.

agreement, or qualify its clear and unambiguous words by considerations of a supposed intention of the parties.¹ The words must be construed according to their primary meaning, and evidence that they were used in another sense was not admissible.²

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At advising on 21st May 1912,—

LORD PRESIDENT.—In June 1906 an agreement was entered into between Wylie & Lochhead, furniture dealers in Glasgow, and Mr Taylor, hotel proprietor, the pursuer in this action, with regard to furniture which was supplied by Wylie & Lochhead for the Adelphi Hotel. The agreement is of the character, well known to us, of a hire-purchase agreement for furniture, and although every agreement must be construed by its own terms, I think it is clear that we have judicial knowledge of the general scope of such agreements. The idea of a hire-purchase agreement is that instead of the price for furniture which is supplied being paid in one sum, that price should be paid by instalments, in respect of those instalments the intending purchaser having the use of the furniture in the meantime, and the matter being so calculated that, when the last instalment is paid, the furniture then should become the property of the hirer and purchaser. It is quite evident that, according to the ordinary business view, the instalments will be so calculated as to provide for interest on so much of the principal as is not paid. All that, I think, may be taken to be common judicial knowledge of this class of agreement. But, as I said before, the particular rights of parties must be judged upon the agreement which is in question.

Now, the agreement here was embodied in a minute, and this minute we have before us. The present question arises upon what is the proper construction of one of the articles of this agreement. The first head of the agreement is that "the hirer agrees to pay the owners an advance hire of the sum of one thousand pounds sterling on fifteenth May nineteen hundred and six," and thereafter to pay various sums. All these sums are payable on 15th May, and the payments begin on 15th May 1907 and they end upon 15th May 1913. They are of varying amounts. Then, after certain clauses which provide for insurance and bind the hirer to keep the furniture in his hotel and not to take it away, and also deal with the question of what will happen if he does not pay up the instalments he has bound himself to pay, we come to the seventh clause, upon which the whole matter turns. The seventh clause is this:—"The owners agree that the hirer may terminate the hiring by delivering up to the owners the furniture and plenishings, and that the hirer may at any time become the purchaser of said furniture and plenishings by payment in cash of the hereon endorsed price, under deduction of the whole sums previously paid by the hirer to the owners."

Now, what happened was this: the hirer paid his various sums duly and properly upon each 15th May down to and inclusive of the 15th May 1910. He then intimated that he wished to take advantage of the seventh clause and become owner of the furniture "by payment in cash of the

¹ Smith v. Cooke, [1891] A. C. 297, *per* Lord Halsbury, at p. 299.

² Shore v. Wilson, (1842) 9 C. & F. 355, *per* Coleridge, J., at p. 525.

May 21, 1912. hereon endorsed price, under deduction of the whole sums previously paid by the hirer to the owners." Now the endorsed price, which is upon the back of the agreement, is an addition sum coming out at the total of £7543, 16s. 6d., and is arrived at by the simple addition of the detailed cash prices of the various articles of furniture which were hired.

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Ld. President.

Accordingly, what the hirer says is that he is entitled to get the furniture upon payment of the difference between the summation of the five sums which he paid (namely, the £1000, the first sum, and then the four sums payable in 1907, 1908, 1909, and 1910 respectively) and the £7543, 16s. 6d. It is, of course, obvious that, if his reading is correct, he practically is allowed to pay cash now, and is not charged any interest or any other hire-payment for the time during which he has enjoyed the furniture, that is from the beginning of the arrangement up to the present time. And accordingly the owners of the furniture, Wylie & Lochhead, say that this is not the true construction of the agreement, but that the true construction is that he must pay (if he wants to get the furniture) the difference between what he has paid and the sum which the whole sums in article 1 amount to, under deduction of that part of the payments yet to come which represents interest. The difference in tender is that the hirer offers to pay £2577, 4s. 6d., whereas the owners of the furniture say that he ought to pay £3511, 0s. 4d.

Now, the question is, What is the meaning of the agreement? The Lord Ordinary, whatever views he may have had on what the parties intended, has considered that they have expressed themselves in such a way that he cannot get beyond the expressed terms of the bargain, and that, inasmuch as "the hereon endorsed price" undoubtedly is the sum of £7543, 16s. 6d., "the whole sums previously paid" mean—and can only mean—the sums which have been paid under article 1 of the agreement. I do not think that one is driven to that construction, which obviously would be against the fair meaning of the bargain. The absurdity of the construction is probably best illustrated thus. If the pursuer chose to exercise his option under article 7 on 14th May 1913, he would have to pay only a sum of some £95; whereas, if he waited until the next day, he would get precisely the same effect, but he would have to pay £1201, 0s. 4d.—a very curious result.

It seems to me, in the first place, that if you take the agreement literally, the only way in which the hirer can become the proprietor of the furniture is by exercising the option under article 7. There is no provision in the agreement (as there might have been) for the furniture becoming *ipso facto* the property of the hirer upon the payment of the last instalment under article 1. Well, if one therefore reflects that article 7 is to be called in aid, that seems inevitably to point to the conclusion that "the whole sums" must really mean the whole sums previously paid towards capital, with the exclusion of interest. It is quite evident that you cannot take the expression absolutely literally, because you could not suppose that, if there had been some completely different transaction between the parties, a sum paid by the hirer to the owner under the other transaction would have entered into computation at all. The expression must refer to sums in connection with this agreement; and, for the reason I have already given, I think it

can only be the sums paid to capital, and not the whole sums including May 21, 1912. interest.

Now, if that is so, you are set to find out what sums have been paid to capital. Article 1 by itself is not so explanatory, and if one was going absolutely strictly, I think it would be necessary to have a proof in order to find out how the sums provided in article 1 were made up. That however is quite unnecessary, because it is set out before us—and it is really admitted by both parties—that the figures in article 1 are arrived at by taking a five per cent interest upon the amount that still remains unpaid and deducting the instalments, as is set out in answer 4. It would be quite useless to have a proof about that, because there could only be one result. But the proof admitted would not be required and admitted in order to show what is the meaning of the agreement. I think one is bound to take the question of the construction of article 7 without any idea that one has had proof before one in the figures which are set forth in answer 4. It is only after I have come, taking the agreement by itself, to the conclusion, for the reasons that I have already stated, that “the whole sums” means the whole sums previously paid to capital, that then I think proof is allowable—not to construe the meaning of the agreement, but simply to find out what is the true arithmetical calculation upon which these figures are based, so as to arrive at what has been paid to capital and what to interest.

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—
Ld. President.

The result of the whole matter, in my judgment, is that the Lord Ordinary's judgment ought to be recalled ; and inasmuch as the action is brought by the hirer and the conclusions are so framed that they can only confirm his view of the agreement, I think the proper judgment is absolutor.

LORD JOHNSTON.—I entirely agree with the judgment your Lordship proposes, and I should add nothing if it were not for an argument which was strongly maintained on behalf of the defenders, and which I think is unsound. We were asked to intervene in this matter, on equitable considerations, to obviate what was represented as an injustice and a hardship upon the defenders if a literal construction was given to a certain section of the agreement. Now, I think that argument is without foundation. We cannot interfere : to do so would be to make a new contract.

I think it is worth while comparing the situation under article 4 and that under article 7 of this agreement.

Under article 4, if the hirer fails to make the continuous payments stipulated for, he forfeits not only the furniture, but all that he has already paid. That undoubtedly would be a great hardship on him and may be represented as inequitable, but the hirer has unqualifiedly and unambiguously agreed to it. If we were to do anything in the way of modifying the conditions of that section, we should certainly be re-writing the contract for him.

Under article 7 the matter is quite different. It is not a question of remodelling an unambiguous contract ; it is a question of construing an ambiguous one. No one can read article 7, with the knowledge which we are entitled to bring to a case of this sort as to what hire-purchase means, without seeing that there is a manifest ambiguity ; because if it be taken, as contended by the pursuer, literally, there might come a period in such a contract at which the sum to be deducted exceeded

May 21, 1912. the sum from which it was to be deducted. That certainly cannot be intended. But I do not think there is much difficulty in understanding what the parties meant. The ambiguity lies in the words "by payment in cash of the hereon endorsed price, under deduction of the whole sums previously paid." And it is perfectly clear that to make this consistent—because we know what the payment in cash is to be, and we know what, taken literally, the sums previously paid would be—it is necessary to give some intelligible construction to the words "the whole sums previously paid." Now, we know—or I should rather say we are entitled to know—that the sums previously paid consist of principal and interest. Although we do not really know how much is principal and how much interest, the parties do. The persons who lent on hire drew the contract and arranged these figures and must clearly understand them, and the person who took on hire must be assumed to do so also. If, then, these sums are partly principal and partly interest, it does not require very much intuition to see that "under deduction of the whole sums previously paid" must mean "under deduction of the whole sums previously paid so far as those sums consist of capital."

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Limited.

Ld. Johnston.

For these reasons I entirely agree with the judgment which your Lordship proposes.

LORD SKERRINGTON.—I concur.

THE COURT recalled the interlocutor of the Lord Ordinary, and assoilzied the defenders.

E. ROLLAND M'NAB, S.S.C.—WHIGHAM & MACLEOD, S.S.C.—Agents.

No. 136.

ARTHUR DALRYMPLE FORBES GORDON, Pursuer (Appellant).—
Constable, K.C.—D. M. Wilson.

May 21, 1912.

ALEXANDER HOGG, Defender (Respondent).—*Johnston, K.C.—
T. G. Robertson.*

Gordon v.
Hogg.

Lease—Management—Outgoing—Rules of good husbandry—Five-shift rotation of crops—Obligation of tenant to sow grass seeds with waygoing white crop.

The tenant of a farm obliged himself under his lease to cultivate the same "agreeably to the rules of good husbandry," and in particular "by at least the five-shift rotation," which was therein defined. Under this rotation the white crop on one-fifth of the land at his outgoing fell to be followed by young grass in the next year.

Held that the tenant was bound in the last year of his lease to sow grass seeds along with his waygoing white crop upon that portion of the land, he receiving reasonable remuneration therefor; or, alternatively, to grant all necessary facilities to the landlord or incoming tenant to do so.

1ST DIVISION.
Sheriff of
Roxburgh,
Berwick, and
Selkirk.

ON 9th May 1911 Arthur Dalrymple Forbes Gordon, liferenter of the farm of Gordon East Mains, in Berwickshire, brought an action in the Sheriff Court at Duns against Alexander Hogg, his tenant in the farm, in which he craved the Court:—"To find and declare that the defender as outgoing tenant foresaid of the said farm and others is bound either (First) To sow down and harrow and roll in,

in so far as not already done, with his waygoing crop upon said farm and others upon that break which in the year 1910 was in fallow or turnips, the usual kind and quantities of grass and clover seeds either supplied by himself or by the pursuer or the incoming tenants as the defender may elect, and upon payment by the pursuer or incoming tenants aftermentioned of fair and reasonable remuneration for all additional work and all expenses occasioned thereby; or alternatively (Second) To grant all necessary facilities and access for the pursuer or James Haliburton, and Ralph Haliburton, both farmers, Raecleuch, near Lauder, incoming tenants of said farm and others, and his or their servants, to sow, harrow, and roll in the same upon said break, in so far as not already done.”

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In terms of the lease under which the defender occupied the farm he was outgoing tenant as to the houses and grass lands at Whitsunday 1911, and as to the lands in grain crop at the separation of the crop of that year from the ground.

The pursuer averred:—(Cond. 2) “By said lease it is, *inter alia*, provided:—‘With respect to the management and cropping of said lands, the said Alexander Hogg binds and obliges himself and his foresaids to labour, cultivate, and manure the same in all respects agreeably to the rules of good husbandry, and particularly without prejudice to said generality to farm and manage these parts of said lands that are arable by at least the five-shift rotation, thus to have in each year not less than one-fifth thereof in old grass, and not more than one-fifth in each of the following crops, *videlicet*:—Young grass, turnips, or bare fallow, white crop after grass and white crop after turnips or fallow, declaring that no two white crops shall succeed each other.’ . . . Explained further that the above narrated clauses of the foresaid lease are in identical terms with corresponding provisions in a succession of leases of said farm and others, and in particular with the corresponding provisions contained in the lease thereof in favour of the late David Allan, terminating at the entry of the defender thereto under his said lease.” (Cond. 3) “It is absolutely necessary not only to secure the labouring and cultivation of agricultural farms such as that before referred to in accordance with the rules of good husbandry, but also for the maintenance of the rotation thereof, as it is also the universally recognised practice in farming, in sowing down the grain crop immediately following upon the break of fallow or turnips, to sow also and to harrow and roll in with the grain crop grass and clover seeds in order that the land may be in young grass in the following year. From similar necessity it is also customary, in the absence of conventional provisions thereanent, in all cases of farm outgoings in which, as in the present instance, the date of vacation of the lands in grain crop is at the separation of the crop of the waygoing year from the ground, in order that the grass and clover seeds may be sown down, that the outgoing tenant should adopt one or other of the following alternatives, namely:—That the outgoing tenant should sow down and harrow and roll in along with his waygoing grain crop immediately following after fallow or turnips the usual kinds and quantities of grass and clover seeds, either supplied by himself or by the landlord or incoming tenant as the outgoing tenant may elect, upon his being paid fair and reasonable value for the seeds, if supplied by him, and for the work of sowing, harrowing, and rolling in the same, and for any other expenses properly incurred by the outgoing tenant thereanent; or, alternatively (second) that

May 21, 1912. the outgoing tenant should grant all necessary facilities and access for the landlord or incoming tenant to enter upon the lands intended for said crop, and to sow the said grass and clover seeds with the said waygoing crop, and to harrow and roll in the same, or that he, the outgoing tenant, should himself harrow and roll in the same, on being paid value for so doing. It is believed and averred that in practice the second alternative is the course almost invariably followed. When conventional provisions are made thereanent, it is merely to vary the outgoing tenant's common law obligation as above, frequently to the effect of conferring on the landlord or incoming tenant the right, and taking from the outgoing tenant the option, of sowing down the seeds, and binding the outgoing tenant to harrow and roll in the same free of charge."

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The defender's answer to these averments was:—"Explained and averred that the sowing, harrowing, and rolling in of grass and clover seeds along with the waygoing grain crop of an outgoing tenant would benefit solely the landlord or incoming tenant, and is matter of bargain, by contract of lease or otherwise, between the landlord or incoming tenant and the outgoing tenant. The defender's lease contains no provisions in regard to the operations condescended on."

The pursuer further averred that the incoming tenants entered upon the fields on which grain seeds had been sown by the defender, and sowed down and harrowed in the usual grass seeds thereon; but that, after they had thus sown two fields, the defender expelled them and their servants from the farm, and refused to allow the sowing operations to be completed by either of the alternative methods referred to in condescendence 3. Consequently, 41 acres which should have been in young grass the following year remained unsown. The pursuer's averments proceeded:—(Cond. 5) "The pursuer has offered and hereby offers, and has all along been willing to pay to defender for all seeds, work, and other expenses which he might properly incur in connection with the sowing down, harrowing, and rolling in of the said grass and clover seeds, and has further offered and hereby offers, without prejudice to his and the incoming tenants' rights, that the sowing, &c., might be completed upon either alternative method or any other proper method under reservation of any claims competent to defender thereanent, but the defender persists in his refusal."

In answer the defender averred that he was willing, and had all along been willing, to allow the pursuer to enter upon the land upon which grain seeds had been sown for the purpose of sowing grass and clover seeds, the defender himself rolling in the same along with his grain seeds, provided that reasonable payment were made to the defender for rolling in the seeds, and provided that the pursuer or incoming tenant agreed to pay the amount of damage, if any (to be settled by arbitration), done to the defender's waygoing corn crop in consequence of the incoming tenant's sowing his grass seeds therewith; but that the pursuer and the incoming tenant had declined to agree to these terms.

The pursuer pleaded, *inter alia*;—(1) The defender being bound to labour and cultivate said farm in accordance with the rules of good husbandry, and *separatim* to preserve and maintain the rotation of cropping thereupon, and having failed to implement said obligations or either of them as stated, decree should be granted as craved. (2) The defender being bound in accordance with the common law and

the custom of the said farm and surrounding district to adopt one or other of the alternatives concluded for, and having refused to implement same, decree should be granted as craved. May 21, 1912.
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The defender pleaded;—(1) The defender not having failed to implement any of the obligations incumbent upon him as tenant of the said farm either under his lease or at common law, decree of absolvitor should be pronounced, with expenses. (2) The defender having afforded to the pursuer upon reasonable terms every facility for carrying out the operations referred to in the conclusions of the initial writ, he should be assoilzied with expenses.

On 15th July 1911 the Sheriff-substitute (Macaulay Smith), after a proof, pronounced the following interlocutor:—"Finds in fact (1) that the defender under a lease of fifteen years was tenant of the farm of Gordon East Mains down to Whitsunday 1911 as to houses and grass; (2) that about one-fifth part of these subjects, now under white crop, is not to be vacated by him till the separation of said crop; (3) that in or about the month of April 1911 the defender was requested by pursuer either himself to sow or to grant facilities for his successor, the incoming tenant, to sow grass seeds along with said crop of corn in order to provide young grass for said incoming tenant, and at same time preserve the rotation of cropping; (4) that defender, after having permitted a portion of said ground to be sown by his successor, refused to allow the remainder to be sown except upon the granting to him by the incoming tenant of certain conditions which, *inter alia*, included a reference to arbiters; (5) that in consequence of defender's refusal a portion of said subjects consisting of about 41 acres is still unsown with grass seeds; (6) that under his said lease the defender was bound to observe the rules of good husbandry and to follow a regular rotation of crops known as the five-shift rotation; (7) that there is no clause in said lease explicitly binding the defender to sow grass seeds as described, nor reserving to the pursuer the right to permit anyone else to come upon the subjects to do so; (8) that in agricultural districts generally there is a practice or custom proved to exist under which sowing of grass seeds with a waygoing crop is carried out either by the outgoing or incoming tenant by arrangement between themselves; and (9) that the defender, in terms of some form of arrangement with his predecessor in the lease, was allowed, under certain conditions, to sow grass seed with his predecessor's waygoing corn crop: Finds in law (1) that the defender is not bound by said practice or custom either himself to sow grass seeds as described, or to permit his successor in the lease to do so; and (2) that he is not bound to do so either by the fact of his having himself had access at the beginning of his lease for sowing grass seeds, or by the terms of his lease: Therefore refuses the crave of the initial writ."

The pursuer appealed, and the case was heard before the First Division (consisting of the Lord President, Lord Johnston, and Lord Skerrington) on 15th May 1912.¹

¹ The following authorities were referred to in argument:—*For the appellant*—Purves v. Rutherford, (1822) 2 S. 53; Marshall v. Walker, (1869) 7 Macph. 833; Simson's Trustee v. Carnegie, (1870) 8 Macph. 811. *For the respondent*—Lyll v. Cooper, (1832) 11 S. 96, *per* Lord Balgray, at p. 116; Stark v. Edmonstone, (1826) 5 S. 45; Hunter on Landlord and Tenant, vol. ii., p. 630.

May 21, 1912. At advising on 21st May 1912,—

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Hogg.

LORD PRESIDENT.—This case raises the question whether a landlord is or is not entitled to have grass seed sown along with the white crop under a five-shift rotation in the last year of the lease. The lease in question binds the tenant "to labour, cultivate, and manure" the lands "in all respects agreeably to the rules of good husbandry, and particularly, without prejudice to said generality, to farm and manage these parts of said lands that are arable by at least the five-shift rotation."

Now, the whole question, it seems to me, comes to be what is the five-shift rotation, and secondly, is the sowing of grass seed with the white crop part of that rotation? I cannot imagine that anybody, whether lawyer or farmer, could give any but the one answer. But I will take two witnesses, who will do as well as more. The first I take is Mr Davidson, a well-known authority on the subject, who says this: "I would say that the failure to have these grass seeds sown is a complete violation of the rules of good husbandry, and also of the fifth-shift system. It is plain you can't have that system unless it is done." And the other is Mr Forrest, Edrom, a witness for the defender, who, in his examination-in-chief, gives us the advantage of some legal views as to what the tenant is bound to do in the last year of the lease, but who, when he is cross-examined, not upon legal views but upon what actually happens, says that he has sown grass seeds after harvest if the sowing which had been done previously had mis-given, that is to say, come to grief. And he goes on thus: "With that exception I have always sown down my grass seeds with the waygoing crop. I have never known of anybody on the fifth shift who did not follow that procedure. (Q.) Would you say that anybody who did not do that was following the rules of good husbandry? (A.) He could not do it otherwise."

I think these two witnesses are quite enough to confirm one in what one might say was part of judicial knowledge, namely, that it is part of the five-shift rotation to sow down grass seeds with the white crop so as to get the young grass in terms of the rotation. Now, I do not think that custom, that is to say custom in a technical sense, has anything to do with this. Custom in a non-technical sense has, because custom, or what everybody does, may serve to show how the five-shift rotation is in practice carried out. When the sowing of the grass seeds is done by the tenant, who is leaving, in the last year of the lease, then custom, in the technical sense, has provided that he shall be remunerated for the grass seeds (if he provides them) inasmuch as he is not going to reap the grass which he has sown, and also that he shall have the right (if they are provided by the landlord or the incoming tenant) to be paid for his labour in sowing them, and for harrowing and rolling them in, unless there are special stipulations in the lease providing that he is to do it for nothing.

I must say that I think it is exceedingly clear that this tenant had no right to take up the attitude he did during the last year of his lease and to say that, by refusing to sow grass seeds himself and preventing the landlord or his assignee, the incoming tenant, doing so, he would make it impossible for the five-shift rotation to be carried on, that five-shift rotation being the particular thing which he was bound to see carried out.

Accordingly, I think the Sheriff-substitute is wrong, and that the appeal May 21, 1912. should be allowed.

Gordon v.
Hogg.

LORD JOHNSTON.—This lease has, as it seems to me, the unusual merit of brevity ; but, at the same time, it contains an exact statement of the situation that was intended to be created between the landlord and his tenant, during its currency, and between the landlord and the outgoing tenant on the one side, and between the outgoing tenant and the incoming tenant on the other. The lease is also drawn evidently with an accurate knowledge of agriculture so far as bearing on the matter, and if agricultural knowledge had been applied to its interpretation, instead of legal ingenuity, this litigation would not have occurred.

To come to the details of the lease, if the farm is to be cultivated upon a five-shift rotation, it must be so cultivated. What, then, is the five-shift rotation? I do not take this from my own knowledge, I take it from the lease itself. The five-shift rotation is : first year, old grass ; second year, white crop after grass ; third year, green crop or bare fallow ; fourth year, white crop after green crop or fallow ; and fifth year, young grass. Now, how is the young grass to get there? It can only get there, according to the rules of good husbandry, by being sown with the white crop. That is the course which, on the five-shift rotation, the tenant was bound to follow, and if he does not, there will be no young grass to follow the last white crop, and as Mr Forrest says in two lines after the passage your Lordship quoted, "If there was no young grass on the farm it would throw it out of rotation for the incoming tenant."

Now, that is just exactly what this outgoing tenant has maintained his right to do. But it seems to me that he is not entitled to say that he has fulfilled the conditions of his lease, if when at the end of his lease he is sowing out his last grain crop, he does not also do that which is part of the due cultivation of the farm on a five years' rotation, and with that grain crop sow out grass seeds for the next year's grass. I do not think, therefore, that there is any question whatever that it was an obligation on the outgoing tenant under this lease to sow out with the last white crop grass seeds to provide young grass for next year. Without doing so, his obligation to cultivate the farm under a five-shift rotation according to the rules of good husbandry would not be fully implemented.

It is perfectly true in many, and probably in most cases, that the incoming tenant is, by arrangement, allowed to come in and sow the grass seed for himself, because—while the obligation is as I have stated—it is, if not expressed, implied by custom that the incoming tenant must pay for the seed, the grass of which he is to reap, and for the cost of sowing it. But this coming in and sowing is not his right. It is a mere arrangement for mutual convenience between the outgoing and the incoming tenant, that the incoming tenant should be allowed to do himself that which he must otherwise pay for, and the doing of which is not a matter of profit to the outgoing tenant. But that does not affect the obligation upon the outgoing tenant in such a lease as the present to sow the grass seeds with the waygoing crop, receiving the cost of the seeds and sowing from the incoming tenant.

I therefore agree with the judgment which your Lordship proposes.

May 21, 1912. LORD SKERRINGTON.—I concur.

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Hogg.

THE COURT pronounced this interlocutor:—"Recall the interlocutor of the Sheriff-substitute dated 15th July 1911: Find in fact in terms of the first six findings in fact in said interlocutor: Find further in fact (7) that the five-shift rotation requires that grass be sown along with the grain crop on the fields in question: Find in law that the pursuer is entitled to decree as craved: Find and declare accordingly in terms of the crave of the initial writ, and decern; find the pursuer and appellant entitled to expenses, and remit," &c.

KINMONT & MAXWELL, W.S.—STEEDMAN & RICHARDSON, S.S.C.—Agents.

No. 137. THE GLASGOW GOLDSMITHS COMPANY, Pursuers (Appellants).—
Sol.-Gen. Anderson—Wark.

May 24, 1912. MACKENZIE & COMPANY AND ANOTHER, Defenders (Respondents).—
Morison, K.C.—T. G. Robertson.

Glasgow Gold-
smiths Com-
pany v. Mac-
kenzie & Co.

Penalty—Recovery of statutory penalty—Procedure—Summary application—Sheriff—Plate (Scotland) Act, 1836 (6 and 7 Will. IV. cap. 69), secs. 2, 18, and 22—Summary Jurisdiction (Scotland) Act, 1908 (8 Edw. VII. cap. 65), sec. 4.

Proceedings for the recovery of penalties under the Plate (Scotland) Act, 1836, must be brought under the forms of the Summary Jurisdiction (Scotland) Act, 1908, and not in the form of an ordinary action in the Sheriff Court.

1st DIVISION. IN March 1911 the Glasgow Goldsmiths Company brought an action in the Sheriff Court at Stirling against Mackenzie & Company, silver-smiths there, and against John Mackenzie, the only known partner of that firm, for the recovery of penalties alleged to be due under the Plate (Scotland) Act, 1836.*

* The Plate (Scotland) Act, 1836 (6 and 7 Will. IV. cap. 69), imposes certain penalties by sec. 2 for using or striking on plate marks other than those prescribed by the statute, and by section 18 for selling or exposing for sale plate not duly marked, and enacts:—Sec. 22. "All penalties and forfeitures imposed by this Act shall be recovered by any person or persons who shall sue for the same before any two Justices of the Peace having jurisdiction within the county, city, burgh, or place in which the offence shall have been committed or where the alleged offender shall reside, or before the Sheriff of any such county; and it shall be lawful for such Justices or Sheriff to proceed in a summary way, and to grant warrant for bringing the parties complained of immediately before them or him, and on proof by the confession of the offender, or on the oath of one or more credible witness or witnesses or other legal evidence, forthwith to determine and give judgment in such complaint; and if on conviction the penalties hereby imposed be not immediately paid, the said Justices or Sheriff are hereby empowered to grant warrant for the recovery thereof, and of the expenses decreed for, by poinding and sale, according to the law of Scotland; and in case such penalties shall not be forthwith paid upon conviction, and if by the confession of the offender, or the report of a Sheriff's officer or constable, it shall appear that no sufficient goods or effects can be found within any place in the said county known to such officer or constable, then

The pursuers averred that the defenders had (1) struck on certain articles of silver-plate marks other than those prescribed by the Act, in contravention of section 2 thereof; and (2) exposed the same for sale, in contravention of section 18 thereof.

The pursuers craved the Court:—"To grant a decree against the defenders ordaining them to forfeit and pay (first) the sum of £100 in respect of each of the offences committed by the defenders under section 2 of said Act, 6 and 7 Will. IV. cap. 69; and (second) the sum of £100, or such other sum as the Court may think right, in respect of each of the offences committed by the defenders under section 18 of said Act."

The defenders pleaded, *inter alia*;—(1) The Court has no jurisdiction, in respect proceedings in the inferior Courts for recovery of alleged penalties imposed by the statute founded on can only be brought in the Sheriff's Criminal Court under the Summary Jurisdiction (Scotland) Act, 1908.

On 17th July 1911 the Sheriff-substitute (Mitchell) sustained the defenders' plea of no jurisdiction and dismissed the action.

On 24th October 1911 the Sheriff (Lees), on appeal, adhered to that interlocutor.

The pursuers appealed, and the case was heard before the First Division (consisting of the Lord President, Lord Johnston, and Lord Skerrington) on 24th May 1912.

Argued for the appellants;—The terms of section 22 of the Plate Act did not prescribe summary procedure as necessary for the recovery of penalties, they merely permitted such procedure to be adopted. The opening words of the section conferred upon a common informer the right to sue for penalties in unlimited terms, and it must be assumed that the ordinary forms of Court were available.¹ The remaining part of the section provided an alternative method of procedure of which the Sheriff might, but need not, avail himself. An action for the recovery of a penalty was not necessarily a criminal

it shall be lawful for such Justices or Sheriff, by a warrant under their or his hand, to cause such offender or offenders to be committed to the common gaol or house of correction for the said county where the matter of complaint may arise, or for the nearest burgh in such county, there to remain without bail for such time as such Justices or Sheriff shall direct, not exceeding six calendar months, unless such penalties and all reasonable charges attending the recovery thereof shall be sooner paid and satisfied; and the penalties so paid or recovered shall belong, one-half thereof to the person or persons suing for the same, and the other half thereof to His Majesty, his heirs and successors: Provided always that . . . the judgment of such Sheriff . . . shall be final, and shall not be subject to review by advocacy, suspension, reduction, or otherwise."

The Summary Jurisdiction (Scotland) Act, 1908 (8 Edw. VII. cap. 65), enacts:—

Sec. 4. "This Act, so far as relating to summary procedure, shall apply to summary proceedings in respect of . . . (b) any offence or the recovery of a penalty under any statute which does not exclude summary procedure . . ."

Sec. 6. "Nothing contained in this Act shall affect any right to sue for any penalty, or to apply for any order of Court or other warrant *ad factum prestandum* in the Court of Session or Sheriff Court, but it shall not be competent to sue for penalties in the Small-Debt Court."

¹ *Crewer v. Wright*, (1883) 2 *Guthrie's Sheriff Court Cases*, 412.

May 24, 1912. proceeding as the learned Sheriffs had apparently thought.¹ The words of the section which applied to the recovery of this particular penalty pointed to its being a civil proceeding. The expression used "to sue for," was not appropriate to a criminal proceeding, and, further, the concluding words of the section pointed in the same direction, "advocation" and "suspension" being appropriate to civil as well as to criminal proceedings, "reduction" to civil proceedings only. In any case, the reservation in section 6 of the Summary Jurisdiction Act, 1908, expressly excepted the present case from the operation of that Act. There was no force in the objection that the pursuers were suing for the whole penalty when they were only entitled to recover one-half thereof. Section 22 expressly authorised them to do so.

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Argued for the respondents;—The form in which the action was brought was bad. It was an ordinary petitory action, and the name of the payee was not given in the initial writ. Such an action had been held to be incompetent.² Further, the pursuers sued for a sum one-half of which was payable to another party. The action, if civil procedure were competent, should have been brought at the joint instance of the pursuers and the Lord Advocate.³ The pursuers had cited no instance of the recovery of a penalty by means of an ordinary civil action. A summary criminal proceeding was the appropriate form of action.⁴ In any case the question was settled by the terms of section 4 of the Summary Jurisdiction Act, 1908, which swept in all actions for any offence which might be tried in a summary way, or for recovery of a penalty where summary procedure was not excluded.

LORD PRESIDENT.—I think that the result to which the Sheriffs have come is right, although I am not quite certain that I have come to that conclusion on the same grounds as the Sheriffs did, because in their notes they have touched upon many topics which are not necessary for the disposal of the action.

The question must necessarily turn upon what is the true interpretation of section 22 of the Plate (Scotland) Act. Now, I think when one reads that section it is quite clear that the only procedure which is contemplated is procedure of a summary character, and that it is not meant there to give ordinary civil action—it may be for very large sums of money—with a privative jurisdiction to the Sheriff Court or the Court of the Justices of the Peace. If that is so, the right view of the procedure that is contemplated by section 22 is that it was meant to be a summary application, and then all difficulty is really at an end. There might have been difficulties as to review under the earlier law, but under the existing law, as the result of the two statutes—the Sheriff Courts Act of 1907 and the Sum-

¹ Campbell v. Young, (1835) 13 S. 535; Dunlop v. Hart, (1835) 13 S. 1173; M'Donald v. Gray, (1844) 2 Broun, 107; Macdonald v. Young, (1862) 4 Irv. 154; Caledonian Railway Co. v. M'Gregor, (1909) 46 S. L. R. 721; Moncreiff's Review in Criminal Cases, 273 and 279.

² Hardie v. Brown, Baker, & Bell, (1907) 15 S. L. T. 539.

³ Paterson v. Robson, (1872) 11 Macph. 76.

⁴ Glasgow City and District Railway Co. v. Hutchison's Trustees, (1884) 11 R. (J.) 43, 5 Coup. 420.

mary Jurisdiction Act of 1908—it is quite clear that the proceedings must be taken under the forms of the Summary Jurisdiction Act, because there is nothing else left.

Now, admittedly, this is not a procedure under the forms of the Summary Jurisdiction Act, and therefore I think the action fails, there being no warrant for it being brought in the form in which it has been.

May 24, 1912.
Glasgow Goldsmiths Company v. MacKenzie & Co.

LORD JOHNSTON.—I agree with your Lordship. I have come to the same conclusion as the Sheriffs, although I do not wish to be held as endorsing everything that they say on the subject. Section 22 gives right to sue for a penalty, and, as I read it, says that if you do sue you must sue in the following way, and that following way is a summary way. Whether the suit is civil or criminal we do not need to decide, but it certainly cannot be entertained under the ordinary civil procedure of the Sheriff Court.

LORD SKERRINGTON.—I concur.

THE COURT dismissed the appeal.

GILL & PRINGLE, W.S.—DUGALD MACLEAN, Solicitor—Agents.

ROBERT KIRKLAND MILLS, Pursuer (Respondent).—*Morison, K.C.*— No. 138.
C. H. Brown.

KELVIN & JAMES WHITE, LIMITED, Defenders (Reclaimers).— May 28, 1912.
Macmillan, K.C.—*Hon. W. Watson.*

Process—Proof—Diligence for recovery of documents—Action of damages for criminal charge made maliciously and without probable cause—Precognitions supplied to Crown officials. Mills v. Kelvin & James White, Limited.

In an action of damages in respect of a criminal charge, alleged to have been made maliciously and without probable cause, and to have been contained in certain documents including precognitions lodged by the defenders with the criminal authorities, the Court *granted* diligence at the instance of the pursuer for recovery of the precognitions, no objection to their production being stated for the Lord Advocate.

ON 28th December 1911 Robert Kirkland Mills, instrument maker, 1st Division, brought an action of damages against Kelvin & James White, Ld. Ormidale, Limited, nautical and scientific instrument makers, Glasgow, on the ground that the defenders had falsely, maliciously, and without probable cause lodged criminal information with the Procurator-fiscal, Glasgow, against the pursuer, charging him with theft and fraud.

The pursuer averred :—"The defenders have prevented the pursuer from obtaining the documents which the defenders, through their law-agent and directors, lodged with the criminal authorities, but he believes and avers that the charge of theft was contained in a statement lodged in or about November 1911 with the Procurator-fiscal, and the charge of fraud was made in or about the month of December or January following, and was contained in what purported to be precognitions and statements of certain of the defenders' directors and servants."

On 20th March 1912 the Lord Ordinary (Ormidale) granted diligence for the recovery of documents in terms of a specification lodged by the pursuer, the first article of which (as amended by the

May 28, 1912. Lord Ordinary) was in these terms:—"All charges, statements, or other writings, lodged by the defenders or their solicitor or by any of their directors with the Procurator-fiscal, Glasgow, or the Crown Agent, Edinburgh, and relating to charges of theft or fraud against the pursuer, between 1st November 1911 and 16th January 1912."

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Kelvin &
James White,
Limited.

The defenders reclaimed, and the case was heard before the First Division on 28th May 1912.

Counsel for the reclaimers stated that they did not object to the recovery, under the first article of the specification, of such documents as were covered by the diligence craved in *Henderson v. Robertson*¹; but argued that precognitions supplied to the Crown authorities were not recoverable, being in the same position as precognitions taken by the Procurator-fiscal.²

Counsel for the respondent were not called on to reply on this point.

The Court were informed that the specification had been intimated to the Lord Advocate, and that he had lodged no objections.

THE COURT (the Lord President, Lord Kinnear, Lord Johnston, and Lord Mackenzie), without delivering opinions, adhered.

CARMICHAEL & MILLER, W.S.—ALEX. MORISON & Co., W.S.—Agents.

No. 139.

ARCHIBALD CALLAN HUNTER, Pursuer (Respondent).—

Morison, K.C.—T. G. Robertson.

May 28, 1912.

JOHN BROWN & COMPANY, LIMITED, Defenders (Appellants).—

Macmillan, K.C.—James Stevenson.

Hunter v.

John Brown &
Co., Limited.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), sec. 1 (3)—Application for arbitration—Competency—Compensation being paid—"Question" arising under the Act.

A workman, who was receiving full compensation for total incapacity under the Workmen's Compensation Act, 1906, applied for the registration of a memorandum of agreement for payment of compensation at that rate until ended, diminished, &c., in terms of the Act. The genuineness of this memorandum was objected to by the employers, on the ground that the workman had signed a receipt bearing that he had agreed that compensation should be paid only while his employers were of opinion that his incapacity continued. The workman accordingly abandoned the application.

He then presented an application for arbitration to fix the amount of compensation, to the competency of which the employers objected on the ground that, as full compensation was being paid, there was no "question" arising in any proceedings under the Act within the meaning of sec. 1 (3) thereof. *Held*, in the circumstances, that there was a "question" in the sense of the Act, and that the workman was entitled to apply for and to obtain an award of compensation.

2D DIVISION. ON 7th December 1911 Archibald Callan Hunter, a labourer in the employment of John Brown & Company, Limited, engineers and shipbuilders, Clydebank, applied in the Sheriff Court at Dumbarton for an award of compensation under the Workmen's Compensation Act, 1906. Prior to this application Hunter had (as stated in the Sheriff-substitute's interlocutor *infra*) made two applications to have

¹ (1853) 15 D. 292, at p. 293.

² *Sheridan v. Peel*, 1907 S. C. 577.

a memorandum of agreement recorded in the special register in terms May 28, 1912. of the Workmen's Compensation Act, 1906, but on both occasions the employers objected to the genuineness of the memorandum, and both applications were abandoned.

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Co., Limited.

In the application for an award of compensation the Sheriff-substitute (Blair) awarded compensation, and, at the request of the employers, stated a case for appeal.

The case set forth that it was admitted that on 24th March 1911 the respondent was injured by an accident arising out of and in the course of his employment with the appellants; that his average weekly wages were 25s.; and that compensation at the rate of 12s. 6d. a week had been paid to him regularly since the date of the accident, and was being paid to him at the date of the case.

The case also set forth:—"On 7th December 1911 the respondent lodged a petition in the Sheriff Court of Dumbarton narrating the [admitted] facts, and stating that the question which had arisen between the parties is what is the amount of compensation due to the respondent, and craving an award for the compensation due to the respondent under the Workmen's Compensation Act, 1906. This petition, which was by way of initial writ, and contained only a bare statement of claim, called in Court at Dumbarton on 19th December following, when the appellants lodged a written note of defence maintaining that the application was incompetent and premature in respect that there were no questions in dispute between the parties in terms of section 1 (3) of the Workmen's Compensation Act, 1906,* so as to entitle the workman to present a petition for arbitration. In the note of defence it was admitted that the respondent was injured in the appellants' employment on 24th March 1911, that he was still incapacitated as the result of that accident, that the appellants were paying the respondent compensation at the rate of 12s. 6d. per week, being one half of his average weekly wage of 25s., and that the respondent had accepted, and was still accepting, this compensation. The appellants therefore craved that the application should be dismissed as incompetent and premature, with expenses.

"Nothing was said in the note of defence by the appellants about the respondent having signed the form of receipt now objected to and hereinafter set forth.

"I heard parties' procurators on these pleadings on 19th December 1911, when the respondent's agent submitted, for the first time in these proceedings and in answer to the note of defence, a copy of receipt which he alleged the respondent had signed on receiving his first payment of compensation, in the following terms:—

"Received from Messrs John Brown & Company, Limited, engineers and shipbuilders, the sum of 12s. 6d., being compensation due to me in terms of the Workmen's Compensation Act, 1906, in respect of injuries which I received through an accident while in their employment; and I acknowledge that my employers and I have agreed that compensation shall be paid to me under this agreement only while the said John Brown & Company, Limited, are of opinion

* The Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), enacts:—Sec. 1 (3) "If any question arises in any proceedings under this Act as to the liability to pay compensation under this Act . . . or as to the amount or duration of compensation under this Act, the question if not settled by agreement shall . . . be settled by arbitration. . . ."

May 28, 1912. that my incapacity continues, and when they are of opinion that my incapacity has ceased, this agreement shall end. Reserving to me
Hunter v. my rights otherwise to recover further compensation should I claim
John Brown & Co., Limited. to be entitled to it. ARCHD. C. HUNTER.'

" A copy receipt was lodged in this process, but the original was not. It was and still is in the possession of the appellants, and it has never been produced by them. The appellants requested me to dismiss the petition on the ground stated in their note of defence. Respondent craved a proof.

" I refused the appellants' motion, and fixed a diet of proof, which took place on 11th January 1912. The respondent led evidence. The appellants refused to cross-examine the respondent's witnesses, and led no evidence on their own behalf.

" On 15th January 1912 I issued an interlocutor finding proved, *inter alia*, the facts admitted on both sides. I further found proved the following facts:—(1) that the respondent, on 15th May 1911, attended at the shipyard to receive his first payment of compensation; (2) that he was one of a long line of men also waiting to receive compensation; (3) that when he was opposite the pay window, the appellants' clerk handed him a sum of money amounting to £4, 9s. 3d., stating that it was compensation for seven weeks and two days, and placed the printed form of receipt already mentioned before him, and asked him to sign it, which he did; (4) that its terms were not read over or explained to him in any way, nor was his attention directed to the fact that its terms made the appellants the sole judges of whether and when the respondent had recovered from his injuries; (5) that the respondent signed the receipt under essential error, in the belief that he was acknowledging only the sum handed to him by the appellants' clerk; (6) that on the 7th of June 1911 the respondent lodged in this Sheriff Court a memo. of agreement, to be recorded in the Special Register, to the following effect:—'That on the 7th of April 1911 the appellants agreed to pay to the respondent compensation under the Workmen's Compensation Act, 1906, at the rate of 12s. 6d. per week, beginning the first payment as at 31st March 1911, and to continue the payment thereof until the same is ended, diminished, redeemed, or suspended in terms of the said Act,' and the appellants lodged a minute in answer, objecting to the genuineness of that memorandum of agreement; (7) that on the 17th day of June 1911 the respondent lodged another memo. of agreement made on the 15th of May 1911, to be recorded in said register, whereby the appellants agreed to pay compensation under the Workmen's Compensation Act, 1906, at the rate of 12s. 6d. per week, beginning the first payment as at 31st March 1911, and to continue the payments thereof until the same is ended, diminished, redeemed, or suspended, in terms of the said Act; and the appellants lodged a further minute objecting to the genuineness of that second memorandum of agreement; and (8) both petitions to record presented by the respondent were thereupon abandoned, because of the terms of the receipt granted to the appellants, and set up by them as their objection to the genuineness of the memo. sought to be recorded. The appellants at the diet of proof intimated that they had no intention of binding the respondent down to the terms of the said receipt. I asked them to put in a minute to that effect. They declined.

" It was further proved that the respondent thereafter continued to receive his compensation without interruption. Accordingly, I

issued an award, and found that the receipt in question was a form May 28, 1912.
 of contracting out not authorised by the said Act; that it was signed
 by the respondent under essential error; that the only agreement ^{Hunter v.}
 entered into by the respondent was to receive compensation in terms ^{John Brown &}
 of the Act; that the only way in which the respondent could protect ^{Co., Limited.}
 himself against the appellants constituting themselves the sole judges
 as to when his compensation should terminate was by an award,
 especially in face of the fact that the appellants declined to put in a
 minute superseding all or any effect which the said receipt might
 have, and also in face of the fact that when the respondent had
 lodged a simple memo. to record, the appellants disputed the genuine
 ness thereof, and set up the aforementioned receipt as the real agree-
 ment between the parties; that the respondent had not recovered
 from the effects of his injury, and that he was entitled to compensa-
 tion at the rate of 12s. 6d. per week from the date of said accident,
 so far as not already paid, and to continue until further orders of the
 Court: And I further found the appellants liable in five guineas of
 modified expenses.

“The validity of this form of receipt under the Workmen’s Com-
 pensation Act is a constant source of discussion between the appel-
 lants and their workmen in compensation cases in the Sheriff Court,
 and it is earnestly desired by both parties that this question should
 be definitely settled by the judgment of the Court of Session.”

The questions of law were:—“(1) Was the receipt in question, as
 a receipt, a proper and competent form of receipt within the meaning
 of the Workmen’s Compensation Act, 1906? (2) Was the said
 receipt, so far as it purports to be an agreement, a competent and
 proper agreement in terms of the Workmen’s Compensation Act?
 (3) In the circumstances, and in respect that the appellants paid, and
 have continued to pay, half wages to the respondent, was the pro-
 cedure adopted by the respondent in asking for an award, and the
 award following thereon, competent?”

The case was heard before the Second Division on 28th May
 1912.

Argued for the appellants;—It was a condition of arbitration that
 there should be a difference between the parties on the matters men-
 tioned in section 1 (3) of the Act.¹ There was no such dispute in
 the present case; for although there was no written agreement, the
 appellants were actually paying compensation to the respondent.

Argued for the respondent;—The respondent was entitled to have
 his right to compensation established so as to be in a position to
 enforce that right in the future. There were only two methods
 of establishing his right, viz., (1) by recording a memorandum of
 agreement; and (2) by an application for arbitration. The respon-
 dent had failed in his attempt to have a memorandum recorded,
 and the second course alone remained. If he failed in this applica-
 tion then he might be met in the future with the objection that he
 had not made his claim within six months.² There was here a dis-
 pute between the parties, as was clear from the fact that the appel-

¹ Caledon Shipbuilding and Engineering Co., Limited, v. Kennedy, (1906)
 8 F. 960; Gourlay Brothers & Co. (Dundee), Limited, v. Sweeney, (1906)
 8 F. 965. Reference was also made to the Lord President’s observations in
 John Brown & Co., Limited, v. Orr, 1910 S. C. 526.

² Rendall v. Hill’s Dry Docks and Engineering Co., [1900] 2 Q. B. 245.

May 28, 1912. the Act, whether as to liability, amount, or duration, and if it be also the fact that the question had not been settled by agreement, then the respondent here was entitled to take the course he did in bringing a petition at that date. It seems to me quite clear that there was a double question as at that date, namely, first, as to the existence of an obligation, depending on the receipt; and, second, if the obligation did exist legally, was it one that could be enforced?

Hunter v.

John Brown & Co., Limited.

Lord Guthrie.

It is said, however, that supposing there was a question at that date the defence put in by the appellants disposed of it. I find no such defence stated by the Sheriff-substitute, because there was no admission that the compensation could only be ended in terms of the Act. It is further suggested that at all events now, after what happened later, the whole dispute between the parties has disappeared, because the appellants at the date of the proof intimated that they had no intention of binding the respondent down to the terms of the receipt. They declined, however, to put in a minute putting themselves under any obligation to that effect; and therefore it seems to me, as at 7th December, and also as at the present moment, there was and is a dispute between the parties which the respondent is entitled to have settled in the way that he has taken.

I think, therefore, that the third question must be answered as your Lordships propose. It is a pity that the only question of great general importance, and it is of great general importance and may be of great difficulty, raised in the case in the first and second questions, could not be answered, but that is the position.

LORD JUSTICE-CLERK.—I agree with your Lordships in holding that the first and second questions ought not to be answered by us. The questions are not really based on anything before us and cannot be dealt with by this Court. As regards the third question I have had some difficulty, but, in the circumstances of the case, I have come to agree that, as there was a receipt by the workman in such terms as to imply that the employers were to pay compensation only for so long as they chose to do so, that was sufficient to justify the workman in making an application to have the question settled.

THE COURT found that the first and second questions were not such as the Court was called upon to answer, and answered the third question in the affirmative.

GARDINER & MACFIE, S.S.C.—AULD & MACDONALD, W.S.—Agents.

JAMES BOGLE GIBSON (Trustee on the Sequestrated Estate of the late David Chrystal) AND OTHERS, First Parties.—*Cooper, K.C.*—*C. H. Brown.* No. 140.
May 30, 1912.

MRS ELIZA AUGUSTA SMITH OR CHRYSTAL, Second Party.—*M'Lennan, K.C.*—*Hedderwick.* Chrystal's Trustee v. Chrystal.

Insurance—Life Insurance—Husband and Wife—Married Women's Policies of Assurance (Scotland) Act, 1880 (43 and 44 Vict. cap. 26), sec. 2—Policy "for the benefit of" the wife.

The Married Women's Policies of Assurance (Scotland) Act, 1880, enacts:—Sec. 2. "A policy of assurance effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife . . . shall, together with all benefit thereof, be deemed to be a trust for his wife for her separate use . . . and such policy . . . shall not . . . form part of his estate or be liable to the diligence of his creditors. . . ."

A married man effected with a life assurance society a policy of assurance, described as an "endowment bond," in terms of which the society undertook, in consideration of the payment of certain annual premiums, to pay to him the principal sum assured, with interest and profits, on the expiry of twenty years. The society also undertook, in the event of the husband's death before the expiry of the twenty years, to pay the principal sum assured to his widow, whom failing, to the husband's executors, administrators, or assigns. The husband having died within the twenty years, survived by his widow, and his estate having been sequestrated—

Held (dub. the Lord President) that the policy in question was a policy "for the benefit of his wife" within the meaning of sec. 2 of the Act, and accordingly that the proceeds thereof fell to the widow and not to the husband's creditors.

ON 7th February 1912 a special case was presented by James Bogle 1ST DIVISION. Gibson, trustee on the sequestrated estate of the late David Chrystal, writer, Stirling, with the concurrence of certain others, the commissioners on the said estate, *first parties*, and by Mr Chrystal's widow, *second party*, for the opinion and judgment of the Court as to the respective rights of the parties in the proceeds of certain policies of assurance on the life of Mr Chrystal.

The circumstances in which the case arose were as follows:—

The late Mr Chrystal married the second party in June 1894, and died in January 1911, leaving a trust-disposition and settlement under which he appointed her to be his universal residuary legatee. Mr Chrystal's settlement contained the appointment of an executor, but the person so appointed refused to accept office, and Mr Gibson was appointed by the Court on 11th February 1911 to be judicial factor on the estate. The estate was thereafter sequestrated, and the first parties were appointed to be trustee and commissioners respectively thereon.

In September 1894 Mr Chrystal had effected with the Equitable Life Assurance Society of the United States two policies for the sum of £1000 each. These policies were described by the society as "Twenty Years Endowment Bonds," with "five per cent guaranteed for ten years." They were in identical terms, and bore that, in consideration of an annual payment of £55, 15s. on or before 18th August in each year for the term of twenty years from their respective dates, "the Equitable Life Assurance Society of the United States promises

May 28, 1912. the Act, whether as to liability, amount, or duration, and if it be also the fact that the question had not been settled by agreement, then the respondent here was entitled to take the course he did in bringing a petition at that date. It seems to me quite clear that there was a double question as at that date, namely, first, as to the existence of an obligation, depending on the receipt; and, second, if the obligation did exist legally, was it one that could be enforced?

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Lord Guthrie.

It is said, however, that supposing there was a question at that date the defence put in by the appellants disposed of it. I find no such defence stated by the Sheriff-substitute, because there was no admission that the compensation could only be ended in terms of the Act. It is further suggested that at all events now, after what happened later, the whole dispute between the parties has disappeared, because the appellants at the date of the proof intimated that they had no intention of binding the respondent down to the terms of the receipt. They declined, however, to put in a minute putting themselves under any obligation to that effect; and therefore it seems to me, as at 7th December, and also as at the present moment, there was and is a dispute between the parties which the respondent is entitled to have settled in the way that he has taken.

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A married man effected with a life assurance society a policy of assurance, described as an "endowment bond," in terms of which the society undertook, in consideration of the payment of certain annual premiums, to pay to him the principal sum assured, with interest and profits, on the expiry of twenty years. The society also undertook, in the event of the husband's death before the expiry of the twenty years, to pay the principal sum assured to his widow, whom failing, to the husband's executors, administrators, or assigns. The husband having died within the twenty years, survived by his widow, and his estate having been sequestrated—

Held (dub. the Lord President) that the policy in question was a policy "for the benefit of his wife" within the meaning of sec. 2 of the Act, and accordingly that the proceeds thereof fell to the widow and not to the husband's creditors.

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The circumstances in which the case arose were as follows:—

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In September 1894 Mr Chrystal had effected with the Equitable Life Assurance Society of the United States two policies for the sum of £1000 each. These policies were described by the society as "Twenty Years Endowment Bonds," with "five per cent guaranteed for ten years." They were in identical terms, and bore that, in consideration of an annual payment of £55, 15s. on or before 18th August in each year for the term of twenty years from their respective dates, "the Equitable Life Assurance Society of the United States promises

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to pay at its branch office in the city of London, England, 81 Cheap-side, London, E.C., on the maturity of this bond on the eighteenth day of August in the year Nineteen hundred and fourteen to David Chrystal Eleven hundred and thirty-six pounds sterling, together with the surplus then to be apportioned to this bond by the society. Or in lieu thereof to pay the surplus in cash and defer the maturity of the bond (£1000) for the term of ten years or until prior death paying until such maturity five per cent per annum on the sum of the annual premiums paid. (If thus extended the bond will also participate in any annual profits apportioned in excess of the five per cent; payable in cash at the end of the ten years.) Or to convert the surplus into an annuity to increase the annual income on the bond and extend the bond as above for ten years or until prior death. Or to convert the bond and surplus into an annuity for life.

"The society further promises that in the event of the death of the said David Chrystal before the expiration of twenty years from the date hereof and while this bond is in force to pay immediately upon the receipt of satisfactory proofs of death the amount of the bond (£1000) to his wife, Eliza Augusta Smith or Chrystal, if living, if not, then to the said David Chrystal's executors, administrators, or assigns. And should the annual premiums paid hereon compounded annually at four per cent interest exceed the amount of the bond, such excess shall be added to the principal of the bond and paid therewith."

Among the privileges guaranteed to the assured under these bonds was the following:—"3. If, after having been in force for three years, this bond should lapse in consequence of non-payment of any instalment, it will have a surrender value in non-participation paid-up assurance for as many twentieths of the original bond as annual premiums have been paid; provided that such surrender be made within six months after default in the payment of the premium. This paid-up bond will mature and be payable at the time at which the original bond would have matured; but if the holder then desires its continuance, this payment may be extended for a period of ten years, or until prior death. If thus extended, the paid-up bond will be entitled annually to as many twentieth parts of the income guaranteed under the original bond as annual premiums have been paid."

On the back of the bond was the following endorsement:—

"Issued on the life of D. Chrystal.

"Payable at maturity on the 18th day of Aug. 1914, until which date no dividend will be declared on this bond.

"Amount £1000.

"Annual instalment £55, 15s. 0d.

"Due on the 18th day of Aug.

"Register date of bond Aug. 18th, 1894.

"20 payments  20 years bond."

With regard to the privilege above quoted the following information was added by minute to the case in the course of the proceedings:—"The parties have ascertained that in the event of article 3 of the list of privileges guaranteed to the assured under each of the said policies . . . being brought into operation, the document to be granted by the assurance society effecting this would, in accordance with the practice of the said society, be an endorsement on the policy in the following terms:—"Inasmuch as the premium due , has not been paid upon the within policy, it is hereby agreed and declared

that in accordance with the wish of the assurant, the said policy has become a paid-up policy for £ sterling, without profits, requiring no further payments except for extraordinary privileges. The paid-up policy will not participate in the tontine or any other dividend, will be known under No. and in favour of the same beneficiaries as before. The conditions of the said policy, except as herein modified, remain as before.'"

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Mrs Chrystal gave no price or consideration in respect of her husband's effecting or keeping up these bonds, nor did she accept them as in lieu of or in implement of any obligations undertaken by him in their marriage-contract.*

At subsequent dates sums amounting *in cumulo* to £1077 were borrowed by Mr Chrystal from the assurance society, and assignations of the bonds in favour of the society were granted in security of these loans. The society required that Mrs Chrystal should sign these assignations in respect of her interest as a beneficiary in the trust created by the bonds. The sums so borrowed were used by Mr Chrystal for the purposes of his business.

After Mr Chrystal's death the balance of the sums due by the society on the bonds, amounting, after deduction of the loans, to £1580, 13s. 6d., was paid over by the society on the joint receipt of the trustee and of Mrs Chrystal, and was put on deposit-receipt pending the settlement of the question that had arisen as to the rights of parties in this balance. The parties were agreed that Mr Chrystal was a domiciled Scotsman at the date when the policies were effected, and remained so continuously until the date of his death, and that the question fell to be determined on the same footing as if the contracts embodied in the policies had been entered into in Scotland, and were to be construed in accordance with the law of Scotland.

The contentions of the parties were stated as follows:—

"The first party maintains that as trustee on the sequestrated estate of the said David Chrystal he is entitled to the said balance as being part of the estate of the said David Chrystal, in respect (a) that having regard to the nature and terms of the policies referred to, they were not effected and held by the late David Chrystal as trustee for the second party under the Married Women's Policies of Assurance (Scotland) Act, 1880.† . . .

* The first parties contended that, having regard to the provisions of this marriage-contract, the effecting of these bonds was in excess of a reasonable provision for the wife, was therefore revocable as a gratuitous donation, and had been revoked by Mr Chrystal's bankruptcy. In view of the grounds on which the case was decided it is unnecessary for the purposes of this report to make further reference to this contention or to the statements made in the case with regard to it.

† The Married Women's Policies of Assurance (Scotland) Act, 1880 (43 and 44 Vict. cap. 26), enacts:—Sec. 2. "A policy of assurance effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife, or of his children, or of his wife and children, shall, together with all benefit thereof, be deemed a trust for the benefit of his wife for her separate use, or for the benefit of his children, or for the benefit of his wife and children; and such policy, immediately on its being so effected, shall vest in him and his legal representatives in trust for the purpose or purposes so expressed, or in any trustee nominated in the policy, or appointed by separate writing duly intimated to the assurance office, but in trust always as aforesaid, and shall not otherwise be subject to his control,

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"The party of the second part maintains that she is entitled to the said balance on the ground that the said policies of insurance—in so far as the second alternative obligation thereby imposed upon the said assurance society is concerned, viz., to make the payments therein set forth in the event of the death of the said David Chrystal before the expiration of twenty years from the date of said policy to the second party, whom failing, the said David Chrystal's executors, administrators, or assigns—were policies of insurance effected by the said David Chrystal on his own life, and expressed on the face of them to be for the benefit of his wife, the second party; and that in terms of said 2nd section of the Married Women's Policies of Assurance (Scotland) Act, 1880, the said policies, in so far as said second alternative obligation is concerned, were held in trust for her benefit. In the event which has happened, viz., the death of the said David Chrystal survived by the second party, the said second alternative obligation and not the first alternative obligation is the one which has become prestable against the said assurance society, and the second party is accordingly entitled to the balance of the sums payable by the said assurance society under said second alternative obligation in virtue of the said trust created for her benefit."

The questions of law for the determination of the Court were:—
"(1) Is the trustee on the sequestrated estate of the said David Chrystal entitled to the balance of the proceeds of the said policies? or (2) Is the second party, as wife of the said David Chrystal, and named in the policy, entitled to the said balance?"

The case was heard before the First Division on 20th and 21st February 1912.

Argued for the first parties;—The policies in question did not fall within the scope of section 2 of the Married Women's Policies of Assurance Act. They were not expressly taken as policies under the Act, nor were their terms such as to bring them within its scope. The Act contemplated an indefeasible interest in favour of the wife, and the husband's interest must be excluded before the trust contemplated for the wife could be set up. These policies were primarily for the benefit of the husband. They were primarily payable to him, and were only destined to the wife conditionally on the occurrence of a certain event, viz., his death before the period of payment. Further, the husband had the right to claim their surrender value at any time before maturity to her exclusion. Accordingly, the wife had not shown that unqualified interest which the Act required. In all previous cases under this Act one of two sets of conditions had been present, either (1) the policy had been taken with express reference to the terms of the Act,¹ or (2) the interest of the wife had

or form part of his estate, or be liable to the diligence of his creditors, or be revocable as a donation, or reducible on any ground of excess or insolvency; and the receipt of such trustee for the sums secured by the policy, or for the value thereof, in whole or in part, shall be a sufficient and effectual discharge to the assurance office: Provided always, that if it shall be proved that the policy was effected and premiums thereon paid with intent to defraud creditors, or if the person upon whose life the policy is effected shall be made bankrupt within two years from the date of such policy, it shall be competent to the creditors to claim repayment of the premiums so paid from the trustee of the policy out of the proceeds thereof."

¹ Schumann v. Scottish Widows' Fund Society, (1886) 13 R. 678; Stewart v. Stewart's Trustee, (1901) 8 S. L. T. 436.

been one which clearly excluded that of the husband.¹ Neither of these sets of conditions were satisfied by the policies here; and to admit these policies to the benefit of the Act would be an extravagant extension of its scope.

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Argued for the second party;—The two sets of obligations undertaken in the bonds were distinct and separate, and the latter formed just such a provision for the wife as was contemplated in section 2 of the Act. There was no authority for the proposition that the bonds must bear *ex facie* to be taken subject to the provisions of the Act. All that was required was that the policies should be taken by a married man in favour of his wife. These policies satisfied that requirement, and neither the fixing of a period of time within which the provision in her favour was to come into operation,² nor the fact that the husband's representatives might take under a destination-over,³ was sufficient to exclude the application of the Act. In such a policy there must necessarily be a right in the husband to take on the failure of the wife or children. The fact that the husband might accept a surrender value did not alter the nature of the wife's right, as he could only take that surrender value as trustee for the wife under the terms of the bond.

At advising on 30th May 1912,—

LORD JOHNSTON.—I have examined the cases referred to by counsel, but I do not find that they give much assistance in the determination of the present, because, even though there are several of them which depend on the construction of policies of this particular American assurance company, they were not concerned with policies of the same class as that with which we have to deal. This is a policy of a peculiar description. It is a combination of the ordinary endowment insurance and of the "Married Woman's Policy of Assurance," and the only difficulty in the case arises from that combination. The methods of the Equitable of New York are not those to which we are accustomed in the practice of our insurance companies. But they are only more complicated. They are perfectly legitimate developments of the principles of life insurance.

The policy in the present case is, as regards the primary interest of the assured, David Chrystal, a twenty year endowment policy—that is to say, it secures him payment of the sum assured with accrued share of profits on his maintaining the policy for twenty years and surviving the term. That it allows him to take payment in four alternative ways is immaterial. What is material is that, at and after the expiry of the endowment period, he and he alone is entitled to the benefits under the policy. But within the endowment period, by which I mean the period of twenty years which

¹ Coulson's Trustees v. Coulson, (1901) 3 F. 1041; Dickie's Trustees v. Dickie, (1892) 29 S. L. R. 908; Holt v. Everall, (1876) 2 Ch. D. 266; Seyton v. Sallerthwaite, (1887) 34 Ch. D. 511. Reference was also made to Cleaver v. Mutual Reserve Fund Life Association, [1892] 1 Q. B. 147, per Esher, M.R., at p. 151, and to Barras v. Scottish Widows' Fund Society, (1900) 2 F. 1094.

² *In re Suse v. Sibeth*, (1887) 18 Q. B. D. 660; Holt v. Everall, 2 Ch. D. 266; Robb v. Watson, [1910] 1 Ir. R. 243.

³ Porter on Insurance Law, 5th ed., p. 375; *In re Parker's Policies*, [1906] 1 Ch. 526.

May 30, 1912. is the primary currency of the insurance, the policy is a provision for the wife of the assured. In the event of the death of the assured within the twenty years, the policy being meantime duly maintained, the sum assured is made payable to the wife of the assured *nominatim*, if surviving, and failing her, to the assured's representatives.

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The difference between the policy in question and the usual policy taken out by a married man for the benefit of his wife, is that the latter confers a right on the wife contingent merely on her husband predeceasing, while this policy confers a right on the wife contingent on a double event, viz., (1) the husband predeceasing her, and (2) dying during the endowment period—that is, before the expiry of the twenty years during which the policy is primarily current.

I think, notwithstanding this double contingency, that the policy in question comes under the protection of the Married Women's Policies of Assurance Act, 1880. It is a policy effected by a married man on his own life, and it is expressed on the face of it to be for the benefit of his wife. The statute does not restrict the benefit of the wife to any specified interest in the policy. The statute does not say that the benefit of the wife must be absolute and void of contingency, so as to leave nothing in the husband. It is recognised that her interest may be clogged with the contingency of her survivance of her husband, and that should she not do so, his radical right may result. On the same principle the benefit of the wife may, I think, depend not merely on one, but on two contingencies, viz., the predecease of the husband, and occurrence of the predecease within twenty years from the date of the policy, and yet the policy be for the benefit of the wife in the sense of the Act. The Act declares the policy together with all benefit thereof to be deemed a trust for the benefit of the wife for her separate use, or for the benefit of children, &c., and to vest in the husband and his legal representatives in trust for "the purpose or purposes so expressed"; and to be not otherwise subject to the husband's control or to form part of his estate. I cannot read the statute as requiring that the policy must be in favour of the wife unconditionally to admit of it, "together with all benefit thereof," being deemed a trust for the benefit of the wife. I read the enactment as providing that the policy and all benefit thereof shall be deemed a trust for the benefit of the wife for her interest, as that interest is defined or expressed in the policy. That is, I think, the meaning of "in trust for the purpose or purposes so expressed"; and I hold that that interest and benefit may be a contingent interest and benefit. It is to the policy that one must go to find the wife's interest or benefit. It is the statute that gives protection, such as the common law would not confer, to the interest or benefit so created.

It is consistent with, and a fair test of, this view that, when the spouses sought to borrow on the security of the policy, it was found the wife had such a vested, though contingent, right in the policy that the spouses could not do so except jointly for their respective interests, as evidenced by the assignment in security of a loan which is printed on page 25 of the case.

The doubt which the Court experienced at the hearing was as to whether the policy, on surrender being made under the third head of the list of privileges endorsed thereon, within the twenty years of its currency, would

cease to be held for the benefit of the wife, but this doubt is entirely resolved by the minute which the parties have lodged. May 30, 1912.

An argument was maintained by Mr Chrystal's trustee as to whether, having regard to his marriage-contract, the effecting of the policy in question was not in excess of a reasonable provision and revocable as a gratuitous donation, and was revoked by his insolvency. But that objection is just one against which the statute expressly protects the wife. The point is, I think, beyond argument.

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Accordingly, I think that the first query should be answered in the negative and the second in the affirmative.

LORD MACKENZIE.—The only question argued in this case on which it is necessary to express an opinion is whether the two policies or endowment bonds are within the protection of the Married Women's Policies of Assurance (Scotland) Act, 1880, section 2. If they are, the second party, who is the widow of the late David Chrystal, is entitled to receive from the assurance society the sum of £1580, 13s. 6d., being the balance payable upon the bonds after deduction of the sums borrowed on their security. If the bonds are not protected by the statute the proceeds go to the trustee on the sequestrated estate of the husband.

It appears to me that the Act does protect the bonds in question. They are in identical terms, are both dated the 10th September 1894, and are issued by the Equitable Life Assurance Society of the United States. They bear to be twenty year Endowment Bonds. Each bond provides for the payment annually in advance of £55, 15s. for the term of twenty years from its date. The benefits which result from these payments fall under two heads. In the first place, the assurance society promises to pay on the maturity of the bond to David Chrystal a specified sum of £1136, together with a share of the surplus. Then follow certain alternative benefits which are conceived in his favour, none of which, however, can be claimed by him until the maturity of the bond. In the second place there is an obligation on the society in the event of the death of the husband before the expiration of twenty years—i.e., before the maturity of the bond—provided the bond is in force, to pay the amount of the bond, £1000, to his wife if living, and if not, then to the husband's executors, administrators, or assigns.

The theory of these provisions is intelligible and reasonable. The view appears to me to be this: the husband was desirous, by contributing out of his annual savings, to have at his command, if he so desired it, at the maturity of the bond, a capital sum of money. He was, however, also desirous of safeguarding the interests of his wife during the period when these savings were being made. The same considerations would apply if a person entitled to succeed to an estate insured his life for the benefit of his wife to provide for the contingency of his not succeeding to the estate. The two parts of the bond are, and must be kept, separate. Nothing that the husband could do so long as the annual premiums continued to be paid, could, in my opinion, diminish the benefit secured by the terms of the bond to his wife during the currency of twenty years. She was entitled to this benefit provided (1) her husband died before the bond matured, and

May 30, 1912. (2) she survived him. This benefit, no doubt, only continues while the bond is in force. If it lapses during the first three years the whole benefit would apparently be lost.

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A list of privileges guaranteed to the assured under the bond is attached thereto, the third of which provides that, if after having been in force for three years the bond should lapse in consequence of non-payment of any instalment, it is to have a surrender value in non-participation paid-up assurance for a certain proportion of the original sum, and this substituted bond is to mature and be payable at the same time as the original bond. This article appeared to cause a possible difficulty, because if its true meaning was that the husband could at any time during the twenty years make available as a fund of credit for his own behoof the amount of the premiums then paid up, this would put an instrument in his hands which might enable him to defeat the interest vested in the wife by the terms of the body of the bond. The minute of amendment lodged by the parties removes this difficulty, because it makes it clear that the paid-up assurance substituted for the original policy is to be in favour of the same beneficiaries as before. The nature of the right vested in the wife would remain the same as before—its extent only would be affected.

Loans were obtained on the security of the bonds in question, the amounts of which found their way into the hands of the husband. The indefeasible nature, however, of the wife's right under the bonds is recognised by the fact that the assignments in security, which the society took, are granted by her as well as by her husband.

The result of this, in my opinion, is that by the bond a policy of assurance was effected by a married man on his own life, and it is expressed upon the face of it to be for the benefit of his wife. It, therefore, in terms of the second section of the Act, is to be deemed a trust for the benefit of his wife for her separate use. Immediately on its being effected it vested in the husband in trust for the purpose so expressed, and is not subject to his control, nor does it form part of his estate, nor is it liable to the diligence of his creditors, nor revocable as a donation, nor reducible on any ground of excess or insolvency. There is no definition or limitation in the Act as to the form in which the policy is to be expressed. The fact that in certain circumstances there is a destination to the husband's executors, administrators, or assigns, will not prevent the statutory consequences of the policy receiving effect. As matters stood during the whole of the twenty years until the bond matured, the policy by virtue of the Act was held for the wife absolutely. It appears to me that there must be in all such cases the possibility of a resulting benefit in favour of the husband. It was so in the case of *Schumann v. The Scottish Widows' Fund Society*.¹ In that case, in the event of the wife predeceasing her husband, it was provided that his heirs, executors, or assignees should be entitled to receive a certain specified sum after his decease. In the present case the fact that if the husband survived the period when the bond matured, a benefit then accrued to him, does not appear to me to be of a different nature, or that there is anything in this feature of the bond under consideration which

¹ 13 R. 678.

would render the wife's right defeasible during its currency. A similar point arose under the English Married Women's Policies Act, and it was held that the possibility of a resulting trust in favour of the husband's representatives did not exclude the operation of the Act—*Holt v. Everall*,¹ and *Seyton v. Satterthwaite*.²

May 30, 1912.
Chrystal's
Trustee v.
Chrystal.

Lord Mac-
kenzie.

Upon the whole matter therefore I am of opinion that the bonds are within the protection of the statute, and that the first question should be answered in the negative and the second question in the affirmative.

LORD KINNEAR.—I am of the same opinion. The conclusive consideration to my mind is that, in the event which has happened, the bond gives the whole benefit of the insurance money, which is the fund now in dispute, to the insured's wife, and that in terms falls within the second section of the Married Women's Policies of Assurance Act. The husband had, no doubt, a contingent interest in the insurance, but that contingent right never became absolute, and was completely and finally determined by his death. The result, to my mind, was to leave this a policy of insurance for the benefit of the wife and of the wife alone.

I do not think any second argument arises upon the point which was raised by the trustee as to the provision for the wife being revocable as a donation *inter virum et uxorem*. That simply raises the same question over again, Does the Married Women's Policies of Assurance Act apply, or does it not? If it does not, there would be, no doubt, a very strong ground for the trustee's contention; but if it does, it expressly enacts that the assurance shall not be revocable as a donation *inter virum et uxorem*, and the insurance money therefore cannot be paid to the husband's creditors.

LORD PRESIDENT.—I confess I have had considerable difficulties in this case, and, indeed, that the first inclination of my judgment was against the result at which your Lordships have arrived. What pressed upon my mind was that I think that at common law, and apart from the provisions of the Married Women's Policies of Assurance Act, this money would, undoubtedly, belong to the husband's creditors. It is, therefore, really the protection of the Act and of the Act alone that effectuates the other result. Now, the Act which grants the privilege says, "A policy of assurance effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife or of his children, or of his wife and children, shall, together with all benefit thereof, be deemed a trust for the benefit of his wife for her separate use." What struck me at first was that this policy was certainly *prima facie* not a policy for the benefit of the wife, but a policy for the benefit of the husband himself, because the first clause provides that if he lives to a certain age he will get a sum of money, and the provision in favour of the wife is only put in to meet the case of his not living to that age.

But I am sensible of the strength of the arguments which your Lordships have used. I feel also that the Act is an enabling statute, and the class of insurance which is here disclosed seems to be a very sensible one. It pro-

¹ 2 Ch. D. 266.

² 34 Ch. D. 511.

May 30, 1912. *vides* for the wife if the husband is taken away by an early death, and, on the other hand, if he lives long enough, it provides him with a considerable sum of money out of which he can make a provision for her after his death. That being so, I do not feel sufficient confidence in the view that first struck me to intimate a formal dissent.

Chrystal's
Trustee v.
Chrystal.

THE COURT answered the first question in the negative and the second question in the affirmative.

ADAMSON, GULLAND, & STUART, S.S.C.—CUMMING & DUFF, S.S.C.—Agents.

No. 141. GEORGE HODGE (Judicial Factor on Mrs Kerr's trust-estate), Pursuer
(Respondent).—*J. R. Christie.*
May 31, 1912. JOHN WISHART (Hugh Kerr's Trustee), Defender (Appellant).—*Wilton.*
Hodge v.
Wishart.

Bankruptcy—Sequestration—Claims—Delay in lodging claim—Interdict of payment of dividend—Bankruptcy (Scotland) Act, 1856 (19 and 20 Vict. cap. 79), sec. 125.

A husband, who was executor on his wife's estate, having become bankrupt, a judicial factor was appointed on the executry estate. The judicial factor lodged a claim in the husband's sequestration, but the claim was not lodged until after a meeting of the commissioners, held as provided for in sec. 125 of the Bankruptcy Act, 1856, at which they had declared a first and final dividend. The judicial factor (although he was aware of the progress of the sequestration from other sources) had received no notices from the trustee, as the bankrupt (who denied that he was due any debt to himself as his wife's executor) had not inserted any such debt in his state of affairs, and the trustee was unaware that such a claim was to be made.

Held that, as there was no fault on the part of the bankrupt or his trustee, and as the delay in lodging the claim was due to the judicial factor's own remissness, the latter was not entitled to interdict the trustee from paying away the estate.

Scobie v. Hill's Trustee, (1869) 8 Macph. 161, *distinguished*.

2D DIVISION.
Sheriff of
Lanarkshire.

GEORGE HODGE, chartered accountant, Glasgow, judicial factor on the trust-estate of the deceased Mrs Elizabeth Kerr, brought an action in the Sheriff Court at Glasgow against John Wishart, accountant, Glasgow, trustee on the sequestrated estate of Mrs Kerr's husband, Hugh Kerr, contractor, Glasgow. In this action the pursuer sought to interdict the defender "from dividing the whole funds available for division among the creditors ranked by him of the said Hugh Kerr, in payment of a first dividend to them in prejudice of the pursuer's claim, until the defender has set aside a figure sufficient to pay an equalising dividend on pursuer's claim, should, on adjudication by the defender as trustee foresaid, the pursuer's claim be admitted."

Hugh Kerr was executor-nominate of his wife, and continued to act as such until, on his sequestration, he was superseded, and the pursuer appointed judicial factor on the estate on the petition of a beneficiary. The pursuer averred that Hugh Kerr had failed to account for his wife's estate to the beneficiaries under her will, and that he (the pursuer) had unsuccessfully endeavoured to get a statement of his intromissions as executor from Kerr, and had "endeavoured to see the agent, William Watson, solicitor, Glasgow, who had acted for bankrupt in the executry, but he could never be found."

The further facts averred on record are stated in the following May 31, 1912. passage from the opinion of Lord Salvesen :—

“The circumstances of the case are these :—The pursuer, Mr Hodge, ^{Hodge v. Wishart.} who was appointed a factor on the trust-estate of the deceased Mrs Kerr, claims to be a creditor *qua* factor of her husband, Hugh Kerr, on whose sequestrated estate the defender is trustee. The pursuer was appointed factor so far back as 18th August 1911, his appointment was extracted on 29th August, and he intimated his appointment as factor to the defender in the beginning of September. The examination of the bankrupt took place on 30th August, and it appears, and I think it is a material circumstance, that the pursuer was represented at that examination, because in another representative capacity he was a creditor of the bankrupt. He therefore had, from that early date, if not sooner, full knowledge of the sequestration of Hugh Kerr, and it was his duty to apprise himself, if necessary, by examination of the *Gazette* of the procedure in that sequestration. He probably even did not require to look at the *Gazette*, because as a representative of another creditor he would get all the usual notices issued to creditors of the estate.

“The pursuer at an early stage seems to have thought that there might be a claim against the bankrupt in respect of his having failed to account for the executry estate, and in September there was some correspondence between him and the defender on that subject. Nothing followed, and no claim was lodged by the pursuer as factor on Mrs Kerr’s estate, and I think the trustee, the defender in this case, was perfectly entitled to assume that, having had the possibility of such a claim brought to his mind, the pursuer had elected not to pursue it. The statutory period of four months expired on 28th November, after which and within fourteen days the commissioners were required to meet and to consider as to the distribution of the estate. The commissioners in fact met on the second day after the 28th November, and they then passed a deliverance to the effect that the whole estate should be distributed (except a small balance on hand) as a first and final dividend. Up to that time the commissioners and the defender had no knowledge that the pursuer intended to lodge any claim. The case might have been entirely different if, at the time that their deliverance was pronounced, a claim had in fact been lodged, or the circumstances were such as to make it their duty to provide for a known claim.”

The pursuer’s claim was in fact lodged on the eleventh day after the 28th of November.

On 22nd February 1912 the acting Sheriff-substitute (Taylor) pronounced the following interlocutor :—“Finds the following facts are admitted—(1) The estates of Hugh Kerr were sequestrated on 28th July 1911 ; (2) the first statutory meeting was held on 8th August 1911, and defender was appointed trustee ; (3) the said Hugh Kerr was confirmed executor of the late Mrs Elizabeth M’Lean or Dimond or Wallace or Kerr on 12th August 1910 ; (4) pursuer was appointed judicial factor on the trust-estate of the said Mrs Kerr on 18th August 1911 ; (5) the state of affairs lodged by the said Hugh Kerr contained no statement of any claim against him at the instance of himself as executor aforesaid ; (6) to entitle creditors to participate in the first dividend, oaths and grounds of debt fell to be lodged on or before 28th November 1911 ; (7) no notice was sent to pursuer by defender intimating the date by which claims required to be lodged in order to

May 31, 1912. participate in the first dividend; (8) intimation of a possible claim at the instance of pursuer was received by defender in the letter of 30th September 1911*; (9) a claim in the sequestration at pursuer's instance for £754, 6s. 5d. was lodged on 9th December 1911; (10) the commissioners on the sequestrated estate met on 30th November 1911, and decided to divide all available sums amongst the creditors whose claims had been timeously lodged: Finds in law that the pursuer is entitled to the interdict craved: Therefore declares the interdict already granted to be perpetual; and decerns."†

Hodge v.
Wishart.

The defender appealed to the Court of Session, and the case was heard before the Second Division on 30th and 31st May 1912.

Argued for the appellant;—The respondent was not entitled to the interdict craved. The case of *Scobie v. Hill's Trustee*,¹ on which the Sheriff-substitute relied, was distinguishable from the present case. In *Scobie*¹ there was fault on the part of the trustee in the sequestration; here there was no such fault. Here also the creditor was aware of the sequestration; whereas in *Scobie*¹ the creditor was ignorant of it. In this case the respondent could blame no one but himself. Further, his remedy was either to appeal, under section 169 of the Bankruptcy Act, against the deliverance of the trustee appointing payment of the dividend²; or to appeal to the *nobile officium* of the Court. The interdict, however, could not be granted for it would create an impossible situation in the sequestration.

Argued for the respondent;—There were two questions in the case, viz., (1) Did the respondent's tardiness preclude him from sharing in the first dividend? and (2) Did that tardiness prevent him from claiming to have money set aside to meet his claim, if established? On the first question the principle of the decision in *Scobie*¹ was directly applicable, although it was not contended here that the trustee was in fault. On the second question, the Bankruptcy Act of 1856 carefully provided³ that contingencies should not be ignored in the division of the estate. Until the expiry of the fourteen days

* This letter, from the pursuer to the defender, contained a request that the defender should arrange for delivery to the pursuer of jewellery belonging to Mrs Kerr, and proceeded:—"Could you assist me in getting from Mr Kerr a statement of his intromissions with Mrs Kerr's estate?"

† "NOTE.— . . . In *Scobie v. Hill's Trustee*, 8 Macph. 161, interdict was granted where a bankrupt had made no statement, and the trustee had taken no steps to force him to do so. Here the bankrupt has left out of his statement a possible claimant, with the result that this claimant receives no notice. There, Lord President Inglis said, 'It is impossible to sanction so great injustice as would result from refusing this interdict, unless there is some provision that, if a claim is not lodged within the specified time, no matter from what cause, the creditor shall not participate in the estate. But I find no such provision.' He goes on to say that, in the absence of a declaration of nullity, the Court is entitled to consider the circumstances, and see if the creditor has fairly complied with the statute or been prevented by the fault of someone else. I think these remarks apply to the present case. Pursuer got no formal notice owing to the fault of the bankrupt, and as the case against him rests on defender's having strictly complied with all statutory provisions, he is entitled to insist on that notice. . . ."

¹ (1869) 8 Macph. 161.

² *Steele v. Ligertwood*, (1865) 3 Macph. 587.

³ Reference was made to secs. 123, 125, and 130 of the Act.

mentioned in section 125, there was no finality under the Act; and May 31, 1912. the policy of the Courts under the various bankruptcy statutes had been not to press too harshly such statutory time limits as the Acts contained.¹ Hodge v. Wishart.

LORD SALVESEN.—[After the narrative quoted above]—Now the Sheriff has held that the defender must be interdicted from distributing the estate so as to prejudice the pursuer, and his ground is that the “pursuer got no formal notice owing to the fault of the bankrupt, and as the case against him rests on defender’s having strictly complied with all statutory provisions, he is entitled to insist on that notice.”

Now, I do not think it was contended before us that there was any fault on the part of the bankrupt. It is quite true that the bankrupt did not, in the state of affairs that he requires to lodge with his trustee, include this claim as one of the debts due by the estate, but the circumstances show quite clearly that he did not do so because he maintained, and has always maintained, that it was not a good claim against him. His case was, as we were informed, that he never fingered a penny of the money, but that the money was appropriated by his law-agents, whom he had properly employed to conduct the affairs of the executry. Therefore I cannot see that there was any fault in the bankrupt’s not including in his state of affairs, as a debt, a claim which he did not recognise and which he had reasonable cause for not recognising as a debt against him.

Fault on the part of the trustee is not alleged. The trustee appears to me to have acted here perfectly properly and fairly. There is no suggestion of any desire on his part to take any undue advantage of the pursuer. He acted entirely in discharge of his statutory duties.

Now, is it to be said that in such circumstances, where a claim is not lodged simply through want of vigilance on the part of the person who is vested in it, that the whole statutory procedure is to be changed in order that the person who has been so neglectful of his own or his constituent’s interests may nevertheless not be penalised? I do not think so. I see no reason why he should not suffer the usual penalty of his failure to take the necessary steps to vindicate his rights. It is quite true that under the Bankruptcy Acts, if there is more than one dividend, a creditor who has neglected to lodge his claim so as to participate in the first dividend is entitled to have an equalising dividend set apart for him on the declaration of the second dividend, if his claim has then been adjudicated upon and found good. That is a great concession to a creditor in such a position, and it may result in his not being penalised at all for not lodging his claim, as he ought to have done, before the first deliverance as to distribution was pronounced. But when the circumstances are, as here, that the commissioners have resolved, in entire ignorance of any outstanding claim, and in the *bona fide* discharge of their duty, to distribute the whole estate in one division, then, it seems to me, the creditor must take the consequences of his own failure to lodge his claim.

¹ *Porteous & Mitchell v. Aitken’s Trustee*, (1828) 7 S. 22; *Mitchell v. Wilson’s Trustee*, (1829) 7 S. 841.

May 31, 1912. The case of *Scobie*¹ was referred to as an authority—and indeed, as the only authority—for this application; but it seems to me that that was a totally different case and rests upon the well-known principle that if non-compliance with a statutory provision has been due to the fault of the person or body who are going to benefit by the strict application of these statutory provisions, then the Court will give an equitable remedy. The Court there proceeded upon the view that, but for the failure of the trustee to have the bankrupt examined, there would in all probability have been notice given to the creditor which would have apprised him of the necessity of lodging a claim in the sequestration, and that, as the creditor had received no such notice because of the failure of the trustee to perform his statutory duty, the creditor was entitled to the remedy of interdict against the estate being paid away to his prejudice. That, in my view, was an entirely different case from the one presented to us here, in which, as I think, there are no specialties at all, because the fact that this creditor was a creditor in a representative capacity cannot make any difference. Indeed, I agree with Mr Wilton that it makes the case rather worse because the pursuer was a professional man well versed in the bankruptcy statutes, having full knowledge, through his position as representing another creditor, of the exact position of this sequestrated estate, and therefore the very person who might reasonably be expected to do all that was necessary to protect the interests of those whom he represented.

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Wishart.

Lord Salvesen.

My view is that, if we were to listen to this demand on so-called equitable grounds, we should really have to give the same relief to every creditor who happened to be too late in lodging his claim to participate in the first dividend, with the result of upsetting the whole scheme of distribution under the bankruptcy statutes. I am therefore for recalling the judgment of the Sheriff-substitute and refusing the prayer of the note.

LORD GUTHRIE.—The question seems to arise chiefly under section 125 of the 1856 Act, which says, at the close of the section, that “they shall declare whether any and what part of the net produce of the estate, after making a reasonable deduction for future contingencies, shall be divided among the creditors.” Now, it is said in this case that the commissioners should have had the respondent’s claim in view as a possible claim. That is the first ground and that is the ground that the Sheriff-substitute has gone on. Mr. Christie, however, argued that, at all events, the claim having been lodged before the expiry of the fourteen days mentioned in section 125, the commissioners should have met again and given effect to the claim by considering it among the items that entered into the reasonable construction of the words “for future contingencies.” Then the third question is, the commissioners, not having taken either course, can we interdict the paying of the dividend? I agree with your Lordships that we cannot. The commissioners were bound to consider all claims that were actually in. It may be that if a claim had been intimated as about to be lodged, but was delayed on account of want of information, they might have been bound to consider that matter also; but here I agree with your

¹ 8 Macph. 161.

Lordship's opinion that the contrary was the case. The claim had been May 31, 1912. suggested at an early period but the conduct of the pursuer was such as to lead to the reasonable inference that it was not to be lodged. If so, it seems to me the deliverance was final and the money could be paid away. No doubt *Scobie*¹ shows that there may be special circumstances in which the remedy here sought will be granted, and the Sheriff-substitute has erred because he thought that the special circumstances which arose in *Scobie*¹ exist here. It seems to me that this case is a case by contrast to *Scobie*¹. In *Scobie*¹ there was fault on the part of the trustee; here it is admitted there was no fault on the part of the trustee or of the bankrupt. There were other circumstances in *Scobie*¹ which would be sufficient to entitle a claimant to the remedy sought; there are none here. The representative capacity will not do, and the omission of the bankrupt to include the claim will not do, and Mr Christie was not able to suggest any other special grounds. Taking it on the lowest footing, if it be the law that cause must be shown why the Court should interfere, then, it seems to me, no cause has been shown here.

Hodge v.
Wishart.
Lord Guthrie.

The LORD JUSTICE-CLERK and LORD DUNDAS concurred.

THE COURT sustained the appeal, recalled the interlocutor appealed against, and refused the crave of the initial writ.

C. STRANG WATSON, Solicitor—JAMES G. BRYSON, Solicitor—Agents.

ALEXANDER EDWARD FORBES MORISON, Pursuer (Respondent).— No. 142.
Blackburn, K.C.—D. P. Fleming.

A. & D. F. LOCKHART, Defenders (Appellants).—*Constable, K.C.—* June 11, 1912.
Skelton.

Morison v. A.
& D. F. Lock-
hart.

*Entail—Powers of heir in possession—Sale—Sale of moveables—Transfer-
ence of property—Sale of growing timber by heir of entail—Right of suc-
ceeding heir to prevent cutting of timber—Sale of Goods Act, 1893 (56 and
57 Vict. cap. 71), secs. 17, 18, and 62.*

The heir in possession of an entailed estate entered into a contract with a firm of wood merchants for the sale to them of certain lots of standing timber on the estate, under the condition that the purchasers should themselves cut down and remove the timber. The contract, which was constituted by offer and acceptance, further provided that half the price was to be paid within six days of the acceptance and the remainder when half the timber was cut, and that the timber should be at the purchasers' risk from the date of acceptance.

The heir died before all the timber was cut, and on the succeeding heir seeking to interdict the purchasers from proceeding with the cutting of the timber, the latter contended that, in virtue of the provisions of the Sale of Goods Act, the property in the timber had passed to them as at the date of the contract of sale.

Held (1) that—even assuming the growing timber to be "goods" in the sense of sec. 62 of the Sale of Goods Act—the property therein had not passed in virtue of the provisions of that Act, in respect that this was not a contract for the immediate sale of timber in a deliverable state, but was merely a personal contract to allow the purchaser

¹ 8 Macph. 161.

June 11, 1912.

Morison v. A.
& D. F. Lock-
hart.

1ST DIVISION.
Sheriff of
Aberdeen,
Kincardine,
and Banff.

to cut and remove the timber ; and (2) that the growing timber being *pars soli* passed to the succeeding heir unaffected by this personal contract of his predecessor ; and interdict *granted*.

ON 6th September 1911 Alexander Edward Forbes Morison, heir of entail in possession of the estate of Bognie, brought an action in the Sheriff Court at Aberdeen against A. & D. F. Lockhart, wood merchants, Huntly, in which he craved the Court "to interdict the defenders by themselves or others from cutting, sawing up, or otherwise interfering with the trees that were standing on the said estate of Bognie on the 24th day of July 1911, and to grant interim interdict."

The pursuer averred :—(Cond. 2) "The pursuer succeeded to the said estate on 24th July 1911, on the death of his father, Lieutenant-Colonel Frederick de Lemare Morison, the previous heir of entail in possession." (Cond. 3) "The said Frederick de Lemare Morison entered into a contract of sale, dated 27th March 1911, with the defenders, whereby he sold to them a quantity of standing timber, consisting of part of the Bogcoup Wood on the said estate of Bognie." (Cond. 4) "The pursuer was not a party to said contract of sale, and was unaware of its existence until after the death of the said Frederick de Lemare Morison." (Cond. 5) "Prior to the death of the said Frederick de Lemare Morison, the defenders had cut down a portion of the timber sold to them, but a large portion thereof still remained uncut at his death. After the death of the deceased, the defenders continued their cutting operations on the uncut portion." (Cond. 6) "As soon as the pursuer became aware of the defenders' operations he made inquiries, and thereupon he requested the defenders to cease all operations as regards cutting, sawing up, or otherwise interfering with trees that were standing on the said estate of Bognie at the date of the said Frederick de Lemare Morison's death, but they have refused to do so unless ordered by the Court. The present application has thus been rendered necessary."

The contract of sale referred to was constituted by offer and acceptance in terms of certain conditions of sale, the provisions of which were, *inter alia*, as follows :—

"CONDITIONS OF SALE by Private Bargain of standing timber on Bognie Estate, 1911, the property of Colonel F. de L. Morison of Bognie, hereinafter called 'the exposor.'"

"First. The timber embraced in the sale consists of a clean cut of part of Bogcoup Wood in two lots, which contain . . .

"Third. The purchaser will be at the sole expense of cutting off root and removing the timber. A stance for a sawmill will be allowed for each lot if required ; but except at such stances no sawmill shall be placed. The whole of the timber must be cut up and any sawmill or engine removed from the wood by the 31st day of December 1911, and all cut up and sawn timber must be removed from the estate by the 31st day of January 1912, and in the event of the purchaser failing to remove from the estate the whole or any part of the timber by the above stipulated dates, he shall pay to the exposor the sum of £1 sterling of pactional damages for every day thereafter during which the wood or any part thereof, or any sawmill, shed, or engine shall remain on the ground. The timber shall be entirely at the purchaser's risk from fire or other damage from the date of the acceptance of his offer. . . .

"Seventh. The price shall be payable half within six days after June 11, 1912. acceptance of offer and before commencing operations, and the balance when half of the wood has been cut off root—but not later than the 30th day of June 1911."

Morison v. A.
& D. F. Lockhart.

The pursuer pleaded, *inter alia* ;—(2) The pursuer, not having been a party to or adopted the said contract of sale, and said contract being personal to the said Colonel Morison, the pursuer, as succeeding heir of entail in possession, is not bound by it, and the defenders' licence to cut trees on the entailed estate ceased on the death of the said Colonel Morison. (3) The previous heir of entail's right to cut trees upon the said estate of Bognie having ceased at his death, all trees standing on the estate at that date became then the property of the pursuer as succeeding heir of entail, and he is entitled to interdict the defenders from interfering with the same.

The defenders pleaded, *inter alia* ;—(1) The action as laid is irrelevant. (2) The defenders having purchased the timber in question from the party entitled to sell the same, and the property therein having passed to defenders at the date of the said contract of sale,* the pursuer is not entitled to the interdict craved, and the interim interdict ought to be recalled. (3) The contract of sale having been entered into by the late Frederick de Lemare Morison in the ordinary course of estate management, is binding on the pursuer as a succeeding heir of entail.

Interim interdict had been granted on 6th September 1911, and on 14th November 1911 the Sheriff-substitute (Laing), after hearing

* The Sale of Goods Act, 1893 (56 and 57 Vict. cap. 71), enacts:—

Sec. 17. "(1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. (2) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case."

Sec. 18. "Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

"Rule 1.—Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed.

"Rule 2.—Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, and the buyer has notice thereof.

"Rule 3.—Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, and the buyer has notice thereof. . . ."

Sec. 62. "(1) . . . 'Goods' include all chattels personal other than things in action and money, and in Scotland all corporeal moveables except money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale. . . . (4) Goods are in a 'deliverable state' within the meaning of this Act when they are in such a state that the buyer would under the contract be bound to take delivery of them."

June 11, 1912. **Morison v. A. & D. F. Lockhart.** parties, pronounced an interlocutor in the following terms:—" Finds in fact (1) that by contract of sale, dated 27th March 1911, the late Colonel Frederick de Lemare Morison, then heir of entail in possession of the entailed estate of Bognie, in the parish of Forgue and county of Aberdeen, sold to the defenders a quantity of standing timber comprised in two lots containing 6286 trees at the price of £575; (2) that in terms of the contract the defenders forthwith proceeded to cut said timber; (3) that on 24th July 1911 the said Colonel F. de Lemare Morison died, and was succeeded in said entailed estates by the pursuer; (4) that the defenders continued after said 24th July to cut down said timber; (5) that on 2nd September 1911 they received a letter from the pursuer's agents intimating to them that they must stop cutting said timber, as their right to do so had ceased as at the date of the death of the said Colonel F. de Lemare Morison; (6) that as the defenders refused to accede to this request, the pursuer on 6th September obtained interim interdict against them prohibiting them from cutting, sawing up, or otherwise interfering with the trees that were standing on the said estate of Bognie on 24th July 1911: Finds in law (1) that the said contract entered into between the said Colonel F. de Lemare Morison and the defenders, being personal to him, the pursuer, as succeeding heir of entail, is not bound thereby; and (2) that the right of the said Colonel F. de Lemare Morison to cut timber on said estate of Bognie having ceased on his death on 24th July 1911, the whole timber standing on said estate, as at that date, became the property of the pursuer as the succeeding heir of entail: Therefore repels the first plea in law for the defenders: Sustains the pleas in law for the pursuer: Declares the interdict already granted perpetual." *

* " NOTE.— . . . As regards the facts essential for a decision at this stage, the facts as stated in the foregoing interlocutor may be taken as admitted, as it was upon them that both parties at the debate founded their respective contentions. Upon these facts the legal question arises, whether the contract for the sale of timber on the estate of Bognie made by the late Colonel Morison is or is not binding on the pursuer as the succeeding heir of entail of Bognie. On consideration of the authorities cited to me, I think that the legal position of the pursuer, as expressed in his second and third pleas in law, is unchallengeable. The right of an heir of an entail to refuse to recognise his predecessor's contracts of a personal nature, and in particular contracts of the nature of that made here, is, I think, well settled by authority. I need not refer in detail to the earlier cases relied on by the pursuer's agent, as I think the law on this subject was fully stated in the opinion of Lord Moncreiff in the case of *Paul v. Cuthbertson*, (1840) 2 D. 1286, at p. 1307, in which opinion Lord President Hope and Lords Gillies, Mackenzie, Fullerton, Cockburn, and Murray concurred." [The Sheriff-substitute then quoted passages from that opinion, and also referred to the cases of *Earl of Galloway v. Duke of Bedford*, (1902) 4 F. 851, and *Gillespie v. Riddell*, 1908 S. C. 628, and proceeded]—

" It was, however, urged for the defenders that, on the assumption that the law was as stated *supra*, it must be held to have been altered by sections 17 and 18 of the Sale of Goods Act, 1893, which prescribe the rules for ascertaining when the parties to a contract of sale of goods intended the property therein to pass, the argument being that the property in the timber sold by the late Colonel Morison to them under the contract referred to passed to them the moment the contract had been signed, *i.e.*, prior to severance of the timber sold. I think this argument is untenable. Trees prior to being cut are not moveable property. Trees are *partes soli*, *i.e.*,

The defenders appealed, and the case was heard before the First Division on 8th and 13th March 1912.

Argued for the appellants;—An heir of entail in possession had power to sell ripe timber, with some exceptions affecting amenity and administration.¹ When growing trees were sold by an heir of entail in possession the property in the timber was now transferred, by operation of the Sale of Goods Act, when the contract was made,² because growing trees, being *partes soli*, were “things attached to or forming part of the land,” and therefore “goods” in the sense of that Act.³ From the terms of the contract here it was quite clearly the intention of the parties that the property in the trees should pass at once. Thus the sale of the timber in question having been completed during the life of the seller, the pursuer had succeeded to the entailed estate of Bognie after the timber sold had ceased to form part of the estate, having become the property of the defenders. The contract here was for the sale of a definite quantity of timber, and was not merely a contract for giving the defenders a right to enter upon the land and cut timber.⁴ Even though trees might not be directly covered by the phrase “industrial growing crops” in section 62 (1), yet in Scotland that attribute of property which conferred a right to separate such crops from the soil applied with equal force to timber, and as the Act had clearly made growing crops moveable even before severance, it was only consistent that it should affect timber in the same way.⁵ It was unnecessary that the Act should have specified trees in view of English authority upon the Statute of Frauds.⁶

Argued for the respondent;—(The following argument was submitted on the assumption that the timber in question was ripe, a

parts of the land on which they grow, and ‘so long as they remain such by growing in the soil, or by being so attached to it that a considerable degree of force would be required for severance, are heritable, but as soon as they are cut down they become moveable’—(Rankine on Land Ownership (1909 edition), p. 119). Now, it is perfectly clear that wherever the subject of a sale is heritable it does not fall under the Sale of Goods Act, and accordingly, as the growing timber which formed the subject of contract between the defenders and the late Colonel Morison was at the date of sale heritable, it follows that the contract itself, and the intentions of parties thereunder, do not fall to be construed in light of the foregoing Act. In other words, the law as laid down in the authorities referred to is unaltered by that Act, for the simple reason that it in no way affects contracts of sale relative to heritable subjects.

“I must therefore make the interdict perpetual, leaving it to the defenders to work out their remedy against the late Colonel Morison’s executors.”

¹ Hamilton v. Viscountess of Oxford, (1757) M. 15,408; M’Kenzie v. M’Kenzie, (1824) 2 S. 775; Bontine v. Carrick, (1827) 5 S. 811; Paul v. Cuthbertson, (1840) 2 D. 1286, Lord Jeffrey, at p. 1292, Lord Moncreiff, at p. 1307; Boyd v. Boyd, (1870) 8 Macph. 637; Gillespie v. Riddell, 1909 S. C. (H. L.) 3, Lord Robertson, at p. 5.

² 56 and 57 Vict. cap. 71, secs. 17 and 18.

³ *Ibid.*, sec. 62 (1).

⁴ Morgan v. Russell & Sons, [1909] 1 K. B. 357, Alverston, C.J., at p. 365.

⁵ Chalmers’ Trustee v. Dick’s Trustee, 1909 S. C. 761, Lord Johnston (Ordinary), at p. 767, Lord Low, at p. 769.

⁶ 29 Car. II. cap. 3; Smith v. Surman, (1829) 9 B. & C. 561; Marshall v. Green, (1875) 1 C. P. D. 35; Chalmers, Sale of Goods Act, 143.

June 11, 1912. fact which the respondent denied)—Growing trees upon an entailed estate were *partes soli*, and therefore subject to the fetters of the entail,¹ Ripe trees continued to be *partes soli* until actually felled, when they became moveable property, and might then be “goods” in the sense of the Sale of Goods Act. But as long as they were growing they were not covered by the words of the Act. They were not “industrial growing crops”; and they could not be held to be covered by the word “things,” for that word was used in contradistinction to “growing crops,” and so must refer to something quite different, *i.e.*, to fixtures attached to the land.² If it had been intended to include growing trees, they would have been specifically mentioned. In any case, the Act could not be founded upon to help out the defenders’ contract with the pursuer’s predecessor, because an heir of entail in possession could confer no higher right than he possessed.³ If a seller had no title to sell, the Sale of Goods Act did not give him a title. It assumed a sale by one having a title to transmit a real right, and all it did was to provide a new mode of delivery in an effective contract. An heir of entail’s own right to cut timber, and therefore any right that he could confer upon another, terminated at his death. It was not suggested that the property in trees cut after the death of an heir in possession would pass to his executor if they had been ripe during his life; nor did the right of his creditors to cut ripe trees continue after his death.⁴ Even during his life, his right to cut them was not unrestrained.⁵ This was determined by authorities subsequent in date to Erskine.⁶ The defenders’ only remedy was to proceed against the representatives of the heir with whom they contracted in respect of implied warranty.⁷

At advising on 11th June 1912,—

LORD JOHNSTON.—So far as this case depends upon the law of entail in Scotland, unaffected by the provisions of the Sale of Goods Act, 1893, it is covered by the decision of the whole Court in *Paul v. Cuthbertson*,⁸ and on this branch of the question I concur, therefore, in the judgment of the Sheriff-substitute, to which I should have had nothing to add, were it not that I think that the argument addressed to us, founded on the Sale of Goods Act, 1893, requires more serious consideration than the Sheriff-substitute has given to it.

The interpretation clause, section 62, of that Act declares that the term “goods” where occurring in the Act “includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.” Growing timber is admittedly attached to and in law forms part of the land, and is therefore “goods” in the sense of the statute, and a contract of sale of growing timber to be cut is therefore a contract of sale of goods to which

¹ Ersk. ii. 2, 4; *M’Kenzie v. M’Kenzie*, (1824) 2 S. 775.

² Benjamin on Sale (5th ed.), 176.

³ *Paul v. Cuthbertson*, 2 D. 1286, Lord Moncreiff, at pp. 1306-1307.

⁴ Bell’s Com. (7th ed.), i. 51; *Cathcart v. Schaw*, (1755) M. 15,399; *Elibank v. Renton*, (1833) 11 S. 238, Lord Gillies, at p. 243.

⁵ Sandford on Entails, 276.

⁶ Ersk. iii. 8, 29.

⁷ 56 and 57 Vict. cap. 71, sec. 12.

⁸ 2 D. 1286.

the provisions of the Act apply. But I do not think that this fact carries June 11, 1912. the defenders so far as they assume, for in the first place every contract of ^{Morison v. A.} sale of goods is not made in the same circumstances, nor is it subject to the ^{& D. F. Lock-} same incidents, nor under the statute has it the same effect; and in the ^{hart.} second place the Act is solely concerned with regulating the rights of the ^{Ld. Johnston.} parties to the contract of sale, and is not intended to affect the rights of third parties. It may regulate the transfer of property under the contract, but it does not affect the seller's rights in the subject of sale and enable him to deal with it in a manner and to an effect which he could not do independently of its provisions. It does not confer on the seller rights in the goods which he had not independently of the Act, nor deprive third parties of rights in them which they have at common law. The contract of sale may be binding between the parties as a contract, and give rise to liabilities *hinc inde*, yet it may be incapable of effect as a sale for want of inherent power or title in the seller. Indeed section 61 (2) expressly says:—"The rules of the common law . . . save in so far as they are inconsistent with the express provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud . . . or other invalidating cause, shall continue to apply to contracts for the sale of goods." A contract for the sale of timber may be a contract for the sale of goods in the sense of the Act, and in many cases perfectly good and effectual according to its terms, but if it comes up against an invalidating cause, such as the law of entail, there is nothing in the Act, still less in a mere interpretation clause, to override that law or to affect the rights of third parties under that law.

When, however, the provisions of the Act are examined, it is, I think, hardly necessary to have recourse to the above saving clause to expiscate the rights of all concerned under this contract. But I think, before considering them, some attention must be given to the terms of the particular contract itself. Growing timber cannot be sold so as to transfer the property as it stands, for as long as it is growing it is *pars soli*, and can only be transferred with the land on which it is growing. If it is to be sold, and it is not already severed, it must be agreed to be severed before sale or under the contract of sale. While growing it may be "goods" in the sense of the Act, about which a contract of sale may be made, but it does not follow that a sale is effected, for there is a distinction, to be afterwards noticed, between a sale and an agreement to sell. Till severed, growing trees are not in a "deliverable state" within the meaning of the Act, for they are not (section 62 (4)) "in such a state that the buyer would, under the contract, be bound to take delivery of them," for physically he could not do so. Hence a proprietor in a proper sale of timber may cut his growing trees and sell the felled timber, or he may sell his growing timber and agree to cut it for delivery, but there may come a time when supervening circumstances, and the law applicable to those circumstances, deprive him of the power to cut and so to render the timber deliverable. Such is the case, for instance, when a fee-simple proprietor unconditionally divests himself feudally of the land on which the trees are growing, or when an entailed proprietor dies.

But the present case is not one of a proper contract of sale of timber. It

June 11, 1912. is a compound of a contract of sale of growing timber and a licence to cut or sever and so put it into a "deliverable state." But this makes no difference; the purchaser is merely doing vicariously what a proper contract of sale requires of the seller, and his licence falls as soon as the right of the licensor comes to an end. It cannot extend beyond the latter's own tenure of the land. There are also details in the contract which must be noticed. The sale is expressed to be of "a clean cut of part of Bogcoup Wood." A "clean cut" means a clean sweep of the whole wood, leaving no inferior trees standing. The purchaser is to be at the whole expense "of cutting off root and removing the timber," and the "goods" in a "deliverable state" are not "ascertained" till cut, for the quantity in each log, more or less, depends on the views or methods of the woodman. Stances for saw-mills are to be allowed, and such mills and their refuse must all be removed from the ground by 31st January 1912, under a penalty of £1 per day payable to the seller for delay; but here the seller ceased to be proprietor by his death on 24th July 1911, six months before the expiry of this licence, and was succeeded by one who does not represent him, and who is under no obligation to give facilities for cutting and dressing timber on his land, irrespective of the question of the property in the timber. Lastly, the price was to be paid forehand, and the risk of the timber was to be with the purchaser from the date of the contract. This may have been a good contract of sale between the parties, but it is clear that both the parties to it ignored the fact that the seller was an heir of entail, and might die before the timber was felled, or were unaware of its bearing upon their transaction.

Turning now to the Act, I think it will be found that its provisions quite recognise the possibility of a contract of sale of growing timber, but regard such as an agreement to sell, and not as a sale, at least so long as the timber remains standing or is *pars soli*. In fact there may be a contract of sale of growing timber as "goods" in the sense of the Act, but what the effect of the contract may be is a different question.

Section 1 carefully discriminates between a sale and an agreement to sell. It tells us (subsection (1)) that a contract of sale is a contract whereby the seller transfers or agrees to transfer the property in goods for a price. The distinction is between "transfers" and "agrees to transfer." It tells us further (subsection (3)) that where under the contract the property is transferred the contract is a sale, but where the transfer is to be future, or subject to condition first to be fulfilled, the contract is an agreement to sell. The distinction is now between a transfer and a suspended or contingent transfer; but an agreement to sell becomes (subsection (4)) a sale as soon as the time elapses or the condition is fulfilled. Transfer of property being thus the important point of distinction between a sale and an agreement to sell, the Act proceeds (section 16, *et seq.*) to assist in the ascertainment of the legal fact of transfer as an effect of the contract of sale. Where (section 16) the contract is for the sale of unascertained goods no property is transferred unless and until the goods are ascertained. As has already been pointed out a sale of growing timber may be a sale of goods in the sense of the Act; but until the timber is severed it cannot be said to be ascertained. Till then the property does not pass, and the contract of sale is only an agreement to sell, which has not yet developed into a sale.

But even if, in a contract of sale of growing trees where "a clean cut" June 11, 1912. of a whole wood is sold, the subject, contrary to my opinion, could be held ^{Morison v. A.} to be specific or ascertained, even then I do not think that under the ^{& D. F. Lock-} statute the property would be transferred and the contract become a sale ^{hart.} until the timber was severed from the ground and therefore deliverable; ^{Ld. Johnston.} for the statute (section 17) says that, where the contract is for the sale of specific or ascertained goods, the property is transferred at the time when the parties to the contract intend it to be transferred, and that in ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case. In the present case the terms of the contract and the conduct of the parties undoubtedly lead to the inference that they thought they were transferring the property and effecting a sale from the date of the contract, or, at any rate, on payment of the first half of the price. But I cannot conclude that it was their intention to do what at law, in the circumstances of the case, it was out of their power to effect. I must assume that they intended the property in the goods to pass and the contract to effect a sale, whenever, in the carrying out of their contract, it should pass at law.

They have made an incautious bargain, but it is an agreement to sell nevertheless, though not a sale, and under it the parties have their rights and obligations *hinc inde*, for (section 12) it is an implied condition on the part of the seller, in the case of an agreement to sell, that he will have a right to sell the goods at the time when the property is to pass. But with this we are not here concerned. All we are concerned with is that the timber, so far as uncut at the death of the last heir of entail, was not "goods" of which he as the seller was in law the owner; that, therefore, these goods have been sold by a person who turned out in the circumstances not to be the owner, and who had not the consent of the owner; and, consequently, that (section 21 (1)) the buyer has acquired no title to them. I therefore think that for these reasons the Sheriff-substitute's judgment falls to be affirmed.

LORD MACKENZIE.—[In his Lordship's absence his opinion was read by the Lord President]—I am of opinion that the Sheriff-substitute has come to a right conclusion in this case. It does not admit of dispute that prior to the passing of the Sale of Goods Act, 1893, the contention of the appellants would have been untenable. The older cases settled that the heir of entail in possession of an estate could not transmit to his executors or to a third party a right to cut timber after his death. The estate passes on death with the trees then growing upon it to the next heir of entail. The heir of entail so succeeding had a right to refuse to recognise his predecessor's contracts of a personal nature. The right of a purchaser was at an end the instant the heir of entail in possession died. These points had all been established before the case of *Paul v. Cuthbertson*.¹ The passages from the opinions in that case quoted in the note of the Sheriff-substitute bring out clearly the limitations upon the right of an heir of entail in possession.

¹ 2 D. 1286.

June 11, 1912. It is said, however, that the provisions of the Sale of Goods Act altered the existing law. It was argued that the reason why before that Act an heir of entail in possession could not make such a contract as the one now under consideration was because he could not give delivery of the trees sold; that the definition of "goods" in section 62 of the Act is wide enough to cover trees; and that under the earlier sections of the statute the property in the trees passed when the contract was made. Even on the assumption that section 62 is wide enough to cover trees, that would not, in my opinion, be sufficient to establish the proposition for which the appellants contend. The contract in question purports to confer upon the purchaser a right to cut certain wood growing upon the estate of Bognie. The seller had no power to confer a right to cut which could be exercised after his death. The provisions of the Act do not and cannot enable an heir of entail in possession to invest a purchaser with a better title than he had himself. It is not a question of delivery; the question is one of capacity to contract. The Act, in my opinion, only applies to a case where an effective contract has been made. If no effective contract has been made, then the appellants cannot pray in aid the sections of the Act to validate it. The title of possession ends with the death of the heir of entail, and the Sale of Goods Act cannot extend it further.

Morison v. A.
& D. F. Lock-
hart.

Lord Mac-
kenzie.

The appellants' case, accordingly, in my opinion, fails at a point antecedent to the consideration of the question whether the provisions of the Sale of Goods Act in regard to delivery and passing of property can be applied to the contract in question here. If, however, it were necessary, I should be prepared to hold that the appellants' case failed here also. No doubt the contract provides (article third) that the timber shall be entirely at the purchaser's risk from fire or other damage from the date of the acceptance of his offer; and (article seventh) that the price shall be payable half within six days after acceptance of the offer and before commencing operations, and the balance when half of the wood has been cut off root—but not later than the 30th day of June 1911. The subject of sale, however, consisted, as stated in article first, of a "clean cut" of certain wood; and (article third) it was provided that the purchaser shall be at the sole expense of cutting off root as well as of removing the timber. These latter provisions show that the subject of the contract of sale was not timber in a deliverable state, but merely the right to cut timber. The sections of the Sale of Goods Act on which the defender relies, do not, in my opinion, apply to such a contract, and I agree with the opinion of Lord Johnston as regards this. Even on the assumption, therefore, that the trees included in the contract were ripe for cutting, which is denied by the heir of entail in possession, I am of opinion that the judgment of the Sheriff-substitute should be affirmed.

LORD KINNEAR.—I have come to the same conclusion, and substantially for the same reasons.

I think it necessary to attend to the precise form of the action. It is an action brought by an heir of entail in possession of the estate of Bognie to have the defenders interdicted from cutting, sawing up, or otherwise interfering with the trees standing on his estate of Bognie on the 24th of

June 1911, and therefore forming part of the soil of his estate. The June 11, 1912. answer is that the defenders are entitled to enter upon the pursuer's lands ^{Morison v. A.} and cut his trees by virtue of a contract of sale between them and the late ^{& D. F. Lockhart.} heir of entail in possession, which they set out in some detail. The question therefore is whether this contract of sale gives a good title after Lord Kinnear. the death of the heir of entail who was party to it, to enter upon the lands and cut down and carry off trees forming part of the property, and in the possession of the succeeding heir of entail.

The contract is one of some complexity. It is not in form or effect a contract for the transfer and delivery of growing trees as such. It is a contract for the sale of the wood that may be got out of certain trees when they are cut down, or of the portion of the trees severed from the root and turned into corporeal moveables; and that is combined with a licence or mandate to the purchasers to enter upon the estate and cut and saw the timber which is to be sold to them. The right to enter and cut is subject to some detailed regulations; the purchaser is limited as to the manner in which he is to enter, and he is tied down by specific details as to the particular operations which he is to execute for the purpose of getting the timber, and he is taken bound to maintain the roads by which he enters upon the lands. I think that is not a pure and simple sale of timber by any means, but a contract enabling the purchaser to enter upon the lands and cut down and carry away the timber which may be got from the trees.

Now, if the question were whether, prior to the Sale of Goods Act, such a contract was binding upon a succeeding heir of entail, the answer must be that it was not. I do not think that depends upon any view that may be taken as to the limitations of the right of an heir of entail in possession to cut down trees during his own occupation. We have heard a very able argument on that point, but it seems to me to be altogether beside the question. The heir of entail's right is said to rest upon his right as a fiar who is in possession of the land subject only to the fetters of the entail, provided he commits no contravention of the entail. He is subject to certain limitations, but I do not think it is necessary for the purposes of this case to consider them in reference to his right to cut and sell timber. But the question really depends upon a different principle, which is that although the heir of entail is fiar in so far as he is not fettered, he is fiar only for the limited period of his own life. His power to affect the fee is determined by his death, and the new heir who becomes fiar in his turn is not bound by any contracts bearing to affect the lands which the previous heir may have executed, except such leases as may be valid under statute or by the deed of entail. We had occasion to consider the law upon this subject very fully in the recent cases of *Gillespie v. Riddell*¹ and *The Duke of Bedford v. The Earl of Galloway's Trustee*,² and I think that it would be out of the question to examine again the grounds upon which these decisions were based. But I think there are two cases to which I may refer shortly—the cases of *Cathcart v. Schaw*³ and *Veitch of Ellioch*.⁴ In both of these cases a contract of sale of growing wood executed by an

¹ 1908 S. C. 628.

³ M. 15,399.

² (1904) 6 F. 971.

⁴ Bell's Com. i. 51, note.

June 11, 1912. heir of entail in possession ceased to have any effect or value on the moment
Morison v. A. of the death of the heir of entail in possession, and that of course rests
& D. F. Lock- upon the law which was so clearly stated in *Paul v. Cuthbertson*,¹ that
hart. while ordinary industrial crops which are sold and consumed from year to
Lord Kinnear. year are moveable before separation, trees which are intended to be parts
of the ground for generations, and part of the soil, cannot be conveyed so
long as they are still growing, excepting as part of the land, however
effectually they may be sold and delivered when they are cut down and
turned into corporeal moveables.

The only question is whether that law is altered by the Sale of Goods Act, 1893. I assume, but without expressing any definite opinion upon it myself, that the definition of "goods" in the 62nd section of the Act is wide enough to cover growing trees. Assuming that that be so, I do not think it carries the defenders very far, because it still remains to be considered what is the effect of the enacting clauses of the Act, construing the words in which they are expressed according to the directions of the definition clause. Now, I apprehend that the argument for the validity of the contract as against the heir of entail is really this, that by the new law, introduced by this Act, the growing timber has been conveyed to the purchasers and become their property. It is said that was no part of the property to which the new heir of entail succeeded, because in law, although not in fact, it had been already separated and made over to them before the succession opened. They had no need therefore, according to the argument, to inquire whether their vendor's personal obligations are transmissible against heirs of entail, because they no longer stand upon contract, but upon the real right given them by the statute. I do not doubt that, in the cases to which the clause making a contract equivalent to a transference of property properly applies, the purchaser does obtain a real right in this sense, he acquires a right not only against the seller and his representatives but against all the world. I see great difficulty in the application of that doctrine to contracts for the sale of growing timber, but I do not think it necessary to consider how far it would apply to any other contract than that which is actually before us. The question is whether the trees still growing on the pursuer's land, in so far as they are covered by the contract in question, are specific goods in a deliverable state, so as to have been carried in property to the defenders by force of the statute.

I am of opinion, for the reasons stated by Lord Johnston and Lord Mackenzie, that this is not a contract for the immediate sale and transference of the property of specific goods in a state in which, at the date of the contract or now, they can be said to be deliverable, but, as I have said, a contract which will enable the purchaser, so long as it is available to him, to enter upon the lands, turn the trees into a new form by cutting them down and severing the trunks and limbs from the stumps, and then to carry off the severed timber. In the meantime the trees are not in the possession of the purchasers, but of the owner of the land; and the purchasers cannot enter upon the land and remove them on any other title than the deceased owner's personal obligation to allow them to do so on

¹ 2 D. 1286.

certain conditions. Their right therefore rests upon contract; and it is June 11, 1912. settled law that the contract is not binding upon an heir of entail who was ^{Morison v. A.} not a party to it and does not represent a party. I do not think it ^{& D. F. Lock-} material that what remains to be done in order to put the trees into a ^{hart.} deliverable shape as timber and not as growing trees, is by the contract to Lord Kinnear. be done by the purchaser and not by the seller, because the purchaser can only do it by authority of the seller's mandate authorising him to enter upon the lands and carry out the operations for sawing and cutting the timber, and that mandate, as I hold, falls by his death, inasmuch as it has no effect as against his successor, the present heir of entail in possession. I therefore agree in the opinions delivered.

LORD PRESIDENT.—I have had more difficulty in this case than your Lordships have had, but in the end I agree with the result at which your Lordships have arrived. But I found my judgment entirely upon the particular contract here; and, holding the view I do about it, I am able to concur entirely in the last sentence of Lord Mackenzie's judgment and in the exposition which your Lordship has just given.

THE COURT dismissed the appeal.

ALEXANDER ROSS, S.S.C.—DUNCAN & HARTLEY, W.S.—Agents.

THE PARISH COUNCIL OF THE PARISH OF MELROSE, Pursuers
(Appellants).—*Kemp*.

No. 143.

THE PARISH COUNCIL OF THE PARISH OF HAWICK, Defenders
(Respondents).—*MacRobert*.

June 12, 1912.

Process—Appeal—Competency—Value of cause—Continuing liability—
Sheriff Courts (Scotland) Act, 1907 (7 Edw. VII. cap. 51), sec. 28.

Melrose
Parish Council
v. Hawick
Parish
Council.

A married woman was admitted as a private patient to a district asylum, and her husband paid for her maintenance there for four months, but afterwards refused to continue the payments on the ground that he was unable to do so. The parish in which the asylum was situated thereafter paid for her maintenance, and subsequently brought an action in the Sheriff Court against the parish of her settlement for recovery of the sums so expended, amounting to £17, 9s. 1d., and for decree ordaining the defenders to free and relieve them of future expenditure. The only question raised in the action was whether, in the circumstances, the patient was a proper object of parochial relief. During the progress of the action the patient recovered and was discharged from the asylum.

The Sheriff having assoilzied the defenders, the pursuers appealed to the Court of Session, when *held* that the appeal was incompetent in respect that the sum concluded for did not exceed £50, and that, in the circumstances of the case, the Court was not asked to decide a question of continuing liability which could exceed that amount.

Question (per the Lord President) whether the judgment in Tait v. Lees, (1903) 5 F. 304, is consistent with more recent decisions.

ON 7th June 1911 the Parish Council of Melrose brought an action 1st Division. in the Sheriff Court at Hawick against the Parish Council of Hawick, Sheriff of in which the pursuers sought payment of £17, 9s. 1d., being the Roxburgh, amount expended, or to be expended, by them upon the maintenance Berwick, and Selkirk.

June 12, 1912. of Mrs Young, the wife of William Young, a baker in Hawick, in the Roxburgh District Asylum at Melrose as a pauper from 24th January to 15th August 1911, and for decree ordaining the defenders to free and relieve them of all further advances they might make on her behalf so long as she might require parochial aid.

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A proof was allowed, at which the following facts were proved:—Mrs Young was admitted as a private patient into the district asylum at Melrose in the pursuers' parish on 24th October 1910. Her board there was paid by her husband, who was an able-bodied man earning 30s. per week, up to 24th January 1911, after which date he declined to continue to pay the cost of her maintenance on the ground that he was unable to do so. The district asylum then called upon the pursuers to pay for her maintenance at the rate of £31 per annum. The pursuers did so, and subsequently brought this action against the defenders, the Parish Council of the husband's settlement, to recover the sums so paid by them, at the rate mentioned, from 24th January up to 15th August 1911. Mrs Young was still a patient in the asylum at the date of the action, but she recovered and was discharged in December 1911.

On 17th May 1912 the Sheriff (Chisholm), on an appeal from an interlocutor of the Sheriff-substitute (Baillie), assoilzied the defenders from the conclusions of the action.*

The pursuers appealed, and on the case appearing in Single Bills of the First Division (without Lord Mackenzie), on 12th June 1912, counsel for the respondents objected to the competency of the appeal on the ground that the value of the cause did not exceed £50.

Argued for the appellants;—The true criterion of the value of the cause was its value at the date at which the parties joined issue, and such value could not be affected by circumstances supervening after the question at issue had been fixed by litiscontestation, or at least by the closing of the record.¹ The decision in *David Allen & Sons Billposting, Limited*,² was a departure from the previous practice in this respect. Taken at the time which was considered the test in the earlier decisions the pleadings here clearly disclosed a case of continuing liability, such as there was in the case of *Paisley Parish Council v. Glasgow and Row Parish Councils*.³ Further, the mere fact of Mrs Young's recovery—even if relevant—did not exclude the possibility of a continuing liability, for her recovery might be merely temporary.

Argued for the respondents;—The initial writ concluded for a sum

* The Sheriff's judgment proceeded on the grounds that Mrs Young, who was committed to the asylum not under section 15, but under section 14, of the Lunacy Act, 1862, was so committed under a voluntary contract between her husband and the asylum authorities; that this contract was terminated by the husband's refusal to continue to pay for her maintenance after 24th January 1911; that the duty of the asylum authorities was then either to have removed her from the asylum or to have called upon her husband to do so, but that they adopted neither of these courses; that the husband was not, in his position, entitled to have her maintained in the asylum at the public cost; and that in these circumstances the pursuers were not only not bound, but were not entitled, to pay the sums claimed from them by the asylum authorities, and could therefore not recover from the defenders payments which neither of the parties were under obligation to make.

¹ Cairns v. Murray, (1884) 12 R. 167; Tait v. Lees, (1903) 5 F. 304.

² *Supra*, p. 970.

³ 1907 S. C. 674.

of less than £50, and in these circumstances appeal was incompetent June 12, 1912. unless the appellants could show that there was a continuing liability which might reasonably be expected to amount to more than that sum.¹ The question of such a continuing liability was here excluded, as the alleged pauper had recovered, and had been discharged from the asylum, at a date when the total liability for her maintenance could only amount to the sum sued for with the addition of a sum of approximately £10, representing the value of her board for the four months between August and December 1911—in all, some £27.

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LORD PRESIDENT.—I think that this appeal is incompetent, and the grounds on which I do so are the grounds which I set forth in the case of the *Paisley Parish Council v. Glasgow and Row Parish Councils*.² Of course, the decision there was the other way, because the case practically involved the determination of a question of continuing liability, which liability, in the circumstances of that case, might reasonably be expected to amount to more than £25. In this case there is no question, as I understand, of continuing liability, because the woman, who was a lunatic, has recovered, she has left the asylum, and the whole bill incurred never can amount to £50, which is now the pecuniary limitation of the right of appeal. To read a single sentence of what I said in the *Row* case²: “The common sense test seems to me to be simply this, Is the Court asked to decide a practical question of continuing liability, or is it not?” I think that is always a practical question, and that it is so here. We are not asked to decide a question of continuing liability, and therefore I think this appeal is incompetent.

Certain cases have been quoted to us, and I wish to reserve my opinion as to whether the case of *Tait v. Lees*³ does not on principle really conflict with what was said in the case of *Paisley Parish Council*² and in the very recent case of *David Allen & Sons*.⁴ But, so far as this case is concerned, there is no conflict, and for this very good reason, that in *Tait's* case³ the sum on the face of the summons clearly exceeded £25, which was then the limit of value, whereas here the sum on the face of this initial writ is under £50. Accordingly, taking the first rough test of competency, viz., what is upon the face of the summons, this appeal is incompetent; in other words, you have got to show that the question is one of continuing liability in order to make the appeal competent. If, as I have already said, you look at the matter in a practical way and find that it is not a question of continuing liability, then *cadit questio*.

So far as I myself am concerned, I should like to say that—although it is a practical question, and although, as I put it in the *Paisley* case,² it is not enough to say that the liability may theoretically recur—if I can suppose that this woman should become insane again and should happen to be put in an asylum in the same parish (because that is necessary to support the

¹ *Paisley Parish Council v. Glasgow and Row Parish Councils*, 1907 S. C. 674, *per* Lord President Dunedin, at p. 677; *Duke of Argyll v. Muir*, 1910 S. C. 96; *David Allen & Sons Billposting, Limited, v. Dundee and District Billposting Co., Limited*, *supra*, p. 970.

² 1907 S. C. 674.

³ 5 F. 304.

⁴ *Supra*, p. 970.

June 12, 1912. hypothesis), I do not think the case would be *res judicata*; because I think the decision of this Court that the appeal is incompetent, in respect that no question of continuing liability is raised, reduces the matter to a mere question whether a particular sum of £17, 9s. 1d. is or is not due. On these grounds I am of opinion that the appeal is incompetent.

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LORD KINNEAR.—I agree with your Lordship for the same reasons. I shall only add that I think the case of *Tait v. Lees*¹ is distinguishable. In that case the parties had joined issue in the Sheriff Court as to liability for an amount which would have allowed a decision to be appealed, and after they had joined issue a minute of restriction was put in, reducing the value of the cause to less than £25. The only question was whether the restriction of the conclusions of the summons after the parties had joined issue had or had not the effect of rendering the case unappealable. I do not think that applies to any question we have to consider here.

LORD JOHNSTON.—I agree that appeal is incompetent in the particular circumstances of this case. But I think it is necessary in order to arrive at a judgment really to know what the merits are. I have read the record and the judgments of the two Sheriffs, and I find that the case is this:—It so happens that the district asylum for Roxburgh, Berwick, and Selkirk is situated in the parish of Melrose; a particular lunatic from Hawick was sent there as a private patient, and was paid for for six months, but then her husband, pleading inability to continue the payment, ceased the payment, and a question has arisen between the parish of Melrose, who were called upon by the asylum authorities to accept initial responsibility after the husband ceased to pay, and the admitted parish of the lunatic's settlement, as to the liability for her board. The question at issue is therefore not the ordinary question of the settlement of the lunatic. It is a question of whether the lunatic was a pauper or not. That question might have involved one of continuing liability, because the pauper might have continued a lunatic, and the obligation to maintain her might have continued. But we are told that the lunatic is now well, and has been removed from the asylum, and that the present obligation to pay for her has ceased. In these circumstances, there is no continuing liability possible, because if she turns out only to have had a lucid interval and has to be sent back to the asylum, the question of the husband's capacity to maintain her arises *de novo* in different circumstances. While, then, this appeal is incompetent as the value at stake is below the limit, if there had been a question as to the pauper's settlement there might very well have been a question of continuing liability, because no one can tell whether the convalescence is to be permanent or is merely a lucid interval.

THE COURT sustained the objection to competency, and dismissed the appeal.

JAMES D. TURNBULL, S.S.C.—SIBBALD & MACKENZIE, W.S.—Agents.

THE CALEDONIAN RAILWAY COMPANY, Complainers (Reclaimers).— No. 144.

Morison, K.C.—Hon. W. Watson.

HUGH SYMINGTON, Respondent.—*Constable, K.C.—D. Jamieson.*

June 12, 1912.

Process—Proof—Diligence for recovery of writs—Letter-books—Primary and secondary evidence. Caledonian Railway Co. v. Symington.

In an action of suspension and interdict, the respondent obtained a diligence for recovery, *inter alia*, of letters written by the complainers or anyone on their behalf relating to certain matters on record, and “failing principals,” for recovery of copies thereof. He subsequently applied for another diligence to recover, *inter alia*, the letter-books of the complainers’ agents containing copies of letters relating to certain other specified matters.

Held that as the respondent had not attempted to show that the principal letters were unavailable, he was not entitled, *hoc statu*, under the first diligence to recover the letter-books containing copies of letters written by the complainers’ agents, or to obtain the second diligence.

THE CALEDONIAN RAILWAY COMPANY, owners of part of the estate of Woodhouse, acquired by them in 1852, in connection with the construction of the Glasgow and Carlisle Railway, under a conveyance which excluded minerals, brought an action of suspension and interdict against Hugh Symington to restrain him from working the freestone upon that estate. 2D DIVISION.
Lord Cullen.

In defence it was averred that the freestone on that estate was a mineral in respect that it was of exceptional quality, and that, at the time when the land was purchased by the complainers, freestone was universally regarded as a mineral, and was so regarded by the complainers, and by those from whom they purchased the land.

After sundry procedure a proof was allowed by the House of Lords.¹ Thereafter the respondent obtained from the Lord Ordinary a diligence for recovery of, *inter alia*:—“1. All notices to treat under the Railways Clauses (Scotland) Act, 1845, or Lands Clauses Consolidation (Scotland) Act, 1845, served by the complainers or anyone on their behalf on the proprietors of the Woodhouse estate, their tenants or lessees, or anyone on their behalf for or in connection with the acquisition or purchase of land, freestone, or sandstone for or in connection with the formation of the Glasgow and Carlisle Railway, and all claims, valuations, reports, arbitration proceedings, awards, and decrees-arbitral following thereon, and all correspondence between said parties, or any of them relating in any way to said notices, claims, arbitrations, or otherwise. 4. All notices to treat served by the complainers, or anyone on their behalf, on landowners, their tenants or lessees, in connection with the acquisition, purchase, or reservation of freestone or sandstone within said county [the county of Dumfries], referred to in said answer 11 for or in connection with the formation of the complainers’ undertaking; all claims, valuations, reports, arbitration proceedings, awards, and decrees-arbitral following thereon, and all correspondence between said parties, or anyone on their behalf, relating in any way thereto, between the years 1845 and 1868. 6. Failing principals of all or any of the books and documents called for, drafts, duplicates, excerpts, jottings, or copies thereof are called for.”

¹ Reported *supra* (H. L.), 9.

June 12, 1912. At the execution of the commission Mr Kirk, a partner of Messrs Hope, Todd, & Kirk, W.S., the complainers' law-agents, was cited as a haver, and was ordered by the commissioner, *inter alia*, to produce, under article 6 of the specification, the letter-books of his firm containing copies of the letters written by his firm on behalf of the complainers between 1845 and 1868, and called for under articles 1 and 4. The haver declined to obey the order. The case was then enrolled before the Lord Ordinary, when the respondent moved that the commissioner's ruling be sustained, and also moved for a diligence in terms of a second specification (No. 59 of process) for recovery of "All books kept by or on behalf of Hope, Todd, & Kirk, Writers to the Signet, Edinburgh, and of their predecessors in business Messrs Hope & Oliphant, Hope & Mackay, Hope, Mackay, & Mann, and Hope, Mann, & Kirk, all Writers to the Signet, Edinburgh, including ledgers, journals, cash-books, day-books, account-books, letter-books, statement-books, receipt-books, voucher-books, and all others, that excerpts may be taken therefrom showing or in any way tending to show the purchase money, compensation, and other moneys paid or payable by the complainers (a) to the proprietors of Woodhouse, their tenants and lessees, and (b) to all other landowners, their tenants and lessees or anyone on behalf of any of them, for or in respect of free-stone or sandstone within the county of Dumfries acquired, taken, used, or reserved by the complainers or their contractors for or in connection with the construction of the railway and railways referred to in answer 11 for the respondent between the years 1845 and 1868."

On 29th May 1912 the Lord Ordinary (Cullen) pronounced an interlocutor which, after disposing of a point with which this report is not concerned, proceeded:—“(2) Having considered the interim report of the commissioner, No. 55 of process, and heard counsel for the parties and the haver, sustains the commissioner's ruling, and ordains the haver to make production to the commissioner of the letter-books in question in order that he may excerpt therefrom copies of letters falling under the specification: Further grants diligence at the instance of the respondent for recovery of the books in terms of the specification, No. 59 of process.”

The complainers, having obtained leave, reclaimed, and the case was heard before the Second Division on 12th June 1912.

Argued for the reclaimers;—The reclaimers' law-agents were not bound to produce the letter-books called for under article 6 of the first specification. The respondent had adduced no proof that the original letters were irrecoverable, and until this had been shown secondary evidence of their contents was inadmissible.¹ This was just a fishing diligence to obtain information about letters as to which the respondent did not even know whether or not they existed, and a diligence of such a nature should be refused.² The same objection applied to the second specification, which should further be refused on the ground that the documents therein called for were only writ of the complainers' agents, and therefore no evidence against the complainers of the matters in question.³

Argued for the respondent;—Article 6 of the first specification

¹ A v. B, (1858) 20 D. 407.

² County Council of Fife v. Thoma, (1898) 25 R. 1097.

³ Smith v. Smith, (1869) 8 Macph. 239.

was in the usual form, and had always been interpreted as meaning that the haver should produce principals if he possessed them, and if not, then copies. The interpretation contended for by the reclaimers, namely, that copies could only be called for after proof that the originals no longer existed, had been suggested, and negatived by the Court in *Sleigh v. Glasgow and Transvaal Options, Limited*.¹ The respondent's view was the most practical and convenient, for in many instances—as in the present case, where it was nearly fifty years since the letters were written—it would be difficult, if not impossible, to prove what had become of the originals. As to the second specification, the complainers' agents kept separate books dealing only with the complainers' business, and such books must be regarded as the complainers' own books and admissible in evidence against them.

LORD JUSTICE-CLERK.—I think that this reclaiming note must receive effect. The ground for so holding is extremely simple, and does not touch many of the points that Mr Constable made in arguing the case for the respondent.

The respondent in this case has obtained a diligence under which he was entitled to recover certain documents if they existed. Without having done anything whatever to endeavour to execute that diligence, which, of course, is a diligence to try and recover principal documents, he asks a second diligence to recover, not the documents themselves, but copies of the documents contained in the books of the complainers' agents, which at best are only secondary evidence, available only on its being proved to the satisfaction of the Court that the principals cannot be obtained. That is so elementary that I cannot see how it could be pleaded that, without anything whatever having been done to discover whether the principal documents existed, a diligence should be granted to recover that secondary evidence. I think, therefore, the proper course will be to recall the interlocutor of the Lord Ordinary, refuse the second specification, and find that Messrs Hope, Todd, & Kirk are not required *hoc statu* to produce their letter-books in order that excerpts may be taken of the copy letters that are to be found in these books.

Even if the production of such books were ultimately to be found necessary, I think that the interests of the agents to whom they belong would require to be very carefully guarded before such a sweeping search could be allowed. The point is certainly a novel one. I never heard of such a case before, and I am not in the least moved by what Mr Constable says, namely, that it is a good many years since these letters were written, and that it would be putting the respondent to great expense to show that he could not recover the letters. The fact that a long time has elapsed may make it difficult to recover the letters, but will make it all the easier to show that the party cannot expect to recover them.

LORD DUNDAS.—I agree. In this case a proof was allowed some time ago, the respondent to lead. He thereupon applied for, and obtained, a diligence and specification for recovery of documents. The last article was

¹ (1903) 5 F. 332.

June 12, 1912. the familiar one, "failing principals . . . drafts, duplicates, excerpts, jottings, or copies thereof." I should have thought it was elementary that, speaking generally, under a clause like this there can be no recovery of copies, drafts, and the like, except of consent, unless and until reasonable diligence has been exercised in attempting to recover the principals. But what the respondent did was to cite before the commissioner as the first haver Mr Kirk, a member of the firm who are agents for the complainers in Edinburgh, and to call upon him to produce copies of the letters written by his firm on behalf of the complainers between the years 1845 and 1868, and called for under articles 1 and 4. He declined to produce the letter-books containing these copies; the commissioner ordered him to produce them; the haver declined to obey the order, and the matter was brought before the Lord Ordinary. The respondent then lodged a second specification of documents, asking for recovery of the books of Messrs Hope, Todd, & Kirk, the complainers' agents, and their predecessors in the agency. In that state of matters the Lord Ordinary pronounced the interlocutor now under review, in which after dealing with a matter which we are not asked to consider, he sustained the commissioner's ruling, and ordained Mr Kirk to make production as ordered, and further granted diligence for recovery in terms of the new specification. I think that is wrong, and I think accordingly with your Lordship that the second branch of the Lord Ordinary's interlocutor ought to be recalled, and that we should refuse *hoc statu* the second diligence, and find that Mr Kirk is not bound *hoc statu* to produce in terms of the order upon him by the learned commissioner. Mr Morison argued strongly that the agents' letters are not evidence against the complainers. I do not know that one need consider that absolute proposition, and I express no opinion upon it; but at the present stage the letter-books of Messrs Hope, Todd, & Kirk are not the best evidence, in this sense that they cannot be got at and recovered until at all events it is made reasonably clear that better evidence is not available. I have a great deal of sympathy with Mr Morison's remark that this is a fishing diligence, promoted apparently in the interests of cheapness. Mr Morison's further contention was upon confidentiality. That would be a matter, if it arose, for the commissioner, and would, no doubt, be safe in his hands.

LORD SALVESEN.—I agree. I think the additional specification should not have been granted until the respondent had in some reasonable sense satisfied the Lord Ordinary that it was necessary for him to recover copies of the documents, in respect it was impracticable to recover the principals.

LORD GUTHRIE.—I agree.

THE COURT pronounced this interlocutor:—"Sustain the reclaiming note; recall the second head of said interlocutor, and refuse *hoc statu* the specification No. 59 of process, as also recall *hoc statu* the ruling of the commissioner appealed against: *Quoad ultra* adhere to the said interlocutor, and remit the cause to the Lord Ordinary to proceed as accords."

HOPE, TODD, & KIRK, W.S.—DOVE, LOCKHART, & SMART, S.S.C.—Agents.

MRS ISABELLA CATHERINE GALLOWAY OR HOUSTON AND ANOTHER,

No.145.

Pursuers (Reclaimers).—*G. Watt, K.C.—MacRobert.*

June 15, 1912.

ISABELLA AITKEN, Defender (Respondent).—*Cooper, K.C.—*

D. P. Fleming.

Houston v.
Aitken.

Insanity—Facility and Circumvention—Will—Reduction—Relevancy of averments that testator's relatives suffered from mental disease.

In an action for reduction of a will on the grounds of insanity and of facility and circumvention, the pursuer averred that the testator was peculiarly liable to suffer from mental disease as mental disease was hereditary in his family, and, in support of this, made specific averments as to the diseased mental condition of various near relatives of the testator.

Objection having been taken to the relevancy of these averments, *held* that the averments were not necessarily irrelevant, and objection *repelled*.

ON 20th October 1911 Mrs Isabella Catherine Galloway or Houston, 1st DIVISION.
with the advice and consent of her husband, Robert Houston, brought Lord
an action against Isabella Aitken for reduction of a general disposi- Skerrington.
tion and settlement executed by Edward Galloway, under which the
defender acted as sole trustee and executrix.

The pursuers averred:—(Cond. 1) "The pursuer Mrs Isabella Catherine Galloway or Houston, wife of Robert Houston, joiner, 15 High Street, Dunfermline, is the only child of the late Edward Galloway (otherwise Edward Drinkwater Bethune Galloway), retired engineer, who resided at Fernbank, Kennoway, Fifeshire, and who died on 10th December 1910. The defender, who is about forty years of age, was, at the date of his death and for a period of about twenty years prior thereto, housekeeper to the said late Edward Galloway." (Cond. 2) "The late Edward Galloway, who was seventy-one years of age at the date of his death, was for many years an engineer in the service of the Egyptian Government, and in receipt of a large salary. He retired on a pension amounting to £8 per month about twenty years ago, and was in receipt of the pension up to the date of his death. While on duty in the Red Sea the said Edward Galloway suffered from sunstroke, and had to leave Egypt sooner than he intended to do. For many years before his death he suffered from arterio-sclerosis of the brain, and latterly softening of the brain." (Cond. 5) "The said deceased Edward Galloway was subject to violent fits of passion. On one occasion he took possession of the defender's clothes and set them on fire. He frequently behaved in an outrageous fashion, and indulged in alcoholic liquor to excess. A sister of the deceased's was confined in an asylum for twelve months on account of her mental condition, and David Galloway, a brother of deceased's, was a person of weak mind. A nephew of deceased (the son of a brother) is at present in an asylum." (Cond. 6) "For a number of years prior to his death the defender exercised a dominating influence over the deceased. About twelve years prior to his death deceased had a shock of paralysis followed by a second shock four years afterwards. These shocks had a marked effect on the mind of the deceased, and for a number of years prior to his death he was mentally weak and easily influenced."

The pursuers further averred that at the date of the execution of the trust-disposition and settlement the testator was incapable of

June 15, 1912. making a will, or that, being weak and facile, the deed was impetrated from him by fraud and circumvention on the part of the defender.
 Houston v.
 Aitken.

The pursuers pleaded, *inter alia*;—(1) The deed under reduction not being the deed of the deceased, the pursuer is entitled to reduction thereof as concluded for. (2) In any event, the deed under reduction having been obtained from the deceased to his lesion by fraud and circumvention when he was weak and facile in mind and easily imposed upon, decree of reduction ought to be pronounced as concluded for.

The defender pleaded, *inter alia*;—(1) The pursuers' statements being irrelevant and insufficient in law to support the conclusions of the summons, the action should be dismissed; and, in particular, the averments with regard to the mental condition of the deceased's relatives are irrelevant, and should be excluded from probation.

On 19th December 1911 the Lord Ordinary (Skerrington) appointed the passage (printed in italics *supra*) in condescendence 5 relating to a sister and a brother and a nephew of the testator to be deleted from the record, and approved of issues for the trial of the cause.*

The pursuers reclaimed, and the case was heard before the First Division on 25th January 1912, when it was continued to enable the pursuers to lodge a minute of amendment. The pursuers thereafter lodged a minute of amendment craving leave to add to condescendence 6, in place of the passage deleted by the Lord Ordinary, the following averments:—"Deceased's father had a sister, Christina, who suffered from mental disease, although she was not actually confined in an asylum. A sister of the deceased was confined in Springfield Asylum for seven months on account of her mental condition. She suffered from melancholia and strong suicidal impulses, and David Galloway, a brother of deceased's, suffered from epileptic fits accompanied by

* "OPINION.—This is an action for the reduction of a will in which the pursuer proposes the two ordinary and familiar issues. The defender's counsel moved that, before approval of the issues, the following passage should be deleted from article 5 of the pursuer's condescendence:—"A sister of the deceased's was confined in an asylum for twelve months on account of her mental condition, and David Galloway, a brother of deceased's, was a person of weak mind. A nephew of deceased (the son of a brother) is at present in an asylum." Evidence of this kind has been repeatedly disallowed in criminal cases, but it would appear from Dickson on Evidence, vol. i., sec. 3, where the whole authorities are collected, that the law is not so clear in regard to civil cases. I do not regard such evidence as necessarily irrelevant. An expert in insanity, who was familiar with the whole history of the various relatives of the testator who are referred to in the passage above quoted, might be able to draw the inference that the testator had a hereditary predisposition to insanity; and this conclusion, if correct, might help him to form an opinion on the further questions whether the testator had in fact become insane, and whether his insanity was of such a kind as to affect the validity of the will. The real reason for excluding such evidence is that its bearing upon the main issue is remote, and that it would be valueless and, indeed, positively misleading unless the inquiry as to the alleged mental disorder of the testator's relatives was conducted with the same care and minuteness as the inquiry into the alleged insanity of the testator himself. Life is not long enough to allow of an exhaustive inquiry into every side issue which has or may have a bearing upon the main issue. I accordingly appoint the passage to be deleted from the record. . . ."

mental derangement. Another sister of deceased's was for a period of nine months mentally incapax. These persons all suffered or suffer from mental disease. The disease showed itself in different forms in different persons. The fact that so many of the relations of the deceased Edward Galloway suffered from mental disease is a clear indication that mental disease is hereditary in the family. The fact that the disease showed itself in varied forms shows that the disease is deeply rooted in the family. Hereditary insanity is different from hereditary disease. In the former case the insanity may, and usually does, take a different form in the descendant, but the cause in both cases is mental disease. With such a family history the deceased was peculiarly liable to suffer, and did suffer, from mental disease."

June 15, 1912.
Houston v.
Aitken.

The case was again heard before the First Division (without the Lord President) on 15th June 1912.

Argued for the reclaimers;—The amendment should be allowed, for the facts therein set forth could competently be inquired into. The mental condition of the testator was a matter on which medical experts would have to give their opinions, but, in arriving at these opinions, the family history of the testator was an element which they might have to take into consideration. For that purpose the facts relative to that history would have to be established by proof. The admissibility of such evidence in a civil case appeared to have come before the Courts in Scotland only once.¹ In criminal cases, although it had generally been rejected, it had sometimes been admitted.² In England, however, the usual practice was to admit it in criminal cases.³ The question of admissibility was really one of degree, depending on the circumstances of each case.⁴

Argued for the respondent;—The amendment should not be allowed, for the facts therein set forth were not such as could be admitted to probation.⁵ They were too remote from the main question in the case; and if admitted would involve a wide inquiry into the facts of each particular case, and, even if irrelevant, could not fail to prejudice the minds of the jury. The only civil case in which the admissibility of such evidence was raised had been carefully considered, and had been decided against the view of the reclaimers here.⁶ In criminal cases the weight of authority was against the admission of such evidence.⁷ In *Lord Advocate v. Galbraith*,⁸ although such

¹ Walker v. Macadam, F. C., 8th March 1806, M. App. voce Proof, No. 3, aff. (1813) 5 Pat. 675, Eldon, L.C., at p. 689.

² Hume on Crimes, i. 40; Lord Advocate v. M'Leod, (1838) 2 Swin. 88; Lord Advocate v. Stewart, (1848) Ark. 471.

³ Taylor on Evidence (10th ed.), sec. 335; Earl Ferrers, (1760) 19 Cobbett's State Trials, 886, at pp. 923 and 932; Frere v. Peacocke, (1843) 3 Curt. Eccl. Rep. 664, at p. 669; The Queen v. Tucket, (1844) 1 Cox's C. C. 103; The Queen v. Oxford, (1840) 9 C. & P. 525, at p. 547.

⁴ Dickson on Evidence, vol. i. sec. 3.

⁵ A v. B, (1895) 22 R. 402; Inglis v. National Bank of Scotland, Limited, 1909 S. C. 1038.

⁶ Walker v. Macadam, M. App. voce Proof, No. 3, 5 Pat. 675.

⁷ Lord Advocate v. Gibson, (1844) 2 Brown, 332, at p. 347; Lord Advocate v. Brown, (1855) 2 Irv. 154; Lord Advocate v. Dingwall, (1867) 5 Irv. 466; Lord Advocate v. Paterson, (1872) 2 Coup. 222; Lord Advocate v. M'Clinton, (1902) 4 Adam, 1, at p. 13; Lord Advocate v. Edmonstone, (1909) 47 S. L. R. 7.

⁸ (1897) 5 S. L. T. 65.

June 15, 1912. evidence had been admitted, the point had not really been discussed.
Houston v. In any event this was not a case for trial before a jury.
Aitken.

LORD KINNEAR.—I think, with the alterations which have now been proposed, and which have been made at the bar, the amendment ought to be allowed. The relevancy of the proposed averments appears to me to raise questions not of law but of fact, because the only point in dispute is whether, if they were proved, the facts alleged would tend to make the fact in issue highly probable, and that does not depend upon any doctrine of law but upon medical opinion. The opinion of medical experts as to the significance of the family and personal history of the testator is a relevant fact, and the facts upon which such opinion is rested may also be proved in order to the proper application of the expert opinion to the question in issue. I think, accordingly, the amendment ought to be allowed, because we can decide nothing at present as to the importance or direct bearing of the evidence, and we decide no more than that it may be admissible if a proper foundation is laid for it.

As to the defender's motion that the case should be sent to proof before a Judge instead of a jury, I am not disposed to accede to that. This is one of the appropriated causes. It is a case that is eminently suitable for trial by jury, and we should be going contrary to the ordinary practice if we appointed it to be otherwise tried.

LORD JOHNSTON.—I concur, but with considerable hesitation, because I foresee great difficulty in dealing with the matters which are proposed to be proved in support of this action in their proper bearing, and in confining them to their proper bearing before a jury. Three physical symptoms of mental incapacity are averred—arterio-sclerosis, softening of the brain, and shocks of paralysis. And these three being the physical symptoms, the mental symptoms averred are fits of violent passion, outrageous conduct, and excessive indulgence in liquor. These physical symptoms are so definite and so personal to the deceased, and so closely connected with the mental condition alleged, that I see very great difficulty in so connecting them with the alleged hereditary history of this man's family as to make evidence of heredity relevant or pertinent. But I admit that there is very great force in a remark which was made, not to-day but at the first discussion, that a medical expert may view symptoms differently if he knows that there has been insanity among near relations in blood, and is not drawing his conclusions solely from the symptoms themselves. I therefore do not see my way to refuse the addition of this very proper notice of details being added to the record, if evidence of the sort referred to is to be allowed.

LORD MACKENZIE.—I am of the same opinion. In a case of this kind evidence of the opinion of medical men has of course great weight, and the facts upon which that medical opinion is founded must be proved. Now, evidence may be tendered on behalf of the pursuers to the effect that the opinion of their medical witnesses is based to some extent upon the facts which are averred in this minute of amendment. If that is so, it would not be possible to exclude subsequent evidence to prove that the facts were

as stated, and accordingly, if a sufficient foundation is first laid, I think June 15, 1912. that the averments in the minute of amendment may be made evidence in the case.

Houston v.
Aitken.

Upon the question of whether this case is to go to proof or to jury trial, I agree with what your Lordship in the chair has said.

Lord Mac-
kenzie.

THE COURT allowed the record to be amended in terms of the minute, recalled the Lord Ordinary's interlocutor, and of new approved of the issues for the trial of the cause.

D. R. TULLO, S.S.C.—MYLNE & CAMPBELL, W.S.—Agents.

HURST, NELSON, & COMPANY, LIMITED, AND ANOTHER, Pursuers
(Reclaimers).—*Moncrieff, K.C.—D. P. Fleming.*

No. 146.

SPENSER WHATLEY, LIMITED, Defenders (Respondents).—
Sandeman, K.C.—J. R. Christie.

June 20, 1912.

Jurisdiction—Foreign—Reconvention—Continued dependency of action of convention.

Hurst,
Nelson, & Co.,
Limited, v.
Spenser
Whatley,
Limited.

A Scottish company, using arrestments *ad fundandam jurisdictionem*, brought an action in the Court of Session against an English company. The English company appeared to defend, and subsequently brought a counter action against the Scottish company. The actions were conjoined, and both were finally disposed of in the Inner House upon a reclaiming note, with a finding of expenses in favour of the Scottish company, and the accounts of expenses were remitted to the Auditor to tax and to report.

Before the Court had approved of the Auditor's report and decerned for expenses, and while the period for appeal to the House of Lords was still current, the Scottish company brought another action arising out of the same subject-matter against the English company, and pleaded jurisdiction *ex reconventione*. When this action was raised, the English defenders were making no claim against the pursuers, but had paid the sums due by them under the decrees in the conjoined actions, and were also willing to pay the accounts of expenses in these actions when taxed.

Held by the majority (the Lord President, Lord Kinneir, Lord Dundas, Lord Johnston, and Lord Mackenzie) of a Court of seven Judges, that the English company was not subject to the jurisdiction of the Scottish Court *ex reconventione*, inasmuch as the original actions had been finally disposed of on the merits by a decree of that Court.

Dissenting Lord Guthrie and Lord Salvesen, on the ground that, at the date of signeting the summons in the present action, the original actions had not been finally disposed of on the merits, as they were still open to appeal to the House of Lords.

Thompson v. Whitehead, (1862) 24 D. 331, *followed*.

Allan v. Wormser Harris & Company, (1894) 21 R. 866, *commented on*, and Lord Rutherford Clark's dissenting judgment therein *approved*.

ON 1st August 1911 Hurst, Nelson, & Company, Limited, Mother-1st DIVISION, well, and the liquidator of the company, brought an action against with three consulted Spenser Whatley, Limited, London, and averred, *inter alia*, that the Judges. defenders were subject to the jurisdiction of the Court of Session *ex Lord reconventione*. This report is concerned solely with that ground of Skerrington. jurisdiction.

The circumstances in which the case was brought are set forth

June 20, 1912. in the following narrative from the opinion of the Lord Ordinary (Skerrington):—

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“ The question in this case is whether the defenders, Spenser Whatley, Limited, are subject to the jurisdiction of the Court of Session in the present action at the instance of Hurst, Nelson, & Company, Limited, in respect either (a) of reconvention, or (b) of arrestments to found jurisdiction. The pursuers are a company registered in Scotland, but having places of business in England. As they are being reconstructed, their liquidator is conjoined as a pursuer. One branch of their business is to repair railway wagons. The defenders are a company registered in England. In the course of their business as coal factors they own and use a large number of railway wagons. For many years prior to 1908 the parties did business with each other under contracts for the maintenance, reconstruction, and hiring of railway wagons. Under the nine maintenance contracts the pursuers undertook to maintain, paint, and repair for various periods certain groups of wagons belonging to the defenders, in return for quarterly payments calculated at so much per annum for each wagon. Under the reconstruction contracts the pursuers undertook to reconstruct individual wagons at various prices. Under the hiring contracts the pursuers hired wagons from the defenders for which they paid rent.

“ On 24th March 1908 the present pursuers, Hurst, Nelson, & Company, brought an action against the present defenders, Spenser Whatley, concluding for payment of (first) £1933, 12s. 4d., and (second) £354, 2s. 2d. The sum first concluded for was claimed as due to the pursuers under the maintenance and reconstruction contracts after giving credit for what was due to the defenders under the hiring contracts. The sum sued for in the second conclusion was the damage claimed by the pursuers in respect of the defenders' alleged breach of the maintenance contracts.

“ In reply to this action Spenser Whatley on 22nd June 1908 brought a cross action against Hurst, Nelson, & Company. The summons contained six conclusions based on the three groups of contracts above referred to, and it concluded for moneys due under the contracts, and also for damages for their breach. The total sum concluded for in the leading action was £2287, and in the cross action £4871.

“ The actions came before me as Lord Ordinary, and they were conjoined. After a long proof I pronounced an interlocutor on 22nd February 1910, in which I disposed of the several conclusions, first in the leading and then in the cross action. In the leading action I found that Hurst, Nelson, & Company were entitled practically to the sum sued for under their first conclusion, but that they were entitled only to one shilling as damages under their second conclusion. In the cross action my decision was, with certain comparatively unimportant exceptions, in favour of Hurst, Nelson, & Company. By interlocutor of 9th March 1910 the sums to which Spenser Whatley had been found by the former interlocutor entitled were fixed at £59 and £117, 1s. 6d., and I further found Hurst, Nelson, & Company entitled to expenses in the separate actions, and also in the conjoined actions modified to three-fourths.

“ Spenser Whatley reclaimed to the First Division, and on 8th March 1911 their Lordships pronounced an interlocutor disposing of the whole merits of the conjoined actions, and also disposing of the

question of expenses. . . . The judgment of the Inner House June 20, 1912. affirmed my interlocutor except on two points, viz.: (a) Hurst, Nelson, & Company's right to about £1100, which I awarded to them as the arrears which I held to be due to them under the maintenance contracts; and (b) as regards the expenses incurred in the Outer House. With reference to the first point, their Lordships held that the pursuers were not entitled to any sum under the maintenance contracts, and they accordingly, to that extent, recalled my interlocutor and dismissed the first conclusion of the summons at the instance of Hurst, Nelson, & Company. The leading opinion was delivered by Lord Mackenzie, and I quote the following passage from it:—'The fact remains that the (maintenance) money had, in part, not been earned. How much had been earned cannot be determined in this process. The action is laid on the contract and on the contract alone as regards the £1123, 7s. 4d. of maintenance money. Though it may be somewhat of a hardship to Hurst, Nelson, the matter is not one of form but of substance. In my opinion they should, as regards the period between 1st October 1906 and 7th January 1908, have sued for *quantum meruit*, or have brought an action to recover damages for work done by them during that period and not paid for. It is not possible in this process to say what that sum should be. I am therefore unable to agree with the Lord Ordinary's view that Hurst, Nelson are entitled to decree for £1123, 7s. 4d.' As regards the expenses incurred in the Outer House, the First Division affirmed my judgment, finding Hurst, Nelson, & Company entitled to expenses in the separate actions and also in the conjoined actions, but they modified the amount to one-half instead of three-fourths.

"The present action, which was signeted on 1st August 1911, was avowedly brought with the object of taking advantage of Lord Mackenzie's suggestion, and the pursuers plead that the sum sued for (restricted to £2314) is due to them either as a *quantum meruit* or in name of damages.

"Another fact bearing upon the question of reconvention is not founded upon in the pleadings in the present action, but is vouched by the correspondence, No. 37, the genuineness of which is admitted. On 28th July 1911—that is, three days before the signeting of the present summons—Spenser Whatley's solicitors wrote to Hurst, Nelson, & Company's solicitors, enclosing a cheque for £438, 16s. 1d., being the amount which they considered to be payable on a balancing of the amounts due under the conjoined actions. This cheque was accepted by Hurst, Nelson, & Company's solicitors, and although a trifling controversy remained unsettled, the fact upon which the defenders' counsel placed great reliance is substantially true, viz., that when the present action was raised Spenser Whatley were making no claim against Hurst, Nelson, & Company, and were ready and willing to pay the latter's account of expenses when taxed. Hurst, Nelson, & Company's account of expenses has not been lodged for taxation even at the present date (February 1912), but their counsel explained that the account was one of unusual magnitude, amounting to about £4000. It is not averred that the delay was intentional, and technically the action at the instance of Spenser Whatley is still a depending cause. In these circumstances, the question arises whether Spenser Whatley's action can be regarded as an *actio conventiois*, entitling Hurst, Nelson, & Company to bring the present action as one *reconventionis*."

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The pursuers pleaded, *inter alia* ;—(1) The defenders are subject to the jurisdiction of the Court of Session (a) *ex reconventionem* ; (b) in respect of the arrestments used to found jurisdiction. (2) (a) the defenders are barred by personal exception by their own actings from insisting in their plea of *forum non conveniens* ; (b) *separatim*, in the circumstances the Court of Session is the appropriate and convenient forum.

The defenders pleaded, *inter alia* ;—(1) The defenders not being subject to the jurisdiction of the Court of Session on either of the grounds alleged by pursuers or otherwise, the action should be dismissed. (2) *Separatim*, this Court being in the circumstances set forth *forum non conveniens*, the action should be dismissed.

On 20th February 1912 the Lord Ordinary (Skerrington) sustained the first plea in law for the defenders, and dismissed the action.*

* “OPINION.—[After the narrative quoted above, his Lordship proceeded] —It was argued for the defenders that their cross action against Hurst, Nelson, & Company was purely defensive, and that accordingly they could not be regarded as persons who had voluntarily appealed to the jurisdiction of the Scottish Courts. There is authority to the effect that as regards reconvention the question is one of substance and not of form, and that an action which is truly defensive in its nature cannot be founded on as giving rise to this plea. A typical example is an action brought by a foreigner in the Scottish Courts for the purpose of suspending threatened diligence on a bill of exchange. These authorities have no application to the facts of the present case. It is true that Spenser Whatley appeared as defenders in the leading action by compulsion in respect of arrestments used against them to found jurisdiction. It is also true that a cross action was necessary in order to give effect to what they conceived to be their rights under the three groups of contracts. None the less, by bringing the cross action, they subjected to the jurisdiction of the Court of Session various questions which were not raised in the leading action, and by suing for a larger sum they practically placed their opponents on the defensive. I am accordingly of opinion that if the present action had been brought while the conjoined actions were depending for judgment, no valid objection could have been taken to the jurisdiction, and that it would not have been necessary for the present pursuers to arrest anew in order to found jurisdiction against the defenders. The whole difficulty to my mind arises from the fact that the present summons was not signeted until long after final judgment on the merits had been pronounced by the Court of Session in the conjoined actions.

“The pursuers’ case rests upon the decision of the Second Division in the case of *Allan v. Wormser Harris & Company*, (1894) 21 R. 866. In that case the Lord Justice-Clerk (Macdonald), Lord Young, and Lord Trayner decided that an action of reconvention was competently raised after final judgment on the merits, with a finding of expenses, had been pronounced in the action of convention. Lord Rutherford Clark dissented, and he quoted the opinion of Lord President Inglis in *Thompson v. Whitehead*, (1862) 24 D. 331, to the effect that reconvention will apply only ‘where the two claims, the *conventio* and the *reconventio*, may be tried simultaneously, and terminated either by a single sentence, or by two sentences contemporaneous or nearly contemporaneous.’ The facts in *Thompson’s* case raised an entirely different question from that which had to be decided in *Allan’s* case or in the present case, but the dictum of the Lord President is of high authority, and it commends itself by its good sense. That dictum seems to me to deprive of all authority the earlier decision of Lord Rutherford in *Baillie v. Hume*, (1852) 15 D. 267, which in some respects is more favourable to the pursuers than *Allan’s* case. In *Allan’s* case the Lord

The pursuers reclaimed, and the case was heard before the Extra June 20, 1912. Division (consisting of Lord Kinnear, Lord Dundas, and Lord Mackenzie) on 14th May 1912, and continued for hearing before seven Judges. Hurst, Nelson, & Co., Limited, v. Spenser Whatley, Limited.

On 18th May 1912 the First Division ordered the cause to be heard before that Division with three Judges of the Second Division, and the case was accordingly heard before the First Division, with Lord Dundas, Lord Salvesen, and Lord Guthrie, on 4th and 5th June 1912.

Argued for the reclaimers;—The Lord Ordinary had erred in so far as he had distinguished the case of *Allan v. Wormser Harris & Company*¹ from the present case. The dissenting opinion of Lord Rutherford Clark in that case was not rested upon Scottish practice, the authorities dealing with which had not been fully cited in that case, and were inconsistent with his Lordship's view.² Until the

Justice-Clerk and Lord Trayner accepted as authoritative the Lord President's dictum, but they did not comment upon the requirement that the two claims 'may be tried simultaneously.' They discussed only the requirement that the two judgments must be 'contemporaneous or nearly contemporaneous.' While I prefer the opinion of Lord Rutherford Clark, it is my duty to give effect to the decision of the Second Division, and I can best do so by quoting the concluding words of Lord Trayner. After stating that the crucial date is that at which the *actio reconventionis* is brought, he proceeds:—'The only tests, at that date, of jurisdiction are (1) do the actions arise out of the same transaction, or are they *ejusdem generis*? (2) is the *actio conventionis* still in dependence? and (3) do the cases in themselves admit of being terminated by judgments nearly contemporaneous? If these questions are answered in the affirmative, there arises jurisdiction *ex reconventionibus*; if otherwise, not. Applying these tests here, I think jurisdiction *ex reconventionibus* was well founded.' It is a question of fact whether in any particular case two actions can be terminated by judgments nearly contemporaneous. In considering this matter I have kept in view the observations of the Lord Justice-Clerk (p. 871), to the effect that delay from accidental causes ought not to be taken into account. Accordingly I discount the fact that the present action was brought in the beginning of the autumn vacation of 1911, and that I was unable to hear the debate until early in February 1912. Allowing for all this, I am of opinion that it is impossible in the present case to hold that there is jurisdiction *ex reconventionibus* unless one is prepared to interpret Lord Trayner's third test in such a wide sense as to deprive it of all meaning.—[His Lordship then dealt with the question of arrestments used by the pursuers to found jurisdiction (with which this report is not concerned), and stated his reasons for holding that, as the subjects arrested were valueless, the arrestments were inept.]

"I dismiss the action for want of jurisdiction, and sustain the defenders' first plea in law. As the defenders' second plea of *forum non conveniens* was carefully argued I may say that I would have repelled that plea if the action had been competently before me. The fact that the defenders plead *res judicata* shows how inconvenient and unjust it would be for the Court of Session to refuse to entertain the action. A Scottish lawyer can see at a glance that this plea is absurd, but an English Court might have difficulty in arriving at the same result."

¹ (1894) 21 R. 866.

² *Balle & Brink v. Benton*, (1763) M. 4036; *Black & Knox v. Ellis & Sons*, (1805) M. App. Foreign, No. 7; *M'Ewan's Trustees v. Robertson*, (1852) 15 D. 265, Lord Rutherford, at p. 266; *Baillie v. Hume*, (1852) 15 D. 267; *Ord v. Barton*, (1847) 9 D. 541.

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process in an action of convention was extracted there was jurisdiction in the Court to entertain an action of reconvention.¹ Applying that test to the present case there was a surviving process in the action of convention in which the present defenders were pursuers, and in which a final interlocutor, dealing with expenses, had still to be pronounced.² That being so, the defenders were subject to the jurisdiction of the Court *ex reconventione*. There were passages in the Civilians from which it appeared that the *actio conventionis* and the *actio reconventionis* need not necessarily be disposed of by contemporaneous judgments,³ as seemed to be implied in the passage quoted by the Lord Ordinary from the opinion of the Lord Justice-Clerk Inglis in *Thompson v. Whitehead*.⁴ Set-off at the sight of the Court was not of the essence of the doctrine, but in the action of convention the present defenders had put in issue before the Scottish Court matters as to which their claims and the claims of the pursuers in the present action of reconvention should be tried by the same tribunal.⁵ The principle was that the defenders being pursuers in the action of convention could not be heard to plead no jurisdiction in the action of reconvention. When the summons in the present action was signeted the judgment in the defenders' action was subject to appeal to the House of Lords, and on the merits it might have been remitted back to the Court of Session. Accordingly, at that date the defenders were still seeking the benefit of the jurisdiction of the Court, and were bound to submit to its decisions.⁶ A plea of *lis alibi pendens* was in some ways analogous, and that plea would be sustained if, in the action in which it was stated, the summons was signeted before taxation of expenses had taken place in the action on which it was based.⁷ In the present case the summons having been signeted before the Auditor had reported upon the present pursuers' account of expenses in the action of convention, that action should be held to have been in dependence and jurisdiction to have been effectually founded *ex reconventione*.⁸

Argued for the respondents;—The stage reached in the action of convention excluded jurisdiction against the defenders *ex reconventione*. Before the present action had been brought against the defenders they had tendered payment of the sum found due to the present pursuers in the action of convention, and they were willing to pay the amount

¹ Longworth v. Yelverton, (1868) 7 Macph. 70; Stirling Maxwell's Trustees v. Kirkintilloch Police Commissioners, (1883) 11 R. 1.

² Inglis v. National Bank of Scotland, 1911 S. C. 6, Lord President, at p. 8.

³ Dig. II. i. 11; V. i. 22; Code VII. xlv. 14; Nov. 96; Voet, V. i. 78, 80, 86, 88; Huber, Prælectiones, XI. ii. 5.

⁴ (1862) 24 D. 331, at p. 344.

⁵ Morison and Milne v. Massa, (1866) 5 Macph. 130, Lord Deas, at p. 137.

⁶ Schibsby v. Westenholz, (1870) L. R., 6 Q. B. 155, Blackburn, J., at p. 161.

⁷ Mackay's Manual of Practice, 226; Aitken v. Dick, (1863) 1 Macph. 1038; Kennedy v. Macdonald, (1876) 3 R. 813.

⁸ Reference was also made to South African Republic v. La Compagnie Franco-Belge du Chemin de Fer du Nord, [1897] 2 Ch. 487; Yorkshire Tannery and Boot Manufactory, Limited, v. Eglinton Chemical Co., Limited, (1884) 54 L. J., Ch. 81; Merlin's Repertoire *voce* Reconvention, I., 2nd paragraph.

of the pursuers' accounts of expenses when taxed. If by bringing the present action before taxation the pursuers could subject the defenders to the jurisdiction of the Court, then by abstaining from extract they could subject the defenders to the jurisdiction indefinitely. Moreover, in the action of convention the defenders had not resorted to the Scottish Courts; but, having been brought there, they took proceedings to vindicate their defence in the only competent Court, because the action which they brought could not have been served upon the present pursuers in England.¹ Their action was really defensive, and there could be no reconvention following upon a defensive action.² The passages in the *Civilians* relied upon by the reclaimers did not affect principles of international law, because the principles of Roman law were not concerned with any question of jurisdiction as between Courts of different nations, but only as between Courts deriving jurisdiction from a common source. In any case these passages supported the view that jurisdiction *ex reconventionem* depended upon the question whether the two causes, the *conventio* and the *reconventio*, could be tried simultaneously and terminated by contemporaneous judgments,³ and that was a question to be determined by the circumstances of each case. In the circumstances of the present case, as the defenders were not seeking to enforce any pecuniary claim against the pursuers there were no two causes to be terminated by contemporaneous judgments, and accordingly there could be no reconvention.⁴ This question had not been considered fully in Scotland until the case of *Thompson v. Whitehead*.⁵ The case of *Balle & Brink v. Benton*⁶ was special by reason of consent signified by caution.⁷ The case of *Black & Knox v. Ellis & Sons*⁸ and other cases relied upon by the reclaimers were also special, and did not turn on principle.⁹ The dissent of Lord Rutherford Clark in *Allan v. Wormser Harris & Company*¹⁰ was in accordance with the decision of the Court in *Thompson v. Whitehead*,⁵ and supported the defenders' application of that decision to exclude jurisdiction in the present case.¹¹ A decerniture for expenses was not a final interlocutor on the merits of a cause, for as to the merits the function of the Court was exhausted by the interlocutor dealing with them.¹² A plea of *lis alibi pendens* was not analogous, and, in any event, could not be sustained if at the time when it had to be disposed of the action on which it was founded was no longer

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¹ *Watkins v. Scottish Imperial Insurance Co.*, (1889) 23 Q. B. D. 285.

² *Goodwin & Hogarth v. Purfield*, (1871) 10 Macph. 214; *Davis v. Cadman*, (1897) 24 R. 297.

³ *Thompson v. Whitehead*, 24 D. 331, Lord Justice-Clerk Inglis, at pp. 342 and 344.

⁴ *Thompson v. Whitehead*, 24 D. 331, Lord Neaves, at p. 347; *Longworth v. Yelverton*, 7 Macph. 70, Lord President Inglis, at p. 74.

⁵ 24 D. 331.

⁶ M. 4036.

⁷ M. 4036; *Vans v. Sandilands*, (1675) M. 4840.

⁸ M. App. Foreign, No. 7.

⁹ *White v. Spottiswood*, (1846) 8 D. 952; *M'Ewan's Trustees v. Robertson*, 15 D. 265, Lord Rutherford, at p. 267; *Baillie v. Hume*, 15 D. 267; *Ord v. Barton*, 9 D. 541, Lord Ivory, at p. 543.

¹⁰ 21 R. 866.

¹¹ *Davis v. Cadman*, 24 R. 297; *Oliver & Boyd v. Miller & Son*, (1905) 12 S. L. T. 634.

¹² *Cruikshank v. Smart*, (1870) 42 Scot. Jur. 241.

June 20, 1912. truly in dependence¹; similarly the Lord Ordinary had rightly sustained the defenders' plea of no jurisdiction in the present case.²

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At advising on 20th June 1912,—

LORD PRESIDENT.—In this case the facts are that Hurst, Nelson, & Company, who are a Scottish company, founded jurisdiction against Spenser Whatley, Limited, who are an English company, by arrestments *ad fundandam jurisdictionem*, and brought an action against them in the Scottish Courts. Spenser Whatley appeared to defend, and at the same time brought a counter action against Hurst, Nelson, & Company. The actions were conjoined; decree was given upon the merits in the Outer House; it was reclaimed to the Inner House, and the Inner House disposed of both actions—I need not go into particulars—by bringing out a sum in favour of Hurst, Nelson, & Company with a finding of expenses in their favour. The case then proceeded in the ordinary way, that is to say, a remit was made to the Auditor to tax the accounts of expenses, and to report, and nothing more remained to be done in those conjoined actions than to approve of the Auditor's report and to decern for expenses. Apart from that, the cases were absolutely finished, and the decision upon the merits could never be altered unless by the House of Lords.

While the cases were in this position Hurst, Nelson, & Company, who had not been found entitled to all that they conceived they were entitled to—the Court having decided, so far as they were unsuccessful, upon the ground that they had sued for a sum upon contract instead of for a *quantum meruit*—raised another action against Spenser Whatley, Limited, but this time without any effectual arrestments *ad fundandam jurisdictionem*. Spenser Whatley appeared in that action and pleaded “No jurisdiction,” and the sole question that has been remitted to seven Judges is whether there is in these circumstances jurisdiction *ex reconventionem*, owing to the fact that Spenser Whatley may still be said to be in the Scottish Courts in respect of the dependence of the former action and cross action to the limited extent that I have already explained, namely, for the stage which is represented by the approval of the Auditor's report on the expenses.

The Lord Ordinary held that there was no jurisdiction, but he did so upon what he considered was a specialty of the case. Apart from that specialty he considered that there would have been jurisdiction owing to the decision of the Second Division in the case of *Allan v. Wormser Harris & Company*,³ in which case it was decided by the Lord Justice-Clerk, Lord Young, and Lord Trayner, that an action of reconvention was competently raised, and that jurisdiction existed *ex reconventionem*. Lord Rutherford Clark dissented from that judgment.

The present case was reclaimed and came before those of your Lordships

¹ *Gracie v. Kerr*, (1846) 19 Scot. Jur. 60; *M'Aulay v. Cowe*, (1873) 1 R. 307.

² *The following English authorities were referred to:*—The “*Salybia*,” [1910] P. 25. Sup. Ct. Rules 1883, O. 31, Rules 15 and 16, and O. 19, Rule 27. The Lord President referred to *Rousillon v. Rousillon*, (1880) 14 Ch. D. 351, *per Fry, J.*, at p. 371.

³ 21 R. 866.

who were sitting in the Extra Division, and I understand that your Lordships then came to the conclusion that the Lord Ordinary's judgment could not be supported upon specialty, and that it was necessary therefore to decide the general question and to reconsider whether the judgment of the majority or the minority in the case of *Allan v. Wormser Harris & Company*¹ was right; and for that reason the case was sent to seven Judges.

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Ld. President.

Lord Rutherford Clark based his judgment in *Allan v. Wormser Harris & Company*¹ upon the opinion of Lord President Inglis when he was Lord Justice-Clerk, in the case of *Thompson v. Whitehead*.² I have considered carefully the various authorities that were cited to us in debate, and, in particular, the latter judgment, and I have come to the conclusion that in our books that is the only attempt which has been made to examine the principles upon which jurisdiction *ex reconventione* is founded, and I think that really nothing can be added to what Lord President Inglis said, viz., that reconvention will apply only when two claims—the claim in the *actio conventionis* and that in the *actio reconventionis*—may be tried simultaneously and terminated by a single judgment or by two judgments contemporaneous or nearly contemporaneous. No doubt that makes it necessary to determine on the facts of each case what you mean by contemporaneous or nearly contemporaneous. It appears to me that the foundation of the whole thing, as Lord President Inglis puts it, lies in the ability of the Court to deal with two actions at one time and in one decree. And therefore I think that unless the case is in such a position that that can be done effectually, there is no reason for the exercise of jurisdiction *ex reconventione*.

I do not think it is sufficient to say that, inasmuch as the foreigner has come to the Scottish Courts, he has by that step impliedly subjected himself for a time to whatever the Scottish Courts may think fit to do with him. Of course, this particular case is very peculiar. In the ordinary case it is the foreigner who comes here on his own account, and therefore to a certain extent he cannot be heard to complain of what happens to him in the way of jurisdiction when he comes. Here the foreigner did not come; he was brought. It is true that he then raised the counter action; but I do not think that that peculiarity affects the application of the general principle of which I have just spoken.

It appears to me that—in the position in which this case was, viz., that everything was done in the action and counter action that could be done; that nothing that this Court could do could alter the decree on the merits; and that all that remained was merely to give effect to a finding of expenses against the foreigner which the foreigner is perfectly willing to pay—there is no ground for upholding the jurisdiction *ex reconventione*. I do not mean that I think there might not be other circumstances in which the result would be different; for instance, supposing what is called the final judgment had only been pronounced by the Lord Ordinary, and the reclaiming days had not expired, I have no doubt the action would have been in time, because it would still be possible in this Court to put the

¹ 21 R. 866.

² 24 D. 331.

June 20, 1912. of the case before us, the result seems to me to be that the plea of jurisdiction *ex reconventione* must be repelled.

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Nelson, & Co.,
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Spenser
Whatley,
Limited.
Lord Dundas. It occurs to me to add two observations. The first is that the pursuers' counsel did not satisfy me that there is any true analogy between the plea we are here considering and that of *lis alibi pendens*; and he is not, in my judgment, in a position to take benefit from the existing decisions upon that question of procedure—some of which have gone very far as to the continued technical “dependence” of a process, and might, perhaps, not unfitly be reconsidered if a suitable occasion should arise. The other observation is that, if it had been necessary to consider and decide the defenders' plea of *forum non conveniens*, I should, as at present advised, have thought much more favourably of it than the Lord Ordinary seems to have done.

LORD JOHNSTON.—I agree that the Lord Ordinary's judgment falls to be affirmed. The practice of the Scottish Courts in assuming jurisdiction *ex reconventione* is an equitable rule of practice or pleading, its motive being, as shown by the Lord Justice-Clerk (Inglis) in *Thompson v. Whitehead*,¹ the equitable object of placing the native defender in the matter of counter claims and counter actions in the same relation to a foreign pursuer as he would have been had the pursuer also, like himself, been a native. It is not to be extended or applied beyond the attainment of that object. To sustain jurisdiction *ex reconventione* in the present case would be so to extend or apply it. If I may humbly do so, I should accept the dissenting judgment of Lord Rutherford Clark in *Allan v. Wormser Harris & Company*² as expressing the opinion which I have briefly indicated, and as conclusive of the question raised in the present case.

LORD SALVESEN.—In common with your Lordships I accept the exposition of Lord Justice-Clerk Inglis in the case of *Thompson v. Whitehead*¹ as stating the grounds upon which, according to the law and practice of Scotland, a foreigner may be subjected to the jurisdiction of our Court *ex reconventione*. The main difficulty, however, in the present case is to apply the rules which were laid down by that learned Judge, and which the majority of the Second Division, who decided the case of *Allan v. Wormser Harris & Company*,² at least professed to follow. Several of these rules occasion no difficulty. Thus reconvention is admitted “not only where the two claims arise *in eodem negotio*, but also where they arise *ex diversis causis*, provided they be claims which can fairly be set against one another without violating some other rule of pleading or principle of equity.”³ I apprehend that this would cover the case of a foreigner suing a Scotsman for the price of goods under a contract of sale, and the Scotsman retaliating with a claim of a similar kind under a different contract of sale. According to our rules of pleading, it would not be competent as between two natives to set off the one claim against the other in the original action, but a counter action would require to be raised which could not be conjoined with the first, but which, nevertheless, might be conveniently tried by the same Judge immediately after he had heard the evidence in the first. Some of the other Judges indicated an opinion that reconvention is

¹ 24 D. 331.

² 21 R. 866

³ 24 D., at p. 345.

not allowed except when the actions can be conjoined, but this was June 20, 1912. certainly not the view of Lord Justice-Clerk Inglis, and is not, in my opinion, in accordance with the balance of authority. It is plain, therefore, that the right to convene the foreigner who sues in a Scottish Court is not confined to cases where, by the law of Scotland, compensation can be pleaded, but rests upon the broad principle of equity as stated in the leading opinion, "that it is iniquitous and oppressive to demand payment of a debt, however just, while you withhold from your debtor his property or funds, by the use of which he might be enabled to pay you."¹

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Whatley,
Limited.

Lord Salvesen.

The second rule is that the defenders' privilege is limited to those cases where the subject-matter of the two claims can be conveniently tried at the same time and in the same Court, and can be brought to a conclusion by one judgment (as in conjoined actions), or by two separate and contemporaneous, or nearly contemporaneous, judgments. This rule might be construed as meaning that an action *ex reconvention* was not competent after a judgment on the merits by the Judge of first instance in an action raised by a foreigner against a Scotsman. I do not think, however, this is the true construction. If the judgment in the first case has become final, then it is impossible to comply with the rule that the two claims shall be brought to a conclusion by one judgment, or by separate and nearly contemporaneous judgments, for the final judgment may be extracted at any moment and the other case would have to be litigated on its own merits; and the judgment would be separated in point of time from the earlier one by just such an interval as must necessarily elapse in order to have the pleadings adjusted and the case disposed of in the ordinary way. But where the judgment of the Judge of first instance is still open to review at the time when the action of reconvention is instituted the conditions postulated in the rule may still be complied with. The earlier judgment may be appealed to the Sheriff or to the Inner House, and may, if the Court thinks proper, be sisted to await the decision in the second, so as to permit of both being tried in the Court of appeal at substantially the same time, and of contemporaneous, or nearly contemporaneous, judgments being pronounced. There may be many cases in which it would be equitable that such a course should be followed. The defender in the first action may have been so confident of success that he did not think it necessary to plead his counter claim. If the Judge of first instance, however, decided against him, and the judgment has not yet become final, I think he is entitled to bring his action of reconvention, and it does not appear to me to be material that he afterwards allows the judgment in the first action to become final. As Lord Trayner pointed out in *Allan's* case,¹ the point of time in questions of jurisdiction, which must always be looked at, is the date at which the action is brought, and if jurisdiction then exists it is not affected by any subsequent change of circumstances.

Applying these principles, I think the case of *Allan*¹ was well decided. At the time the action of reconvention was raised the judgment in the original action had not become final. It is true that judgment upon the merits had been pronounced, but the pursuer still required to appeal to the

¹ 24 D., at p. 344.

June 20, 1912. jurisdiction of the Scottish Courts in order to obtain a decree for his expenses.

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Nelson, & Co.,
Limited, v.
Spenser
Whatley,
Limited.

Had the defender therefore appealed the case, it was open to him to get the action sisted until judgment was given in the second action; and it would therefore have been possible for the Court of appeal to have disposed of the two actions by contemporaneous, or nearly contemporaneous, judgments.

The circumstance that the original defender felt that he could not with any reasonable prospect of success challenge the judgment that had been pronounced against him cannot, in my opinion, affect the question of jurisdiction. I differ from the view that reconvention is not a ground of jurisdiction. Unless it be so, the Court cannot entertain an action against the foreigner who is convened and who is not otherwise subject to the jurisdiction of the Scottish Courts.

I should like to add, with reference to something which has fallen from Lord Kinnear, that I think the distinction which he has drawn between a final judgment in this Court and a judgment on the merits in an inferior Court shows that the decision of your Lordships is not inconsistent with the decision in the case of *Allan v. Wormser Harris & Company*.¹

Assuming, however, the jurisdiction to exist, it must always be a question of discretion whether in a particular case the Court think they should exercise the jurisdiction, or should remit the pursuer in the action of reconvention to the *forum* of the defender. That was expressly laid down by Lord Young in his opinion in *Allan's* case,¹ in which I respectfully concur, and has been given effect to in other cases, of which *Williamson's*² is an example. In the present case the plea of *forum non conveniens* is presented with unusual force. In the first place, the *actio conventionis* had been decided not merely by the Judge of first instance, but by a decision of the Inner House which, although still appealable to the House of Lords when the *actio reconventionis* was raised, has since been permitted to become final. This latter action would therefore have to be carried through quite independently of the former process. A still stronger circumstance is that we were told by the respondents' counsel, without contradiction, that the subject-matter of the dispute arose in England, and that by far the greater number of the witnesses are resident there; and it may well be that, if there be any difference between the laws of the two countries, the proper law to apply is that of England. Further, there is no reason to suppose that the action will not be tried just as well in England as here; and I am not at all moved by the consideration which seems to have appealed to the Lord Ordinary, that a plea of *res judicata* might be entertained in the English Courts which would not have the smallest chance of success here. On these grounds I concur with your Lordships in holding that we should dismiss this action; not, however, on the ground that we have not jurisdiction to entertain it, but on the ground that it is not convenient that the jurisdiction which we possess should be exercised against the defenders here.

LORD MACKENZIE.—The question in this case is whether the defenders, who are an English company, can be sued here *ex reconventionis* by the pursuers, whose company is registered in Scotland.

¹ 21 R. 866.

² (1884) 11 R. 596.

The facts in connection with the previous action brought in the Court of June 20, 1912. Session by Hurst, Nelson, & Company, the pursuers here, against Spenser Hurst, Whatley, Limited, the defenders here, and the counter action brought Nelson, & Co., by the latter against the former, are given by the Lord Ordinary in his Limited, v. Spenser Whatley, Limited. opinion. The merits of these litigations have been wholly exhausted and expenses have been awarded. The only thing that remains to be done is to obtain approval of the Auditor's report. These circumstances were also Lord Mac- present in the case of *Allan v. Wormser Harris & Company*,¹ in which kenzie. it was held by a majority of the Court that an English firm was subject to the jurisdiction of the Court here on the ground of reconvention. The pursuers' counsel maintained that the judgment of the majority was conclusive in his favour, and the case has been sent to seven Judges in order that it may be decided whether the view taken by the majority in the case of *Allan*¹ was sound or not. An argument was maintained by the defenders which would obviate the necessity of considering the case of *Allan*,¹ because they maintained that the previous action they raised against Hurst, Nelson, & Company was not of the nature of an *actio conventionis* at all, but had been brought in order to establish their counter claims to the demands which Hurst, Nelson, & Company had made in the original action in which they were the defenders. As the Lord Ordinary points out, Spenser Whatley, Limited, did raise in the pleadings in their action various questions which were not raised in the leading action, and by suing for a larger sum they practically placed their opponents on the defensive. In this view I agree. Accordingly, if Spenser Whatley's action is to be considered as still in dependence, I think they would be liable to be sued in the present action. If that action is not in dependence, then there cannot be reconvention.

If the true test be whether there is anything that Hurst, Nelson, & Company have to set against any sum for which they might obtain decree, it is plain there is nothing here. When the present action was raised Spenser Whatley were making no claim against Hurst, Nelson, & Company, and had offered to pay their account of expenses when taxed. It appears to me that the true test is whether the claim in the *actio reconventionis* can be pleaded in compensation to demands made in the leading action. I accordingly agree with the Lord Ordinary who states that he prefers the opinion of Lord Rutherford Clark, who dissented, in the case of *Allan*.¹ Lord Rutherford Clark's opinion gives effect to the principles that were laid down by the Lord Justice-Clerk (Inglis) and the majority of the Court in the case of *Thompson v. Whitehead*,² and its substance is that reconvention holds its place in our jurisprudence on the equity that a foreigner who is appealing to the jurisdiction of a Scottish Court must submit to that jurisdiction in such actions as his adversary may raise and are necessary to enable the Court to do justice between the parties; that it is a condition of jurisdiction *ex reconventionione* that the other action shall depend for judgment, for to hold that the *actio reconventionis* can proceed when the *actio conventionis* has ceased to be in dependence would be to act on a principle after the reason of it has ceased to exist. After final decree

¹ 21 R. 866.² 24 D. 331.

June 20, 1912. the cause cannot be in dependence for judgment. The question of expenses having here been disposed of, any further interlocutor approving of the Auditor's report will be merely executorial.—*Inglis v. National Bank*.¹

Hurst, Nelson, & Co., Limited, v. Spenser Whatley, Limited.
 Lord Mac-kenzie.

The decree on the merits cannot be altered. The question, therefore, whether the decree has been extracted or not does not appear to be relevant, for the Judge after pronouncing decree has no power to alter its terms either before or after extract. The passages from the civil law cited by Lord Rutherford Clark show that the *actio reconventionis* is truly a *mutua petitio* which implies that each petition is before the Court for judgment.

The case in which there is the fullest exposition of the law on the whole subject is *Thompson v. Whitehead*,² and although it is not directly a judgment on the merits of the question here, as the ground of judgment was that the two claims did not arise *in eodem negotio*, yet the principles regulating reconvention were fully explained. The opinion of the Lord Justice-Clerk is summed up in the passage quoted in the opinion of the Lord Ordinary to the effect that reconvention will apply only "where the two claims, the *conventio* and the *reconventio*, may be tried simultaneously, and terminated either by a single sentence, or by two sentences contemporaneous or nearly contemporaneous."³ It is pointed out in *Thompson's case*² that the law will have fully satisfied the principle of equity on which reconvention is founded if it allows the Scottish defender to protect himself against the demand of a foreigner by setting off against it *pro tanto* the foreigner's debt to him. The law of Scotland, like the law of Rome, permits reconvention out of favour to a defender that he may not be condemned to pay without his having at the same time an opportunity of enforcing his demand against the pursuer. The pursuers' counsel in the present case contended that there were further passages in writers on the civil law which threw additional light upon the matter. The result of the passages referred to appears to me to be this,—that a foreigner during the dependence of the law suit, and while he is himself pursuing, is personally barred from objecting to the jurisdiction of the Court in which he has brought his action in regard to all claims arising *in eodem negotio*, or even *ex diversis causis*, provided they are claims which could fairly be set against one another without violating some other rule of pleading or principle of equity. This view of the equity on which the plea rests was recognised in the case of *Longworth v. Yelverton*⁴; and in *Davis v. Cadman*⁵ Lord M'Laren pointed out that reconvention just means that when a pursuer, being a foreigner, takes proceedings here, and thereby submits the matters in dispute to the judgment of this Court, "he is not allowed to plead want of jurisdiction in any counter action which may be necessary for completely determining the rights of parties which are in dispute." This bears out the view that in a proper case of reconvention the question is a question of the terms on which the pursuer is to get judgment in the leading action. In the present case, so far as this Court is concerned, what is being treated as the *actio conventionis* is at an end on the merits. It is not relevant to consider what the House of Lords might have done if an appeal had been taken. If this consideration was relevant, then

¹ 1911 S. C. 6.² 24 D. 331.³ 24 D., at p. 344.⁴ 7 Macph. 70.⁵ 24 R. 297, at p. 305.

the argument in *Allan's* case¹ was futile. The merits of the cause which is June 20, 1912. treated as the *actio conventionis* have been exhausted in this Court.

It does not appear to me that the principles explained by the Lord Justice-Clerk in *Thompson's* case² and Lord Rutherford Clark in the case of *Allan*¹ are inconsistent with the decisions in any of the earlier cases with the exception of *Baillie v. Hume*.³ That judgment is entitled to great respect, having been pronounced by Lord Rutherford, but no reasons are given in the report for the conclusion reached. The case of *Balle & Brink v. Benton*,⁴ which at first sight appeared to be an authority for the pursuers, proves on examination to contain a specialty which was quite sufficient for the decision of the case. Upon the application of Andrew Fowler, a merchant in Aberdeen, as agent for Benton, a merchant in Newcastle, a vessel was arrested at Aberdeen. Fowler was ordered to find caution for payment of all damages and expenses. As the result of the process at Benton's instance it was found by the Court of Session that the property in the ship had been regularly transferred by proceedings in Norway to a Danish purchaser. Benton and Fowler together with their cautioner were thereafter sued for damages and expenses in consequence of the arrestment of the ship and the judicial procedure following upon it. The facts above stated were quite sufficient to subject the defenders to the jurisdiction of the Scottish Court. *Black & Knox v. Ellis & Sons*⁵ is not an authority on the question of reconvention. It decided that a foreign creditor who executed a poinding in Scotland could only take the poinded goods subject to the *nexus* put upon them by Act of Parliament, and was bound under the Bankrupt Act to contribute the statutory proportion of the proceeds of the poinded goods. With all deference therefore to what is said about this case in *M'Ewan's Trustees*,⁶ *Black & Knox*⁵ cannot be regarded as an authority on the question. In *M'Ewan's* case⁶ it was held that, where a debtor who had been sequestrated and discharged under a composition arrangement had left Scotland, he could not be sued in the Court of Session by a creditor for payment of the composition on the ground of reconvention.

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Lord Mac-
kenzie.

In *Ord v. Barton*⁷ the foreign defender was a claimant in a Scottish sequestration, and it was therefore held, as Lord Moncreiff puts it, that he must take from us the whole law of bankruptcy which may bear upon his claim. The process in that case was a depending one. This case recognised that jurisdiction *ex reconventionis* is not to be tested with reference to the power of the Court to give full effect to its decree.

It therefore appears to me that if the judgment in the case of *Allan*¹ is to be taken as laying down law inconsistent with the opinion of the Lord Justice-Clerk Inglis in *Thompson*,² it is not in accordance with principle or authority. I therefore arrive at the same conclusion as the Lord Ordinary. I do so, however, upon the grounds stated, not because I am able to distinguish the facts of the present case from those in the case of *Allan*.¹

It is not necessary to express an opinion upon the plea of *forum non conveniens* stated by the defenders. The facts set forth in the third article

¹ 21 R. 866.

² 24 D. 331.

³ 15 D. 267.

⁴ M. 4036.

⁵ M. App. Foreign, No. 7.

⁶ 15 D. 265.

⁷ 9 D. 541.

June 20, 1912. of their statement of facts, however, show that there is much to be said in support of it.

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Whatley,
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LORD GUTHRIE.—I concur in the opinion of Lord Salvesen. I think the action should be dismissed, on the ground of *forum non conveniens*, in accordance with the respondents' second plea, not on the ground stated in the first branch of the first plea, which the Lord Ordinary has sustained, namely, that the Court has no jurisdiction *ex reconventione*.

It is common ground that the two requisites necessary, by the law of Scotland, for an action of reconvention are, first, that the matters with which it deals must be the same as those in the action of convention, in the sense of being either *ex eodem negotio* or *ejusdem generis*; and second, that the action of reconvention must be instituted while the action of convention is still, as Lord Rutherford Clark puts it in *Allan's* case,¹ in dependence for judgment. It seems to me that what Lord Trayner states, in the case of *Allan*,¹ as a third element, namely, to quote the Lord Justice-Clerk Inglis in the case of *Thompson v. Whitehead*,² that the action is only competent "where the two claims, the *conventio* and the *reconventio*, may be tried simultaneously, and terminated either by a single sentence, or by two sentences contemporaneous or nearly contemporaneous," is only an ingredient in the second requisite that the action of convention be still in dependence.

The Lord Ordinary holds, and it is not disputed, that this action satisfies the first requisite. The question is, Does it satisfy the second?

The expression "in dependence," used in the writings of the jurists and in the decided cases, is ambiguous. I read it as meaning in dependence for final judgment on the merits. If so, the date at which the question is to be considered is all-important. If the ruling date in this case is the present date, it is clear that the action of convention is no longer in dependence for final judgment on the merits, because the interlocutor of the First Division on the merits of that action is no longer appealable. If, however, the ruling date be the date of raising the action of reconvention, then, that action having been raised on 1st August 1911, it was still open to either of the parties to the action of convention to have taken the interlocutor of the First Division of 8th March 1911, disposing of the merits of that action, to review by the House of Lords.

I concur with Lord Trayner in the case of *Allan*,¹ that the date of raising the action of reconvention is the ruling date. If so, I do not see how, as at that date, while the period given by statute to the parties to consider whether they will treat a judgment as final or not was running, any final judgment on the merits can be properly said to have been pronounced, and the action in that sense to have been no longer in dependence.

Two consequences, inequitable to the native litigant, and not demanded in the just interests of the foreigner, seem to me to follow from the opposite view, as laid down by Lord Rutherford Clark in the case of *Allan*.¹ First, I have difficulty in seeing how a sufficient distinction can be drawn—Lord Rutherford Clark makes none—between a judgment on the merits pronounced in the lowest of a succession of tribunals constituting a judicial

¹ 21 R. 866.

² 24 D. 331, at p. 344.

system of lower and higher Courts, and a judgment pronounced in one of June 20, 1912. the higher Courts; and thus it would seem to follow that, after judgment on the merits has once been pronounced by a Sheriff-substitute in the action of convention, an action of reconvention, competent so far as the subject-matter is concerned, cannot be brought for want of jurisdiction either in the Sheriff Court or the Court of Session. The second consequence would seem to be that an action of reconvention would not be competent even if, before it was brought, the judgment on the merits in the action of convention had been appealed; and, *a fortiori*, it would not be competent if brought before an appeal was taken in the action of convention, even if, after it was brought, a timeous appeal was taken in that action.

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Whatley,
Limited.

Lord Guthrie.

I see nothing inconsistent with the Lord Justice-Clerk's opinion in the case of *Thompson v. Whitehead*¹ in holding that, by the law of Scotland, a proper action of reconvention can always be raised while the relative action of convention is still in dependence for final judgment on the merits, meaning thereby, so long as the merits have not been disposed of by a judgment no longer appealable. Nor, as at the date when this action was brought, do I see anything to prevent the reasonable application of the Lord Justice-Clerk's rule laid down in *Thompson v. Whitehead's* case,¹ that the two claims must be capable of being tried and terminated contemporaneously or nearly contemporaneously.

On the question of *forum non conveniens*, I think this is a typical case for giving effect to that plea.

THE COURT adhered.

P. GARDINER GILLESPIE & GILLESPIE, S.S.C.—DAVIDSON & SYME, W.S.—Agents.

WILLIAM BENSON ALLAN AND OTHERS (John MacKechnie's Trustees), No. 147.
First Parties.—*J. R. Christie.*

MRS CHRISTINA MACKECHNIE, Second Party.—*J. R. Christie.*

ANDREW MACKECHNIE, Third Party.—*J. R. Christie.*

WILLIAM INGLIS MACADAM, Fourth Party.—*Malcolm.*

June 21, 1912.

MacKechnie's
Trustees v.
Macadam.

Trust—Administration—Investment—Power to continue business—Conversion of business into private limited company.

A testator by his will directed his trustees to realise the business owned and carried on by him, or, alternatively, to "continue" the business if they considered it "desirable to retain the same and conduct it for behoof of" his estate. In the event of realisation the trustees were directed to invest the proceeds in trust investments. The trustees, after carrying on the business for some years, proposed to form it into, and conduct it as, a private limited liability company, with substantially the same capital and under the same control as before.

Held that, in the circumstances, the trustees' proposal did not amount to a realisation of the old business (which would require the proceeds to be invested in trust investments), or to the starting of a new business, but was in substance a continuation of the old business; and, accordingly, that it was within the powers conferred upon them by the will.

¹ 24 D. 331.

June 21, 1912.

MacKechnie's
Trustees v.
Macadam.

2D DIVISION.

JOHN MACKECHNIE, coppersmith and brassfounder, who carried on a business at Port-Glasgow under the firm name of William Hume & Company, of which firm he was the sole partner, died in 1908, leaving a trust-disposition and settlement by which he disposed his whole estate to trustees. The testator, *inter alia*, directed his trustees to apply the income of his estate for the maintenance of his wife and children, with a power to encroach on capital for this purpose, and on his wife's death to pay over the residue to his children and their issue, whom failing, to certain other persons. The will further provided:—“(Fourth) I direct my said trustees to realise as soon after my decease as expedient the manufacturing business presently carried on by me in Port-Glasgow, unless it appears to them, and to my said wife, whose views I request my trustees to obtain and consider on this subject, that it is desirable to retain the same and conduct it for behoof of my estate, in which latter event, I direct my said trustees, with the concurrence of my said wife, to continue the said business, and to pay over to my said wife, so long as she remains unmarried, the whole or such part of the net income thereof as they may deem necessary for the maintenance in comfort of my said wife and of my child or children then surviving, due regard being had to the opinion of my said wife as to the amount necessary for her said maintenance, with power to my said trustees to appoint a manager, who may be one of themselves or any other fit person, and to assume such manager as a partner in said business, and to allow such manager or partner to conduct said business subject to their supervision, and to pay him an adequate remuneration for his services: (Fifth) In the event of my said business being sold, I direct my said trustees to invest the proceeds thereof, along with any other uninvested estate belonging to me, in such investments as are authorised by law. . . .”

The testator was survived by his wife and one child. For some years after his death his trustees continued to carry on the business under the powers contained in the will. Questions having arisen with regard to the continuation of the business, a special case was presented for their determination. The *first parties* were the trustees, the *second* and *third parties*, the testator's widow and child respectively, and the *fourth party*, one of the conditional residuary legatees.

The case stated:—

“6. The trustees have now come to the conclusion that it would not be expedient to continue to carry on the business as a private company, notwithstanding the fact that powers to do so are given in the settlement, as they consider it would be unwise in the interests of the trust-estate to continue trading, with the risk that if a misfortune befell the business the free estate of the testator might be required to assist in paying the debts incurred in carrying on the business. They are of opinion, and the second and third parties agree with them, that if the business of William Hume & Company were formed into a limited liability company as after mentioned, with the capital belonging to the deceased still retained therein, it could be successfully carried on without endangering the other estate left by the deceased. The trustees therefore would propose to form the said business into a private limited liability company on the following lines, viz.:—The company to be formed would be a private one within the meaning of section 121 of the Companies (Consolidation) Act, 1908, and would be incorporated under the name of ‘William Hume & Company, Limited,’ the liability of each member being limited to

the amount unpaid on the shares held by him. The nominal capital of the company would be fixed at £2500 or thereby in shares of £1 each. Of this amount there would be issued to the trustees or others, their nominees, in trust for the late John MacKechnie's trustees, say 2300 shares as fully paid as against the value of the business transferred to the Company. This represents the sum of £2300, which is the estimated amount presently at the credit of the trustees of Mr MacKechnie in the books of the firm after providing for all liabilities. This sum is made up of (1) the value of plant and machinery, estimated at £500 or thereby; (2) value of stock in trade, estimated at £1100 or thereby; and (3) debts due by sundry trade debtors, estimated at £700 or thereby. As, in the course of management of the business, accounts are, as a rule, paid monthly, and liabilities settled similarly, it has not been found necessary to provide further cash for the working of the business; and it would probably be unnecessary to issue any further capital than that issued as against the assets acquired. The trustees, however, regard it as in the interest of the business that the truster's widow, the second party hereto, should be allowed to become a shareholder, and she is willing to join the Company if it shall be found to be within the competence of the trustees to form it for carrying on the business. She would take 100 shares either by purchase for cash, or by acquiring 100 of the shares to be issued to the trustees as fully paid. It is proposed that the number of shareholders should by the memorandum of association be limited to five, and that, with the exception of the second party, and one other person acting for the time being as manager as after mentioned, no person should be capable of holding more than ten shares in the concern otherwise than in trust for the first parties. Provision would be made whereby the directors of the company must be trustees for the time being under the said trust-disposition and settlement of Mr MacKechnie; and it is proposed to appoint the trustee who has been managing the business hitherto, or other competent person to be nominated from time to time by the trustees, to be manager of the company, subject to the supervision and control of the directors, at such remuneration as shall be fixed by the directors. The regulations of Table A of the Act would be made applicable so far as consistent with the foregoing proposals; and the objects of the company would be strictly limited to the carrying on of the business hitherto carried on under the powers of the trust-disposition and settlement.

"The business has since the death of the testator been conducted on strict lines, and the books and accounts have been annually submitted for audit, so that it could be carried on as a private company under the Act with little, if any, change in the present arrangements."

The first, second, and third parties contended that it would be for the advantage of the estate to form the business into a private limited company, and that such a course was within the powers of the trustees.

The fourth party contended that it was not expedient to allow the business to be formed into a company, and that the trustees had no power to do so or to retain the testator's funds therein.

The following question of law was stated for the opinion and judgment of the Court:—"Under the terms of the trust-disposition and settlement of the deceased John MacKechnie, have the trustees power to form the business into a limited liability company in the manner proposed, and to retain therein the funds of the deceased presently embarked in the business?"

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The case was heard before the Second Division on 21st June 1912. Argued for the first, second, and third parties;—The trustees had power under the will to form the business into a private limited liability company under the provisions of the Companies Act, 1908.¹ So long as it remained substantially the same firm and business, the trustees had power to carry it on.² In each case it was a question of circumstances whether the business remained the same. In the present instance the changes proposed by the trustees did not affect the identity of the business.

Argued for the fourth party;—The trustees had not the power contended for. The leading direction in the will was to “realise” the business, and the discretionary power of the trustees to continue it must be construed strictly. To incorporate the business into a limited liability company would be to alter, not to retain, its personality.³ The trustees could not retain the testator's funds in such a company, since incorporation involved the realisation and sale of the business, and in such an event the trustees were expressly directed to invest the proceeds in trust investments only.

LORD JUSTICE-CLERK.—I think that the question in this special case should be answered in the affirmative.

If the widow here was objecting, that might raise a totally different state of circumstances; but she is not objecting, and what is proposed to be done is simply to carry on the same business in the form of a limited company. Now, I cannot see how that can possibly be to the disadvantage of the estate; it might be greatly to the advantage of the estate; and, as it is not really a new business in any sense, and what is to be done is what was done before, and the difference is only in the form in which the business is to be carried on, I do not see any objection to the course proposed by the trustees.

LORD DUNDAS.—I agree. This is, I take it, a friendly suit, brought in order to obtain the sanction of the Court to what is more or less a family arrangement. The argument for the fourth party was very clearly and temperately stated by Mr Malcolm, who said, as I understood, in the first place, that the proposal to form this company, was not to “retain,” “conduct,” or “continue” the business within the meaning of the truster's settlement. I think that is much too narrow a reading of the language, and that in substance and in common sense this is just a continuation of the business. It was then suggested that what was proposed was a sale, but I think the same remark applies to that. In substance and in truth this is not, I think, a sale, but a continuation of the business. When one comes to look at the kind of private company which it is proposed to form, one sees that the control and management of it are absolutely secured to the trustees, and, so far as I can observe, no increased risk or liability to the general

¹ Companies (Consolidation) Act, 1908 (8 Edw. VII. cap. 69), secs. 2, 121, 137, (1) (a) (i).

² *Alexander v. Lowson's Trustees*, (1890) 17 R. 571; *Lawrie v. Lawrie's Trustees*, (1892) 19 R. 675.

³ *Smith v. Patrick*, (1901) 3 F. (H. L.) 14; *Thomson's Trustees v. Thomson*, (1889) 16 R. 517.

estate will ensue, but the contrary. I see no reason, therefore, why we should not answer the question as your Lordship proposes.

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LORD SALVESEN.—I am of the same opinion. The testator, in a certain event which has happened, directed his trustees, with the concurrence of his widow, to continue his business. They did so for a number of years, with results that showed that the business is one which is capable of being carried on at a profit, and indeed that a very large loss would, in all probability, be involved to the estate if the business had to be realised. They now propose, instead of carrying it on as a private partnership to convert it into a private company, and to make such alterations on the constitution as the Companies Act of 1908 renders necessary. I am far from saying that we could authorise trustees to carry on a business as a private company under the Companies Act, 1908, generally, but one has to consider what are the terms of the memorandum of the company which the trustees propose to form. These terms are set forth in the special case—as I think they were bound to be before we could determine the question raised by the case—and I find that in substance there is no change upon the old private partnership except such minute changes as compliance with the Companies Act, 1908, requires, and they are in no degree adverse to the interests of the fourth party as residuary legatee. The same capital is being employed; the same persons are going to control the administration of the business; and in every respect, so far as I can see, the new company will be identical with the old, with this important difference, that the rest of the trust funds will no longer be endangered should disaster ultimately overtake the business. Now, these being the facts, I think the trustees are substantially within the direction of the testator, and that this proposed new company is a continuation merely of the business, and is not the establishment of a new business, which is impliedly prohibited. Accordingly, I am of opinion with your Lordship that we should answer the question in the affirmative.

LORD GUTHRIE.—I agree. In the proposal which we are asked to approve there seem to be only two differences of any moment between the business as now proposed to be carried on and the business presently in existence. The one is that certain persons will now be interested in the management and in the profits who were not interested before, but the testator contemplated that his trustees might assume an additional person as partner, namely, the manager if they appointed one. The other difference is a substantial one, namely, that under the new proposal the rest of the estate will not now be in risk. That does not seem to me a difference that can possibly affect the question now before us, because it is in the interest of everybody, including the fourth party, and it will be to the advantage of the estate left by the deceased.

THE COURT answered the question of law in the affirmative.

JAMES G. BRYSON, Solicitor—CARMENT, WEDDERBURN, & WATSON, W.S.—Agents.

No. 148. THE GRAND LODGE OF ANCIENT, FREE, AND ACCEPTED MASONS OF SCOTLAND, Petitioners (Appellants).—*Clyde, K.C.—Macmillan, K.C.*
 June 21, 1912. —*Keith.*

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THE COMMISSIONERS OF INLAND REVENUE, Respondents.—
Sol.-Gen. Anderson—J. A. T. Robertson.

Revenue—Corporation duty—Exemptions—Funds applied to charitable purposes—Customs and Inland Revenue Act, 1885 (48 and 49 Vict. cap. 51), sec. 11.

The Customs and Inland Revenue Act, 1885, sec. 11, imposes a duty of five per cent upon corporate property, but exempts therefrom "property which, or the income or profits whereof, shall be legally appropriated and applied . . . for any charitable purpose."

The Grand Lodge of Freemasons in Scotland held and administered by means of committees three benevolent and annuity funds, which were kept separate from the general funds of the body and were appropriated entirely to benevolent purposes. These funds were derived from grants given by Grand Lodge, from contributions by members of Grand Lodge, from a proportion of the fees for intrants paid by daughter lodges, and from voluntary donations and subscriptions by lodges and by individuals. The funds were administered for the relief of distress among freemasons and their relatives and dependants; the relief given being entirely within the discretion of the committees, and no one having any legal right to participate in the benefits of the funds.

The Inland Revenue having sought to assess these funds for corporation duty on the ground that they were not charitable funds but were of the nature of benefit or provident funds—

Held that the funds were appropriated to charitable purposes within the meaning of sec. 11 of the Act, and were accordingly exempt from corporation duty.

Incorporation of Tailors in Glasgow v. Inland Revenue, (1887) 14 R. 729, distinguished.

Exchequer
 Cause.
 1ST DIVISION.

ON 19th March 1912 a petition and appeal was presented by the Grand Lodge of Ancient, Free, and Accepted Masons of Scotland against an assessment by the Commissioners of Inland Revenue for corporation duty upon the following funds held and administered by the petitioners, viz.:—(1) The Fund of Scottish Masonic Benevolence; (2) the Annuity Fund; (3) the Metropolitan District Benevolent Fund.

The petition set forth, *inter alia*:—

"8. The petitioners and appellants are the Grand Lodge of Ancient, Free, and Accepted Masons of Scotland, hereinafter called 'Grand Lodge.' . . . Grand Lodge is composed of certain office-bearers and others, and of the master and wardens, or, in their absence, the proxy master and proxy wardens, of each daughter lodge holding a charter from Grand Lodge. The members and office-bearers of Grand Lodge must be master masons whose names have been recorded in the books of Grand Lodge, and who are subscribing members of a lodge holding under the Scottish constitution. By rule 74 of the said constitution and laws every member of Grand Lodge is required, in order to raise a fund for supporting the same, to pay 5s. annually besides the contribution specified in the schedule of fees contained in rule 226. By rule 77 all lodges holding of Grand Lodge are required to pay annually the fees exigible for representation in

Grand Lodge. Rule 115 fixes the fee for commissions to provincial or district grand masters at ten guineas, renewable every five years under rule 116 for a further fee of two guineas. By rule 138 the lodges in the metropolitan district are required to pay certain fees annually to grand committee of Grand Lodge to meet the necessary expenses of the visitation committee and for purposes of benevolence on behalf of applicants belonging to the said lodges, the funds so collected being administered under the direction of grand committee. Each daughter lodge must annually obtain a certificate from Grand Lodge under rules 151 and 152, for which the sum of 5s. is payable. By rule 164 the master of each lodge is required annually to make up a list of all intrants and affiliates in his lodge during the preceding year, and to transmit the same along with the fees to Grand Lodge. Rule 188 requires each brother at his initiation or affiliation to pay 11s. 6d. through his lodge towards the funds of Grand Lodge for recording his name and for a Grand Lodge diploma when he shall have become a master mason, and by the same rule certain other fees are fixed. By rule 189 no brother whose name has not been registered in the books of Grand Lodge shall be eligible to be a member thereof or of any provincial or district Grand Lodge, or to be a member or office-bearer in any daughter lodge; neither shall he have any claim on the fund of Scottish Masonic Benevolence or on the Annuity Fund. Rule 226 contains a schedule of fees payable to the General Fund.

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"9. By rule 89 of the said constitution and laws the constitution of grand committee is defined, and by rule 92 grand committee is required annually to appoint various standing committees, including a finance committee. The whole of the financial income of Grand Lodge from whatever source, Benevolent and Annuity Funds included, is placed under the direct supervision of the finance committee. . . .

"10. The petitioners and appellants hold and administer five separate funds, known respectively as the General Fund, the Metropolitan District General Fund, the Fund of Scottish Masonic Benevolence, which includes a small fund known as the Dalhousie Annuity Fund, the Annuity Fund, and the Metropolitan District Benevolent Fund. No question arises with regard to the General Fund or the Metropolitan District General Fund.

"11. The fund of Scottish Masonic Benevolence was instituted in August 1846, and is regulated by rules 199 to 213 inclusive of the said constitution and laws. Rule 199 provides that 'this fund shall be devoted to the purposes of benevolence and shall not be appropriated to any other use.' It is raised by means of annual contributions from the office-bearers and members of Grand Lodge, the amount of these annual contributions being fixed by rule 227; 1s. from the registration fee paid for each intrant, and such voluntary donations as may from time to time be made. It is directed to be kept separate from the ordinary income of Grand Lodge, and no part of the ordinary income may be applied to benevolent purposes unless by special vote on notice given. Rule 200 earnestly recommends Provincial and District Grand Lodges and daughter lodges to contribute annually to this fund as a central fund for carrying out the benevolent objects and principles of freemasonry, either from their lodge funds or by subscription among the brethren. The application and distribution of the fund is by rule 201 entrusted to a committee of Grand Lodge, known as the Benevolent Fund Committee. All

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applications for benevolence are by rule 203 required to be made through and considered by the lodge from which the petitioner derives right. Under rule 204 no petition shall be considered from any brother whose name is not registered in Grand Lodge books nor from the parent, widow, or child of such brother, neither shall any brother have a claim to be relieved unless his name has been at least two years so registered, with certain exceptions. All applications are decided upon by the said Benevolent Fund Committee and must be accompanied by a certificate by grand secretary of the registration of the applicant or the applicant's son, husband, or father. . . . In cases of extraordinary distress, relief may be afforded by the committee, under rule 207, to brethren, or their widows or children, under the constitution of other Grand Lodges. In urgent cases, grand secretary, by rule 208, may authorise grand treasurer to give such poor brethren as may appear proper objects of relief any sum not exceeding 10s. Rule 211 directs the monies received to be from time to time paid into bank to an account kept in name of the fund. By rule 212, 10 per cent of the monies received is required to be annually set apart to form a sinking fund, and the yearly interest is made applicable to benevolence in addition to the annual revenue. The sums to be distributed in each year by the committee are, under rule 213, limited to the receipts of that year including interest on capital, but under deduction of the payment to sinking fund. The amount unappropriated on each year's contributions, including the contribution of 10 per cent to sinking fund, is required to be regularly capitalised. The Dalhousie Annuity Fund is a small fund consisting of the investments, representing a balance of £150, with certain accumulations of interest, of a fund subscribed in 1872 by members of Grand Lodge and other craftsmen, for the purpose of presenting a bust of himself to the then Earl of Dalhousie, Past Grand Master, and which remained over after that object had been accomplished. The fund is held by the trustees of the Fund of Scottish Masonic Benevolence, and the annual proceeds are payable to the aged wife or aged widow of a Scottish freemason by way of annuity during the pleasure of grand committee, in accordance with a scheme approved by grand committee on 27th December 1894. . . .

"12. The Annuity Fund was established by Grand Lodge in November 1888, and is regulated by rules 214 to 225 inclusive of the said constitution and laws. By rule 215 this fund is placed under the management of an annuity board, consisting of the members of grand committee, and is supervised by the finance committee. By rule 218 the accounts of the income and expenditure of the fund are directed to be kept separate from the other funds of Grand Lodge. The fund, as provided by rule 219, consists of donations from lodges and individual brethren, of one-half of the annual free income of Grand Lodge, of any other sums that Grand Lodge may see proper to grant, and of the proceeds of annual and special collections made in the daughter lodges. The donations and one-half of all sums received from Grand Lodge are reserved as capital and invested in the names of the trustees for the Fund of Masonic Benevolence, or such other trustees as Grand Lodge may direct. The contributions from daughter lodges are purely voluntary, and many of them make no contributions to the Annuity Fund. Further, a sum of £15,000, being the proceeds of a bazaar held in 1889 on behalf of the Annuity Fund, was in that year added to the Fund, and is now represented by

investments held by the Annuity Fund trustees. In addition to June 21, 1912. these sources of revenue Grand Lodge in 1908 transferred from their general funds to the Annuity Fund as a donation under rule 219 a ^{Grand Lodge of Freemasons} sum of £20,000, now represented by investments held by the Annuity ^{v. Inland Revenue.} Fund trustees. By rule 220 the half not directed to be capitalised of the sums which have been received from Grand Lodge and the income which has arisen from capital during the preceding year under deduction of management expenses, are directed, so far as may be required, to be distributed in annuities. Any surplus is carried forward for disposal in subsequent years. By rule 221 the annuity board is empowered to grant twenty annuities of £15, ten of £20, and five of £25 each in cases which are considered deserving of special treatment. All other annuities are to be of £10 each. The board is empowered to appoint annuities to be paid by instalments, and, if deemed expedient, to fix in what way they are to be applied for the benefit of the annuitants. Under rule 222 every master mason registered in the books of Grand Lodge, and every parent, widow, or child of a master mason so registered, is qualified to be placed on the roll of annuitants, but only one annuity shall be on the roll at the same time in favour of parties deriving right from the same brother. . . . Rule 223 provides that any annuity may be withdrawn at the pleasure of the board. Annuities are granted to applicants qualified as before mentioned, whether the lodge through which they claim contributes to this fund or not.

“ 13. The Metropolitan District Benevolent Fund is a fund devoted to the purposes of masonic benevolence connected with the metropolitan district, and is administered by a committee under a scheme which was adopted by Grand Lodge at a quarterly communication held on 1st August 1907. . . . The fund is divided into two parts—capital and revenue. The capital consists of (1) a fund amounting to £1102, 9s. 1d. or thereby, then set aside and invested; (2) one-half of the annual levy of 5s. per intrans payable by each lodge in the district; (3) such other funds as may from time to time be added to capital as thereafter provided; and (4) any legacy or donation of £20 or upwards unless otherwise specially stipulated by the donors. The revenue consists of (1) the interest or dividends on invested capital; (2) one-half of the said annual levy of 5s. per intrans; and (3) any legacy or donation under £20, unless otherwise specially stipulated by the donors. The accounts of the fund are directed to be kept separate from those of the other funds administered by Grand Lodge. Any unexpended balance on revenue account at the end of the financial year may, in the discretion of the committee, either be added in whole or part to capital or carried forward for distribution in the succeeding year. The capital of the fund is directed to be invested in name of the trustees of the fund of Scottish Masonic Benevolence, but as an ear-marked fund. It is further provided by the said scheme that the revenue of the fund shall be devoted solely to the relief of worthy poor and distressed brethren who are members of lodges in the district, and of the widows, children, or parents of such brethren, or of such others as may be deemed by the committee to have been dependent on them. The fund is distributed by a committee consisting of the members of the visitation committee of the metropolitan district and the masters of the lodges in that district. Provision is made for the committee obtaining all necessary information regarding the circumstances of

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each case in respect of which an application for relief is made, and the committee is required to examine all applications for relief, and is empowered in its discretion to grant according to the circumstances of each case such sums as may appear necessary.

" 14. No member of any lodge has any legal right to participate in the benefits of any of the said funds described in the three immediately preceding articles hereof, nor does any member on joining a daughter lodge make any direct payment to Grand Lodge in respect of these funds. The distribution of grants and annuities therefrom is entirely discretionary on the part of the administrative bodies, and is in no way regulated by or commensurate with the contributions which may have been received from the daughter lodge through which the applicant claims relief, the sole considerations in granting relief being the necessities and merits of the particular case. The said funds are administered entirely on a charitable and benevolent system.

" 15. The petitioners have, since the said Customs and Inland Revenue Act, 1885, came into operation, annually furnished the Commissioners of Inland Revenue with an abstract of their whole accounts showing separately the accounts of their General Fund and the Fund of Scottish Masonic Benevolence, and also of the Annuity Fund, the Metropolitan District General Fund, and the Metropolitan District Benevolent Fund, since the three last-mentioned funds respectively came into existence. No corporation duty was charged by the said Commissioners on the income of any of the said funds except the General Fund until recently, when the Commissioners for the first time intimated to the petitioners a claim for corporation duty on the income of the whole of the said funds for the years 1908-9, 1909-10, and 1910-11. The petitioners objected to this claim so far as regards the funds other than the General Fund and Metropolitan District General Fund, and maintained that the income of the said Benevolent and Annuity Funds was exempt from assessment to duty under section 11 (3) of the Act of 1885, inasmuch as these funds, or the income or profits thereof, were legally appropriated and applied for charitable purposes, in conformity with the respective schemes above set forth, which are strictly observed in the administration of the said funds."

Answers were lodged for the Commissioners of Inland Revenue in which they denied that the funds were appropriated for charitable purposes and therefore exempt.

The case was heard before the First Division on 30th May 1912.

Argued for the petitioners;—Legal appropriation to a charitable purpose meant appropriation by the constitution of the body whose funds were in question. By the constitution of Grand Lodge relief might be given from the funds in question to some (*e.g.*, dependants of a mason) who had never been contributors to them and who were therefore recipients of charity. There was no direct relationship between Grand Lodge and individual members of daughter lodges. The only way in which the members assisted the funds in question was indirectly by payment of entrance fees or by voluntary contribution to their lodges. It was not disputed that the funds had always been legally appropriated and applied to specific benevolent purposes, and it was significant that no attempt had ever been made to impose corporation duty, though the Act under which it was sought to do so had been in force since 1885. No

applications for relief from the funds could be considered except those of persons who were proper objects of charity, and all applications were disposed of, not as of right, but entirely at the discretion of the appropriate committees. Benefits could not be described as purchased, because there was no commensuration between contributions and benefits, and a large contributor might quite well be an unsuccessful applicant. The fact that there were no legal rights conferred and obligations imposed distinguished the present case from that of the *Incorporation of Tailors in Glasgow v. Inland Revenue*,¹ in which the fund in question was derived chiefly from obligatory payments, as in the case of a provident society. That funds were mainly devoted to charitable purposes sufficed to bring them within the statutory exemption.² Although the application of the benefits of the funds was limited to the class of freemasons and their dependants, that fact did not destroy their charitable character. In considering whether funds were entitled to exemption a generous construction ought to be placed upon the statute.³

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Argued for the respondents;—Each mason was obliged to contribute to his own lodge, and his lodge in turn contributed to the funds in question. In return for that each mason acquired a right to apply for assistance from these funds; and an obligation was imposed upon Grand Lodge to give consideration to his application. The case was akin to the case of the *Incorporation of Tailors in Glasgow*,⁴ and was governed by that decision. As an applicant for benefits had to be a mason, contributions to the funds in question were, in fact, compulsory, though the payments were made indirectly; and, although the funds were administered by committees with discretionary powers, they were in fact provident funds administered for the benefit of contributors and their dependants. These considerations excluded the funds from the exemption claimed,⁵ and it was immaterial that the funds received some augmentation from voluntary contributions.

At advising on 21st June 1912,—

LORD PRESIDENT.—The question raised here is as to the liability of a certain portion of the funds of the Grand Lodge of Masons in Scotland for corporation duty, which is levied in terms of the Customs and Inland Revenue Act of 1885. That Act provides for a duty being paid upon the profits accruing to corporate bodies, the view of the Act being that inasmuch as corporations never die, there ought to be some contribution taken out of the corporate property which should more or less correspond to what is taken out of private property on the occasions of the deaths of successive holders. But there are certain exemptions made, one of which is, “property which, or the income or profits whereof, shall be legally appropriated and applied

¹ (1887) 14 R. 729, Lord President Inglis, at p. 732.

² *Income-Tax Commissioners v. Pemsel*, [1891] A. C. 531, *disapproving* *Baird's Trustees v. Lord Advocate*, (1888) 15 R. 682.

³ *Inland Revenue v. Forrest*, (1890) 15 App. Cas. 334; *Royal College of Surgeons of England*, [1899] 1 Q. B. 871; *Society of Writers to the Signet v. Inland Revenue*, (1886) 14 R. 34.

⁴ 14 R. 729.

⁵ *Institution of Linen and Woollen Drapers*, (1887) 2 Tax Cases, 651, 58 L. T. R. 949, 4 T. L. R. 345.

June 21, 1912. exemption contained in section 11, subsection 3 :—[His Lordship then
 Grand Lodge of Freemasons v. Inland Revenue.
 Lord Mac-kenzie. quoted the section; and after narrating the constitution and objects of the funds in question, as set forth in the passages from the petition quoted *supra*, proceeded]—No corporation duty was charged on the income of any of the funds until recently, when a claim was intimated for the years 1908-9, 1909-10, and 1910-11. The Crown do not dispute that all three funds are legally appropriated to a specific purpose, nor is it denied that they are applied to the specific purposes for which they were raised. It was, however, disputed that the purpose was a charitable one, the argument being that, inasmuch as the distressed persons who are relieved are themselves contributors, they merely get back their own in the shape of benefits as the members of a benefit society do. If the present case was the same as that of a benefit society, then it would fall under the decision in the *Incorporation of Tailors in Glasgow v. Inland Revenue*,¹ in which it was held that funds belonging to an incorporate body, which were derived from the entry-moneys of members and were solely applicable as pensions to decayed members and widows of members at the absolute discretion of certain office-bearers, were not to be regarded as funds appropriated “to a charitable purpose” in the sense of the statute. The argument for the Crown was that that case and the present contained the following elements in common :—(1) that the contributions are compulsory; (2) that the funds are appropriated to benevolent purposes; (3) that the objects of benevolence were those who had contributed or their dependants; (4) that the amount of the award, or whether there would be any award, depended upon the discretion of those administering the funds; and (5) that no individual had any absolute right to a share of the funds. The fact that the payments into the three funds in question here were not direct did not, according to the argument of the Solicitor-General, make any difference.

It appears to me that the question whether a particular fund falls within the exemption of the statute or not is largely a question of degree. If the objects of the corporation are purely mutual benefit, if the individual corporators make their contributions as an investment, the case would be governed by the principles laid down in the *Incorporation of Tailors in Glasgow*.¹ From the bye-laws which govern the Tailors Incorporation it appears that all that was left was for the mutual benefit of the individual members. So too in the English case *re The Linen and Woollen Drapers, &c., Institution*,² which was founded upon by the Crown, it appears from the opinion of Pollock, B., that the institution was a mutual benefit society. As the rules are not printed in the report it does not appear upon what grounds this opinion was reached, but the opinion of Lord President Inglis in the *Incorporation of Tailors in Glasgow*,¹ is referred to and adopted by Hawkins, J., in his judgment.

In the present case it does not appear to me that the contributions by individual freemasons are of such a character or amount as to necessitate the Court arriving at the conclusion that the funds in question are not legally appropriated and applied for a charitable purpose. The individual

¹ 14 R. 729.

² 58 L. T. R. 949.

pays not to any of these funds but to a daughter lodge and makes these payments in order to become a freemason. From the rules a consequence results that a small proportion of his contributions goes to these funds. That, however, is not the main object he has in view when he makes his contribution. He makes his contribution in order to share in the benefit of freemasonry, and this is not confined to receiving payments from these funds. Accordingly I think that there is in the present case sufficient to distinguish it from the *Incorporation of Tailors in Glasgow*¹ and the *Linen Drapers Institution*.² It is not, in my opinion, necessary to make any distinction as regards the funds in question. I think all three fall within the exemption of the statute, and, therefore, that the prayer of the petition should be granted.

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LORD KINNEAR concurred, and the Lord President intimated that LORD JOHNSTON, who was absent at advising, also concurred.

THE COURT sustained the appeal and recalled the assessments complained of.

J. L. OFFICER, W.S.—SIR PHILIP J. HAMILTON GRIERSON, Solicitor of Inland Revenue—Agents.

FREDERICK WEIR, Appellant.—*Morison, K.C.—Aitchison.* No. 149.
THE NORTH BRITISH RAILWAY COMPANY, Respondents.—*Cooper, K.C.*
—*E. O. Inglis.* June 21, 1912.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), Second Schedule (17) (b)—Act of Sederunt, 26th June 1907, sec. 17 (g)—Stated case—Procedure—Remit to arbitrator to reconsider his award. Weir v. North British Railway Co.

In an appeal by way of stated case in an arbitration under the Workmen's Compensation Act, the Court, without answering the questions put, *remitted* the case to the arbitrator to reconsider his award in light of the opinions expressed by the House of Lords in a judgment pronounced after the date of his decision.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), First Schedule (1) (b) and (16)—Incapacity—Possibility of supervening incapacity—Review—Nominal award—Suspensory order.

Decision in *Rosie v. Mackay*, 1910 S. C. 714, to the effect that it is incompetent to keep open a claim to compensation by means of a nominal award or similar device, *doubted* in view of the opinions delivered in the House of Lords in the subsequent English case of *Taylor v. London and North-Western Railway*, [1912] A. C. 242.

In an application by the North British Railway Company under the Workmen's Compensation Act, 1906, for review of a weekly payment made by them to Frederick Weir, labourer, the Sheriff-substitute (Thomson) at Glasgow, ended the compensation and, at the request of the workman, stated a case for appeal.

2D DIVISION.
Sheriff of
Lanarkshire.

The case set forth that the appellant lost his right eye through an accident which occurred on 22nd June 1911, and which arose out of and in the course of his employment with the respondents. The respondents admitted liability, and by an agreement, of which a memorandum was recorded, undertook to pay him compensation

¹ 14 R. 729.

² 58 L. T. R. 949.

June 21, 1912. during incapacity at the rate of 11s. 9d. weekly. The application for review was presented on 20th November 1911, and proof was led on 10th January 1912. At the diet of proof the appellant lodged a minute in the following terms:—"The claimant, without prejudice to his pleas that his incapacity is not in any way diminished, respectfully craves the Court, in the event of the Court finding in fact that he is able at present to perform his ordinary work, to find further in fact and law, in respect said accident has involved patent and serious physical disability to the claimant, that he is entitled to a nominal award of compensation so as to preserve his right to apply to the Court for subsequent orders in respect of the injuries sustained by said accident, or otherwise to sist further procedure or continue the present application for review, and grant leave to either party to renew the application in the event of any change of circumstances occurring."

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The case further stated that the following facts were admitted or proved:—

"(2) That by 20th November 1911, the date of the present application, he had recovered from the effects of the accident, in so far as recovery was possible; that there was then no danger of the remaining eye becoming affected through the accident, and that the sight of the remaining eye was normal.

"(3) That at the time he met with the accident he was a 'tapper'; that he had been a tapper for three and a-half years, and before that had been an ordinary labourer.

"(4) That his duties as a tapper were, as the parties by joint minute have admitted, 'to bore out copper stays in fire-boxes'; these boxes have holes which are fitted up with copper stays, 'and when these require renewal the tapper cuts the head off the stays on the outside with a hammer and chisel, and he then bores out the stay with a machine and inserts the new stay.'

"(5) That his eyesight in the remaining eye is quite sufficient for the work of a tapper, and that he is now, and was at the date of this application, fit to resume work.

"(6) That the respondents have in their employment, doing the same or similar work, several men who many years ago lost the sight of one eye by accident, and who are able, notwithstanding the loss of the eye, to earn, and do earn, full wages."

The arbitrator found in these circumstances that the compensation fell to be ended, and he ended the same accordingly as at 20th November 1911, and refused the crave of the minute for the appellant lodged on 10th January 1912.

The questions of law for the opinion of the Court were:—" (1) Whether on the facts found proved, as stated in the interlocutor, the arbitrator was entitled to terminate the compensation? (2) Whether in view of the whole facts of the case, the arbitrator was bound to give effect to the appellant's minute, either by making a nominal award or by sisting procedure?"

The case was heard before the Second Division on 20th and 21st June 1912.

Argued for the appellant;—When the arbitrator's award was pronounced the law in Scotland, as laid down in the case of *Rosie v. Mackay*,¹ was to the effect that it was incompetent to keep a claim

¹ 1910 S. C. 714.

for compensation open by the device of a nominal award, or by a June 21, 1912. suspensory order. Since then the competency of such a device had been affirmed by the House of Lords in *Taylor v. London and North-Western Railway*.¹ The circumstances in the present case were just those in which a suspensory order should be pronounced. At any-rate the arbitrator, if he had not considered himself bound by the case of *Rosie*,² might have pronounced such an order; and the case should therefore be remitted to him to reconsider his award in the light of the opinions expressed in the case of *Taylor*.¹ The case of *Hargreave v. Haughhead Coal Company, Limited*,³ relied on by the respondents, was distinguishable. In that case there was an express finding that the wage-earning capacity had not diminished, and that the workman had returned to work. A workman who had suffered a permanent disfigurement might recover sufficiently to be able to work as before, and yet his wage-earning capacity, *i.e.*, his power to get work, might be diminished, if, for example, he had been refused work on account of his disfigurement.⁴ The arbitrator had apparently relied on *Boag v. Lochwood Collieries, Limited*,⁵ which had been expressly disapproved.⁶ He was bound to consider "the entire results causally connected with" the injury.⁷

Argued for the respondents;—The appeal should be dismissed on the ground that the arbitrator had come to a right decision on the law as it existed at the date of his award. In any event, the decision in the case of *Rosie*² was not overruled by the dicta in the case of *Taylor*,⁸ which were *obiter*, and not necessary for the decision of the case. The decision in *Rosie*² was never referred to in the case of *Taylor*.⁸ Assuming that *Rosie*² had been overruled, still no case had been made out for a remit, because on the findings the arbitrator had come to a right conclusion, and, if the case were remitted to him, he could do nothing else than reaffirm his award. To justify a suspensory order there must be proof, as in the case of *Rosie*,² of a probable recurrence of incapacity due to the accident. In the present case the findings of fact expressly excluded such a probability. Incapacity had ceased, and therefore the compensation fell to be ended.⁹

LORD JUSTICE-CLERK.—This case stands in a very peculiar position indeed. I do not think I have ever seen a case in such a peculiar position. The Sheriff-substitute when he came to decide this case was in this position, that he presumably had before him the decisions which had been pronounced in the Court of Session, and in particular the decision in the case of *Rosie v. Mackay*²; and having considered the case with these decisions before him, he decided it in the way he did.

¹ [1912] A. C. 242, *per* Lord Chancellor Loreburn, at p. 245, Lord Atkinson, at p. 246, and Lord Shaw, at p. 253.

² 1910 S. C. 714.

³ *Supra* (H. L.), 70, [1912] A. C. 319.

⁴ *Ball v. William Hunt & Sons, Limited*, [1912] A. C. 496 and *supra* (H. L.) footnote, p. 77; *Duris v. Wilsons and Clyde Coal Co., Limited*, *supra* (H. L.) 74, [1912] A. C. 513.

⁵ 1910 S. C. 51.

⁶ *Ball v. William Hunt & Sons, Limited*, [1912] A. C. 496, *supra* (H. L.) footnote, p. 77.

⁷ *Ibid*, *per* Lord Shaw, [1912] A. C., at p. 509.

⁸ [1912] A. C. 242.

⁹ *Hargreave v. Haughhead Coal Co., Limited*, *supra* (H. L.) 70, [1912] A. C. 319.

June 21, 1912. Now we are in this position, that since he decided the case there have been expressions of opinion in the Supreme Court of Review, in the House of Lords, which tend very much to show that we in this Court, in deciding the case of *Rosie*,¹ were under a mistake, that is to say, that the view taken by the majority was wrong, and therefore that the law is different from what in that case it was declared to be. Against that it is argued that the decision of the House of Lords in the case of *Taylor v. London and North-Western Railway Company*² was a decision on a different point from that involved in the case of *Rosie*,¹ that all the observations which affect the case of *Rosie*¹ were only *obiter dicta* of the learned Lords who decided that case, and that indeed the case of *Rosie*¹ was not even cited to them. That may be quite true, and I am inclined to accept it as true; but, although, looking to the decision they gave in that case, they did not need to express those opinions, still we must assume that in the Supreme Court of Review definite opinions upon particular matters are not expressed without consideration, and we must assume, and are bound to assume, that what they said was properly corrective of the decision which had been erroneously arrived at in this Court.

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Clerk.

In these circumstances the position is a very peculiar one. It seems to me that the right course for us to adopt is, without answering at present these questions which are before us, to let the case go back to the Sheriff-substitute in order that he may consider whether what has happened since his judgment, in the way of review of the law, would lead him to any different conclusion from the conclusion at which he arrived. He may see no reason to change, and may again come to the same conclusion, or he may see ground to modify his opinion and to adopt the course now open to him in view of these *obiter dicta* in the House of Lords, and so, instead of ending the compensation finally as he has done by his present decision, to pronounce an order keeping alive the liability of the employers. I do not say that he ought to do that, I express no opinion upon that whatever; it is a matter entirely for his individual judgment.

I think that is all we ought to do. I do not think I need say anything more, because I am very anxious not to express any opinion which might lead the Sheriff-substitute to think that we have expressed any view on the merits of the question, whether or not the compensation should be ended finally. Therefore, if your Lordships approve of the course I have proposed, that will be the course taken.

LORD DUNDAS.—I agree. It is, I think, very unfortunate that the decision by seven Judges of this Court in the case of *Rosie v. Mackay*¹ was not brought under the notice of the House of Lords when they heard and decided the case of *Taylor v. The London and North-Western Railway Company*.² In *Rosie's* case¹ the existing decisions, Scots and English, were considered and collated, and it was apparent that there was a grave divergence of judicial opinion upon the question whether or not it was competent for an arbitrator under the Act of 1897, in a case where he considered that capacity had been restored, but that there was a danger, more

¹ 1910 S. C. 714.

² [1912] A. C. 242.

or less great, of incapacity recurring and supervening, to keep matters open, June 21, 1912. either by what is sometimes called the device of the penny or in some other ^{Weir v.} way; or whether he was bound to end the compensation then and there. ^{North British} The point had been touched upon, but not decided, by the House of Lords ^{Railway Co.} in *Nicholson v. Piper*,¹ Lord Halsbury and Lord Robertson in that case Lord Dundas. expressly reserving their opinions upon it. The majority of the seven Judges in *Rosie v. Mackay*² held that the whole matter was one of statute; that the statute did not give any warrant for resorting either to the device of the penny or to any other equivalent course; and that, therefore, the arbitrator was bound in such cases to end the compensation. It was attempted to appeal *Rosie v. Mackay*³ to the House of Lords, but the attempt failed, as it was bound to do; because that case arose under the Act of 1897, which did not allow appeals from Scotland—though it did allow English appeals—in cases of this sort to the House of Lords.

If the important case of *Rosie v. Mackay*² had been brought under the notice of the noble and learned Lords in *Taylor's case*,⁴ I do not doubt that their Lordships, if they were to arrive at a conclusion adverse to the opinion of the majority of the Scottish Judges, would have expressed in reasoned language and with some measure of argument their grounds for differing from and overruling those opinions; and we should have stood in a more definite and satisfactory state of knowledge than we are in at present. *Rosie's case*² has not been formally overruled; but whether or not it is to be treated as impliedly overruled, we have, at all events, in *Taylor's case*⁴ opinions pronounced (*obiter*, it may be) by the noble and learned Lords to the effect that a resort to some means of keeping matters open is competent; and I think, with your Lordship, that we ought to respect and give effect to those opinions, whether they are *obiter* or whether they are not.

Now, we must, I apprehend, assume that the learned arbitrator in this case, when he decided the question, took *Rosie v. Mackay*² to be law, as it certainly then was, and therefore felt that he had no alternative but to end the compensation, whatever view he might have been inclined otherwise to entertain. In that state of matters I agree that the proper course for us is to remit the matter to the learned arbitrator in order that he may have an opportunity of reconsidering the question in the light of the opinions subsequently pronounced by the House of Lords in *Taylor's case*.⁴ It is possible, it may be more than possible, that he will arrive at the same conclusion as he did before; but the point that is important is that he should have an opportunity of exercising the discretion which he must have thought he had not, but which it appears that in law he had.

Other topics were touched on during the debate, but I think the one with which I have dealt is the only one which arises effectually upon the case as stated, and upon which there is any necessity to pronounce an opinion. I agree therefore that, without answering the questions as they are put—and I think they are badly stated—we should remit to the learned arbitrator for the purpose that your Lordship has indicated, and in which I agree.

¹ [1907] A. C. 215.

² 1910 S. C. 714.

³ *Supra* (H. L.) 7.

⁴ [1912] A. C. 242.

June 21, 1912. LORD SALVESSEN and LORD GUTHRIE concurred.

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THE COURT pronounced this interlocutor:—"Find it unnecessary to answer the questions; remit to the arbitrator to consider the facts found by him in light of the opinions expressed by the House of Lords in the case of *Taylor v. London and North-Western Railway Company*, [1912] A. C. 242, and thereafter to pronounce such finding as may to him seem just: Find no expenses due to or by either party."

BALFOUR & MANSON, S.S.C.—JAMES WATSON, S.S.C.—Agents.

No. 150.

MRS MARGARET MARTIN OR LOVE, Pursuer (Appellant).—
Moncrieff, K.C.—J. Smith Clark.

June 25, 1912.

Love v.
Amalgamated
Society of
Lithographic
Printers of
Great Britain
and Ireland.

THE AMALGAMATED SOCIETY OF LITHOGRAPHIC PRINTERS OF GREAT
BRITAIN AND IRELAND AND OTHERS, Defenders (Respondents).—
Constable, K.C.—Keith.

Jus Quæsitum Tertio—Trade union rules—Agreement with member to pay sick benefit to dependants—Revocable agreement—Claim by dependant—Title to sue.

Trade Union—Agreement to provide benefits—Enforcement—Provision of sick benefits to person dependent on member—Trade Union Act, 1871 (34 and 35 Vict. cap. 31), sec. 4 (3) (a).

The Trade Union Act, 1871, by section 4 (3) (a), provides that nothing in the Act shall enable the Court to entertain proceedings for directly enforcing "any agreement for the application of the funds of a trade union to provide benefits to members."

The rules of a trade union, which could be altered at the will of the general council, provided that if a member became insane his wife, family, or parent, if dependent upon him, should be eligible to receive sick benefit for one year.

In an action at the instance of the wife of an insane member against the union for recovery of sick benefit, the defenders maintained (1) that as the rules could be altered, the pursuer had no indefeasible *jus quæsitum tertio*, and so had no title to sue; and (2) that as this was an action to enforce an agreement to provide benefits to members, it could not be entertained by the Court.

Held (1) that as the agreement embodied in the rules, though revocable, had not been revoked when the pursuer's claim arose, she had a good title to sue; and (2) that as the agreement was not one for the provision of benefits to a member, but to the dependant of a member, the jurisdiction of the Court was not excluded; and decree granted.

2D DIVISION.
Sheriff of the
Lothians and
Peebles.

MRS MARGARET MARTIN OR LOVE brought an action in the Sheriff Court at Edinburgh against the Amalgamated Society of Lithographic Printers of Great Britain and Ireland, registered under the Trade Union Acts, 1871 to 1876, and its trustees and secretary. The action concluded for (1) various sums in name of sick benefit, in respect of the illness of her husband, James Love, from 17th August 1909 to 17th August 1910; and (2) superannuation benefit, in respect of his inability to work, from 17th August 1910, to be continued until his death, all in terms of the rules of the defenders' Society.

Rule 30 of the defenders' Society provided :—

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“ RULE 30.—*Insane Members.*

“ 1. If any member through loss of reason be unable to follow his employment the case shall be referred to the E.C. [Executive Committee], who shall deal with it at their discretion. Should the member recover sufficiently to receive a doctor's certificate certifying that he is able to work, he shall be eligible to receive unemployed benefit.”

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“ 2. Should the afflicted member have dependent upon him either wife, family, or parent, they shall be eligible to receive sick benefit for a period of one year, and, should the mental affliction continue, the member may (if eligible as per rule) be placed on superannuation benefit.”

Rule 58 provided that the General Council of the Society, which met every three years, should have power to make new rules and amend existing ones.*

The facts of the case were thus stated in the interlocutor of the Sheriff-substitute (Orr) of 24th July 1911 :—“ Finds it is admitted (1) that the pursuer is the wife of James Love, who became insane on or about 17th August 1909, and has continued insane since then up till the present time; (2) that the said James Love was on 17th August 1909 a member of the Amalgamated Society of Lithographic Printers of Great Britain and Ireland, having its registered general office at Campfield Chambers, 312 Deansgate, Manchester, and its Edinburgh office at 2 Canonmills, Edinburgh, and at said date had

* Rules 20 and 24 were as follows :—

“ RULE 20.—*Sick Benefit.*

“ 1. Any member having been in this Society twelve months and entitled to benefit, when visited by sickness or lameness (not occasioned by drunkenness, disorderly conduct, or any disease improperly contracted) shall give notice in writing, in accordance with the form contained in these rules, to the secretary of the branch to which he belongs, and send, within three days, a doctor's certificate stating the nature of his complaint, such certificate to be renewed at the discretion of his branch.

“ 2. Payment for sick benefit commences from the date of declaring on.

“ *Scale of Benefits.*

“ 3. 10s. per week for 6 weeks; 5s. per week for 12 weeks; 2s. 6d. per week for 12 weeks.

“ 6. Any member having drawn all his sick benefit for one year cannot claim again until the expiration of twelve months, dating from first payment. . . .

“ RULE 24.—*Superannuation.*

“ 1. Any member who has been twenty years successively in the Society, and who, through old age, infirmity, or incurable disease is unable to obtain employment at the trade, and applies for superannuation benefit, shall state his claims to a special meeting of the branch of which he is a member. He shall also present a doctor's certificate, stating that he is permanently disabled from following his employment.

“ 2. Should the meeting be satisfied with the validity of his claim, they shall furnish all evidence to the Executive Committee, who shall have power to grant the sum of six shillings per week until his death, provided the applicant is in all cases entitled to benefit according to rule.

“ 3. The number of members in receipt of superannuation shall be at the rate of 4 per cent of the total membership of the Society.”

June 25, 1912. **Love v. Amalgamated Society of Lithographic Printers of Great Britain and Ireland.** been a member of said Society for over twenty years; (3) that when the said James Love became insane his contributions to said Society had all been duly paid in terms of the rules of said Society: Finds it is admitted by counsel at the bar that at said date the pursuer was dependent upon the said James Love."

It was also admitted in the debate on appeal that the Society was an unlawful association at common law, since its rules, or some of them, were in restraint of trade.

The defenders averred that the claims of the pursuer under rule 30 had been considered and rejected by the Executive Committee of the Society, and this was not denied.

The pursuer pleaded;—(1) The said James Love, being a member of the defenders' Society of over twenty consecutive years' standing, and being mentally afflicted as condescended on, the defenders, in accordance with their rules, are liable to the pursuer in payment of the amounts of sick and superannuation benefit first and second concluded for. (2) The defences are irrelevant.

The defenders pleaded, *inter alia*;—(2) The present action, being an action to enforce a claim to benefits under the rules of a society which is directed to enforce strikes and act otherwise in restraint of trade, and is illegal at common law, is incompetent, and should be dismissed with expenses. (4) No title to sue. (8) The claims of pursuer under rule 30 having been considered and rejected by the Executive Committee of the Society, defenders should be assoilzied from the conclusions of the present action.

On 24th July 1911 the Sheriff-substitute (Orr) pronounced this interlocutor:—[After the findings in fact above quoted]—"Finds that in terms of said rules the pursuer is entitled to receive sick benefit for a period of one year as from 17th August 1909: Therefore repels the defences and decerns against the defenders for payment to the pursuer of the sum of £7, 10s." *

The defenders appealed to the Sheriff (Maconochie) who, on 16th October 1911, recalled the interlocutor of the Sheriff-substitute, and dismissed the action as incompetent.

The pursuer appealed to the Court of Session, and the case was heard before the Second Division (without Lord Dundas) on 23rd May 1912.

Argued for the appellant;—(1) Rule 30 embodied a contract between the Society and its members by which, in certain circumstances, a right was conferred on third parties, namely, the dependants of a member who became insane. The pursuer, being such a dependant, had a right to sick benefit under the contract, and in consequence had a title to sue and vindicate her claim. Her right might have been defeated if the rule had been altered before her husband's illness; but under the rule as it then stood, her claim vested and became indefeasible. It was no answer to say that the contract might have been revoked, when in fact it was not. (2) Section 4 (3) (a) of the Trade Union Act, 1871,† applied only to agreements for the provision of benefits to members.¹ This was not such an agreement, but was one for the provision of a benefit to a person who

* £7, 10s. represented sick benefit for thirty weeks, the maximum amount payable in any one year in terms of rule 20 (3) and (6).

† Secs. 3 and 4 (3) (a) of the Trade Union Act, 1871, are quoted in the opinion of Lord Salvesen, *infra*, p. 1083.

¹ Wilkie v. King, 1911 S. C. 1310; Baker v. Ingall, [1911] 2 K. B. 132.

was not, and never could be, a member of the Society. The pursuer was not claiming as a representative of a member, but independently and in her own right. There was nothing either at common law or under the Act to exclude the Court from entertaining an action to enforce such a claim. Further, on a construction of the terms of rule 30, the appellant—assuming that she had a title to sue and that the Court had jurisdiction to entertain the action—was entitled as matter of right, and not merely at the discretion of the Executive Committee, both to sick and to superannuation benefits.

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Argued for the respondents;—(1) The pursuer had no title to sue on the agreement contained in rule 30, even assuming it to be one which the Court had jurisdiction to enforce. A third person, not a party to a contract, might in certain cases adopt the contract and enforce its provisions so far as in his favour. But it was a necessary condition that his right should be indefeasible, and that the contract should not be revocable by the parties to it.¹ In the present case there was express provision in the constitution of the Society for the alteration of the rules, and an alteration of the rule relating to sick benefits would have been binding on the pursuer's husband, even if made after he had become insane.² (2) But in any event, this was a legal proceeding directly to enforce the provision of a benefit to a member, which the Court had no jurisdiction to entertain.³ The pursuer had no right except through her husband. If, for example, he had been in arrears with his subscriptions, she would have got nothing, which was inconsistent with the idea that she had an independent right. Support given to those dependent on a member during the time he was ill was primarily a benefit to the member himself, and was one of the advantages which he obtained by joining the Society. In any event, on the construction of rule 30, the granting of sick and superannuation benefits to the appellant was in the discretion of the Executive Committee, and her claim had been considered and disallowed by them.

At advising on 25th June 1912,—

LORD SALVESEN.—This case involves a comparatively small sum of money, but the questions raised are of general importance and present so much difficulty that I am not surprised that the Sheriffs have differed. The pursuer sues for certain benefits which she maintains are payable to herself under rule 30, section 2, of the rules of the defenders' Society, of which her husband at the date of his insanity was a member. She claims, in the first place, sick benefit for a period of one year, and in the second place that her husband's name should be placed on superannuation benefit and that the amount due should be paid to her in her own right. The Sheriff-substitute has allowed the first claim to the extent of £7, 10s., and disallowed the second claim *in toto*; but the Sheriff has assoilzied the defenders from the whole conclusions of the action.

¹ Blumer & Co. v. Scott & Sons, (1874) 1 R. 379, *per* Lord Ardmillan, at p. 387; Finnie v. Glasgow and South-Western Railway Co., (1857) 3 Macq. 75, *per* L. C. Cranworth, at p. 88, Lord Wensleydale, at p. 89; Burke v. Amalgamated Society of Dyers, [1906] 2 K. B. 583.

² Burke v. Amalgamated Society of Dyers, [1906] 2 K. B. 583; Allen v. Gold Reefs of West Africa, Limited, [1900] 1 Ch. 656.

³ Trade Union Act, 1871 (34 and 35 Vict. cap. 31), sec. 4 (3) (a).

June 25, 1912. The first question we have to decide is whether the pursuer has any *jus quæsitum* under the contract made between her husband and the defenders; and the main ground upon which it is maintained that she has none, and therefore no title to sue, is that the rules which constitute the contract are alterable at a General Council meeting, and that they might have been altered at any time so as to deprive dependants of any rights which they might otherwise have under rule 30 (2) of the existing rules. It is not said, however, that any alteration has in fact been made; and so far as the pursuer's first claim is concerned, the period in respect of which it is made has long since expired. We were referred to two authorities on this matter—the cases of *Finnie*,¹ and *Blumer v. Scott*.² These cases have no direct application, but were cited for certain dicta of Lord Chancellor Cranworth and Lord Wensleydale in the former, and of Lord Ardmillan in the latter, on the legal doctrine known as *jus quæsitum tertio*. Lord Ardmillan says:—“According to Lord Stair it is only where there is in a contract some ‘article in favour of a third party’ which cannot be recalled by one or both of the contractors that there is *jus quæsitum tertio*, and this doctrine is specially recognised and approved of by Lord Cranworth and Lord Wensleydale. . . . Even if not named, the third party may be entitled to adopt the agreement and enforce it by action. But in such a case it must be clear that both the contracting parties intended so to secure him, and that they could not, separately or together, revoke the stipulation.” Now I do not doubt that as a general statement of the law these propositions are perfectly sound. The contract between the pursuer's husband and the Society embodied in their rules might have been revoked by both or modified by the defenders alone by way of alteration of the rules so as to have taken away any right of action from the pursuer; but such revocation must have taken effect, as I understand the law, before a right of action emerged, if that right was to be entirely defeated, or before the period in respect of which the claim was made had expired, if it was to be partially defeated. I cannot imagine that if a claim has vested in a third party under a contract the vested interest can be discharged by any act of the contracting parties, and still less by the act of one of them who is the debtor in the obligation. The only analogous case cited was that of *Burke*,¹ where it was held that the alteration by a trade union, during the insanity of a member, of the rule as to sick benefit to the prejudice of that member was binding on him, if made in accordance with the rule authorising and regulating alteration of the rules of the union. But in that case it was not contended that the rule took effect except with regard to the period after it was passed. I am therefore of opinion that the Sheriff-substitute reached a sound conclusion in holding that the agreement had become irrevocable when the pursuer became entitled to found upon it, and at all events until, pending the running of the sick benefit claimed, an alteration of the rules had in fact been made.

The pursuer now admits that the defenders' Society must be regarded at common law as an unlawful combination, in respect that some of its objects are in restraint of trade. Such societies are, however, legalised by the

¹ 3 Macq. 75.² 1 R. 379.³ [1906] 2 K. B. 583.

Trade Union Acts, 1871 and 1876. By section 3 of the former Act it is provided:—"The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or void-able any agreement or trust." Had there been no further provision in the Act, trades unions might have sued or been sued in respect of any agreement entered into between them and their members; but section 4 contains an important limitation and, so far as applicable to the present case, provides that "Nothing in this Act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely:—(3) Any agreement for the application of the funds of a trade union (a) to provide benefits to members." If, therefore, this had been an action at the instance of the pursuer's husband or his representative, it could not be entertained by a Court of law; but the pursuer does not here sue, as the plaintiff did in the case of *Burke*,¹ as the administratrix of her husband. She is suing in her own right. Even this would not avail her if the agreement on which she founded was one which could be described as "providing a benefit to a member." If the section of the statute had intended to strike at all agreements to provide benefits, it is difficult to understand why the words "to members" should have been added; and it is plain that it was not the intention of the statute to exclude the jurisdiction of a Court in the case of a claim made by a third party against a trade union, for such an action was competent at common law, even if the trade union were an unlawful combination—the third party not being tainted with the illegality which disabled a member from invoking the jurisdiction of the ordinary Courts.

The question, however, remains whether the pursuer, as a dependant of her insane husband, has any absolute right at all; or whether her demand for sick benefit is in the discretion of the Executive Committee. It is true that the words "shall be eligible," on which the Sheriff relies, at first sight suggest some power of election, vested in a body or person different from the claimant, but these words occur frequently throughout the rules; and I think in the rule in question and elsewhere they must be treated as meaning "shall be entitled to, if qualified." In the second paragraph of the first section of rule 30 the same words occur, and when one turns back to rule 19, one finds that the member who is declared to be eligible to receive unemployed benefit has an absolute right to such benefit at a stipulated rate, provided his being thrown out of employment was not the result of misconduct. We were referred to other passages in the rules in which the same words occur, where they must be construed as equivalent to "shall be entitled." Thus in rule 18, section 7, there is a provision that members shall pay certain contributions, "and if entitled as per rule, shall be eligible to receive the following benefits." I think this clause must be construed as meaning "if eligible or qualified as per rule, shall be entitled to receive." The defenders appealed to the first part of section 1 of rule 30, which provides "that if any member, through loss of reason, be unable to follow his employment, the case shall be referred to the E. C., who shall deal with it

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¹ [1906] 2 K. B. 583.

June 25, 1912. at their discretion"; but I think that this clause is in contrast with the one on which the pursuer founds, and cannot be held to govern an entirely independent section. I accordingly agree with the Sheriff-substitute that, the qualification of the pursuer being admitted, she is entitled under the clause to which she refers to receive sick benefit. [His Lordship then dealt with other questions, turning upon the construction of the rules of the society, with which this report is not concerned. *Inter alia*, he found, on a construction of rule 30, that the pursuer was only entitled to superannuation benefit at the discretion of the Executive Committee, and as they had refused to grant it, that she could not enforce this part of her claim.]

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LORD GUTHRIE.—I think the Sheriff-substitute has rightly decided that the appellant is entitled to receive sick benefit from the respondents for a period of thirty weeks, and not for fifty-two weeks as she claims, and that she is not entitled to receive superannuation allowance.

The effect of section 4 of the Trade Union Act of 1871 is that what are called "benefits to members," conferred by the constitution of a trade union like the respondents, are rendered unenforceable at law. The dispute turns on whether the sick benefit and the superannuation allowance in question in this case, which are admittedly of the nature of benefits, are or are not benefits to members in the sense of the statute. Are they, one or both, primarily benefits to the members of the trade union themselves, and only secondarily, if at all, benefits to dependants like the appellant; or are they, one or both, primarily benefits to the dependants, and only secondarily, if at all, to the members themselves?

In my opinion, taking rules 20, 24, and 30 together, the two classes of allowances or benefits are sharply contrasted in the case of insane members, like the appellant's husband, who have wife, family, or parent dependent on them, first, in the form of words by which they are conferred, second, in the persons to whom they are payable, and, third, in the purposes to which they are applicable. The sick benefit is payable directly to the dependant, and those alimending the insane person can have no claim on it; while the superannuation allowance would be payable to the legal representatives of the insane person, and the whole of it would be available for his support.

An apparent difficulty is caused by the expression, in rule 30, "they shall be eligible to receive sick benefit." But a consideration of the terms of rules 20, 24, and 30 leads me to the conclusion that the word eligible is equivalent in this clause to "entitled, if qualified."

The respondents founded strongly on the case of *Burke*,¹ in support of their proposition that the appellant could have no *jus quæsitum* under an agreement between a member and the Society constituted by rules which are revocable by the Society. But that case in no way conflicts with the appellant's right to vindicate a right which had vested in her under the rules when she made her claim.

LORD JUSTICE-CLERK.—I concur in the opinion of Lord Salvesen, which I have had an opportunity of reading.

¹ [1906] 2 K. B. 583.

THE COURT sustained the appeal, recalled the interlocutor June 25, 1912.
 appealed against, found in fact and in law in terms of the
 findings in fact and in law in the interlocutor of the Sheriff-
 substitute, dated 24th July 1911, and found the defenders
 liable to the pursuer in expenses.

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CHARLES GARROW, Solicitor—SIMPSON & MARWICK, W.S.—Agents.

THE MAGISTRATES OF EDINBURGH, Pursuers (Respondents).— No. 151.
Cooper, K.C.—W. J. Robertson.

THE LORD ADVOCATE, (as representing The Commissioners of His June 26, 1912.
 Majesty's Works and Public Buildings), Defender (Reclaimer).—
Sol.-Gen. Anderson—Pitman. Magistrates
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 cate.

*Crown—Statute—Building restrictions—Exemption of the Crown from
 statutory restrictions—Personal Objection—Edinburgh Corporation Act,
 1906 (6 Edw. VII. cap. clxiii.), secs. 67 and 78.*

Section 67 of the Edinburgh Corporation Act, 1906, confers powers upon the Corporation in certain circumstances to require that no buildings shall be erected upon unbuilt-upon ground abutting on an existing street within thirty feet from the centre of the street. Section 78 exempts from the provisions of the Act "every building structure or work vested in or in the occupation of His Majesty . . . or in the occupation of any department of His Majesty's Government for public purposes."

The Commissioners of Works, as managers of the Royal Botanic Gardens, Edinburgh (which are Crown property), applied to the Dean of Guild for warrant to erect the first wing of certain proposed buildings in the Gardens, the building line of which would encroach within 30 feet of the centre line of a public street. The plans lodged showed the completion of the buildings on the same building line extending further down the street. The Edinburgh Corporation offered no opposition, and the lining was granted and the first wing of the buildings was erected.

Two years afterwards the Commissioners applied for warrant to complete the buildings by erecting the other wing in accordance with the original plans, and a lining was granted. The Corporation thereupon passed a resolution, in terms of section 67 of the Act, that no buildings should be erected within 30 feet of the centre of the street, and brought an action to interdict the Commissioners from erecting the buildings within that distance.

The Court *assolized* the defenders; *per* the Lord President and Lord Kinnear on the ground that the proposed buildings were exempted from the operation of section 67 by virtue of the provisions of section 78, which applied to future buildings as well as to existing buildings; *per* Lord Johnston on the ground that the Corporation, by permitting the first warrant to be granted and a portion of the buildings to be erected within the 30 foot space, were barred from objecting to the completion of the buildings on the same building line.

Observations, per the Lord President and Lord Kinnear, on the extent to which the Crown is bound by restrictions contained in local Acts.

ON 9th October 1911 the Magistrates of Edinburgh brought an 1st DIVISION.
 action against the Lord Advocate, as representing the Commissioners Ld. Ormidale.
 of His Majesty's Works and Public Buildings, in their capacity as
 managers of the Royal Botanic Gardens of Edinburgh which are
 Crown property. The conclusions of the summons were for declarator,

June 26, 1912. *inter alia*, that the defenders had no right or title to erect houses or buildings on the portion of the Botanic Gardens therein described, and for interdict to prevent them doing so. The portion of the Gardens so described consisted of a strip of ground lying along the side of Inverleith Row, Edinburgh, within 30 feet of the centre of the street, and the effect of the interdict would be to prevent the erection of buildings nearer the centre of the street than 30 feet.

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The circumstances in which the action was brought were thus narrated by the Lord President:—"In 1909 the Commissioners of His Majesty's Works and Public Buildings proceeded to erect in Inverleith Row certain buildings in connection with the Royal Botanic Gardens. These buildings had a facade to the street with an entrance, and the plans which were exhibited at that time show clearly, to my mind, that it was intended to complete the buildings which were first designed by the addition of another wing on the other side of the entrance, which, although at that time at the end of the building, was described as a central entrance. A warrant for the erection of the first wing, so to speak, of the buildings was duly obtained from the Dean of Guild Court at the time, and the buildings were so far erected. These buildings were all inside the ground belonging to the Commissioners, and came forward to within less than 30 feet of the centre of the street in front of them. Last year the Commissioners decided to complete their original scheme by building the other wing. The facade of the other wing was, naturally, to be in line with the facade so far as erected. They again applied to the Dean of Guild Court and obtained a warrant for the erection of this new wing."

The Town-Council did not oppose the granting of the warrant of 1909, and the proceedings in the Dean of Guild Court in connection with obtaining the warrant of 1911, and the attitude of the Town-Council thereanent, were thus described by the Lord Ordinary in his opinion:—

"It appears that on 2nd September 1911 the defenders [the Commissioners of Works] presented a petition in the Dean of Guild Court for warrant to erect 'upon a portion of the grounds forming the Royal Botanic Gardens, Edinburgh, on part of which portion of the said grounds a laboratory is at present erected, certain buildings to be used' for purposes which are described 'in connection with said gardens, all as shown on five plans' produced. On the plans the proposed new buildings are described as an extension of laboratory buildings (which were erected so recently as 1910, under a warrant obtained from the Dean of Guild in 1909), and the plans show that the proposed new buildings are, so far as their design and purpose are concerned, in complement of the existing buildings. The buildings for which warrant was craved included also a porch to the north-east of the proposed extension.

"The petition was served upon the pursuers. No answers were lodged by them, but on the 7th September an agent appeared for them, and while offering no objection to the petition so far as the main buildings were concerned, took exception to the porch. On that date the Dean of Guild granted interim warrant for the erection of the buildings other than the porch, the cause being continued *quoad* the porch. The interim warrant was extracted on the 14th September.

"On the 15th September the pursuers lodged a minute craving the Court to allow them to lodge answers relative to the whole operations

of the petitioners. This crave was afterwards abandoned and no answers were lodged. On the 20th September the pursuers passed what has been referred to as the 'sterilising' resolution quoted in article 4 of the condescendence. On 3rd October the defenders lodged a minute consenting to their petition being dismissed so far as it craved warrant for the erection of the porch, and on 12th October the Dean of Guild, having heard parties' procurators, allowed the petition, so far as warrant had not been already granted, to be abandoned. No appeal was taken against any interlocutor of the Dean of Guild.

"As there is at present no proposal or intention to erect the porch, the present action appears to be unnecessary so far as it relates to the porch."

The resolution of the Town-Council of 20th September 1911, above referred to, was in these terms:—"The Magistrates and Council, in virtue of the powers conferred by section 67 of the Edinburgh Corporation Act, 1906,* resolved and hereby resolve that no houses or buildings shall be erected in Inverleith Row . . . within a distance of 30 feet from the centre line of the following portions of said streets . . ." and then followed, *inter alia*, a description of the portion of Inverleith Row on which the Botanic Gardens abutted, with the exception of the small part covered by the buildings erected under the warrant of 1909.

The pursuers pleaded, *inter alia*;—(1) The portion of the Royal Botanic Gardens of Edinburgh described in the first conclusion of the summons being ground to which section 67 of the Edinburgh Corporation Act, 1906, applies, and the pursuers having exercised in regard to such ground the powers conferred upon them by said section 67, they are entitled to decree, in terms of the first declaratory conclusion and the first part of the conclusion for interdict of the summons. (3) The said Commissioners having challenged the right of the pursuers to enforce against them the provisions of the statutes founded on by the pursuers, decree should be granted in terms of the conclusions of the summons.

The defender pleaded, *inter alia*;—(2) In respect that the lands in question are the property of the Crown, the pursuers are not entitled to decree of declarator and interdict as concluded for. (3)

* The Edinburgh Corporation Act, 1906 (6 Edw. VII. clxiii.), enacts:—

Sec. 67. "Where any ground whether belonging to one or to more than one proprietor abuts on an existing street and is for a continuous distance of two hundred yards or upwards along the street either unbuilt upon within a line parallel to and running at a distance of thirty feet from the centre line of the street or not occupied within the said thirty-foot line by buildings of a greater height than fifteen feet the Corporation may from and after the commencement of this Act require that no houses or buildings shall be erected within the said thirty-foot line. Provided that this section shall not apply to an existing street which has been formed or laid out under the provisions of the Edinburgh Municipal and Police Acts."

Sec. 78. "Without prejudice to any existing right of His Majesty there shall be exempted from so much of the provisions of this Act as relates to buildings structures or works every building structure or work vested in or in the occupation of His Majesty either beneficially or as part of the hereditary revenues of the Crown or in trust for the public service or for public services as also any building structure or work vested in or in the occupation of any department of His Majesty's Government for public purposes or for the public service."

June 26, 1912. In any event the defender is entitled to be assoilzied from the conclusions of the action in respect of the exemption of Crown property contained in section 78 of the Edinburgh Corporation Act, 1906. (4) In view of the position adopted by them in the Dean of Guild Court and the warrant of 7th September, the pursuers are barred from insisting in the present action.

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On 7th March 1912 the Lord Ordinary (Ormidale) granted declarator and interdict in terms of the conclusions of the summons.*

* " OPINION.—[After the narrative quoted *supra*—In the circumstances I have narrated it does not appear to me that the pursuers are barred from insisting in the present proceedings, either by the existence of the Dean of Guild's warrant, or by anything they did or omitted to do in the Dean of Guild Court proceedings. At the time the warrant was granted they had no valid ground on which to oppose it. It was on that account that the supervenient resolution of 20th September was passed. Now, the validity of the resolution is not challenged. It is not suggested that any of the physical conditions required by section 67 in order to warrant it were non-existent. What is maintained is, that it cannot be given effect to in connection with the present proposed buildings, in respect that the pursuers joined issue with the defenders on the question of the defenders' right to erect the buildings in the manner and on the site proposed by them in a Court competent to deal with and to decide that question, and that the defenders obtained a judgment in their favour. But the warrant has not to any extent been put in execution, and I see no reason why the Court of Session should not *de plano* interdict the erection of the buildings complained of without the warrant being formally reduced, or by some other process set aside. I cannot give to the Dean of Guild's order the effect of a judgment ascertaining and determining the rights of parties. The matter is certainly not *res judicata*, for the objection now taken was not open to the pursuers on the 7th September, and the Dean of Guild did not in fact entertain or dispose of the present question, assuming that it was within his competency to do so. The existence of the warrant and the proceedings in the Dean of Guild Court, therefore, do not appear to me to form any bar to the present proceedings.

" The contention of the defenders, founded on section 78, raises a difficult question, but I have come to the conclusion that it does not apply to the buildings in question. The section purports to grant an exemption of certain Crown property from so much of the provisions of the Act as relates to buildings, structures, or works. These words are quite general in expression, and there is nothing in them, read by themselves, to exclude from their purview buildings which are not yet erected. As section 67 regulates the distance at which buildings may be kept back from the centre line of a street, it seems to me clearly to contain provisions which relate to buildings in the sense of section 78, and accordingly, if the exemption conferred by section 78 had applied to all Crown property, I should have had no difficulty in giving effect to the defenders' contention. But what is exempted is not all Crown property but every building, structure, or work vested in or in the occupation of His Majesty. Now, these words of themselves impose a limitation, for buildings which are not yet erected, but which it is only proposed to erect, cannot be described as vested in anyone. What is vested in the Crown here is a piece of unbuilt-upon ground upon which it is proposed to erect buildings, and unbuilt-upon ground is not in terms exempted from the provisions of the Act relating to buildings, including section 67. I do not think I am warranted in reading into the section the words 'or which will be vested.' It was said that such a construction limits the effect of section 78 to buildings already erected, and that there are no provisions in the Act relating to such—that all the provisions relat-

The defender reclaimed, and the case was heard before the First June 26, 1912. Division (without Lord Mackenzie) on 25th and 26th June 1912.

Argued for the reclaimer;—The buildings proposed were exempt, ^{Magistrates of Edinburgh} by virtue of section 78 of the Edinburgh Corporation Act, 1906, from ^{v. Lord Advocate.} the restrictions imposed in pursuance of section 67 thereof. The general provisions of the Act applied to buildings to be erected in the future,¹ and the Lord Ordinary was wrong in construing section 78 as being different from the rest of the Act and as applying only to existing buildings. But, even assuming his construction to be right, this was part of an existing building, for it was a mere completion of the portion already erected. Further, the subjects in question here were vested in the Commissioners of Works subject to the rights of the Crown affecting the same,² and it was a rule of universal application that the Crown was excepted from the operation of any statute in which it was not expressly mentioned.³ The Crown had been held to be unaffected by bye-laws made by a corporation under the Public Health Acts,⁴ and *a fortiori* it was unaffected by mere building restrictions. In any event, the pursuers' resolution of 20th September 1911 came too late, and they were barred from objecting to the proposed erection. They had allowed warrant to be obtained in 1909, and a building to be erected on the faith of it, which not only encroached on the 30 foot line, but showed the completion of the building, now proposed, also encroaching on that line. Further, with regard to the warrant for the present buildings—if a warrant for the Crown were really necessary⁵—the pursuers had taken no

ing to buildings, relate to buildings to be constructed. Even if that were so it would not alter the construction of the section. It would only mean that the Crown took no benefit from the exemption. But I do not think that it is so in fact, for there are certain provisions in sections 65, 66, and perhaps 69, which relate or may relate to existing buildings, and from these provisions buildings vested in the Crown would, on the construction I give to section 78, be exempt.

“It is to be regretted, I think, that the defenders should not be allowed to erect the buildings in question, for they are really an extension of existing buildings which are themselves built within the 30 feet limit, and it is difficult to understand in what way the public interest would be affected by the erection of the extended buildings. The phraseology of the two sections 67 and 68 does not, however, permit of any distinction being made between the extension of existing buildings over unbuilt-upon ground and the erection of entirely new and self-contained structures. Had there been room for such a distinction a proof would probably have been necessary to ascertain precisely the true relation of the addition which the defenders propose to make to the existing buildings, for the erection of which warrant was granted in 1909.

“I shall grant decree in terms of the first declaratory conclusion of the summons, and the first part of the conclusion for interdict.”

¹ 6 Edw. VII. cap. clxiii. secs. 67 and 69.

² Universities (Scotland) Act, 1889 (52 and 53 Vict. cap. 55), sec. 24.

³ Maxwell on Statutes (4th ed.), pp. 202 and 209; Hornsey Urban District Council v. Hennel, [1902] 2 K. B. 73; Cooper v. Hawkins, [1904] 2 K. B. 164; *In re Cuckfield Burial Board*, (1854) 24 L. J., Ch. 585; Coomber v. Justices of Berks, (1883) 9 App. Cas. 61; Somerville v. Lord Advocate, (1893) 20 R. 1050; Motor Car Act, 1903 (3 Edw. VII. cap. 36), sec. 16.

⁴ Gorton Local Government Board v. Prison Commissioners, [1904] 2 K. B. 165, footnote (3).

⁵ Somerville v. Lord Advocate, 20 R. 1050.

June 26, 1912. steps in the Dean of Guild proceedings, either by objections or by appeal, to maintain the point for which they were now contending; and, standing the Dean of Guild's warrant, which was a decree of a competent Court, the present action to enforce a resolution of later date could not be entertained.

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Argued for the respondents;—Section 78 of the Act dealt only with “buildings,” while section 67 dealt with “ground.” Therefore, as the two sections dealt with different matters, section 78 did not exempt the Crown from the effect of a resolution as to “ground” passed in virtue of section 67. Nor, indeed, could a warrant by the Dean of Guild for the erection of “buildings” override such a resolution. Further, so far as the buildings referred to in section 78 were concerned, existing buildings only were meant. When the Act intended to deal with future buildings, as in sections 65 and 66, it expressly said so. There was no rule in the law of Scotland that the Crown was exempt from the operation of a statute in which it was not expressly mentioned; and this was especially the case with regard to land such as this, which was not held *jure coronæ* but had been acquired for public purposes from a private owner. But *esto* that there was such a rule, the Crown being expressly mentioned in section 78, and the extent of the exemption conferred being there defined, there was impliedly no exemption beyond the limits of that section.¹ Further, the pursuers had not done or omitted to do anything with regard to these buildings by which they could be held to have surrendered their statutory rights, or to be barred from insisting in the present action. The resolution of 20th September 1911, passed in pursuance of section 67, was passed without delay after presentation of the defender's petition to the Dean of Guild. It was only by force of that resolution that restrictions in terms thereof could be enforced, and at the date of the Dean of Guild's warrant relied upon, or when the plans of the Commissioners of Works were first approved in 1909, the pursuers could not have taken any objection thereto upon the grounds upon which declarator and interdict were now sought.

LORD PRESIDENT.—[After narrating the facts]—Several questions have been argued before us. It is said by the Commissioners that the Town are barred from insisting in their present demand, because, although they were parties to the case, they made no opposition to the warrant being granted in the Dean of Guild Court. Personally, I do not care to put my judgment upon that. I do not think, myself, that the Town could be prevented from passing the resolution that they did pass, and, when they did so, it seems to me it gave them, for the first time, the title to object to what was being done. But, then, the general question was argued for the Crown—the Commissioners of His Majesty's Works and Public Buildings hold for the Crown—that the Crown is not bound by any restriction of this sort contained in any local Act unless the restriction is *totidem verbis* imposed upon the Crown. While I do not think that that is quite true as a general proposition, I do not think it is necessary to go at length into this matter. I may say that I agree generally with the views expressed by Lord Kyllachy

¹ Somerville v. Lord Advocate, 20 R. 1050; The Crown v. Magistrates of Inverness, (1856) 18 D. 366; Lord Advocate and Barbour v. Lang, (1866) 5 Macph. 84.

in *Somerville's* case,¹ and I think the outcome of it is this: While I do not doubt that there are certain provisions by which the Crown never would be bound unless that were clearly expressed—such, for instance, as the provisions of a taxing statute, or certain enactments with penal clauses adjoined, as, for example, certain provisions of the Motor Car Act, and so on—yet, when you come to a set of provisions in a statute having for its object the benefit of the public generally, there is not an antecedent unlikelihood that the Crown will consent to be bound, and this, I think, would be so in the case of regulations which are meant to apply to all the land in a city, and where the Crown's property is not property held *jure coronæ*, but has been acquired from a subject-superior for the use of one of the public departments. While I think that is so, yet, all legislation being primarily for the subject and not for the Crown, you must in some way or other gather that the Crown means to be bound. In the present case there is, I think, no antecedent improbability of the Crown being bound, and I say that the want of antecedent improbability is turned into a certainty the other way when you find, in a statute like this, saving clauses put in which deal with the Crown's rights. Therefore, looking at this statute, I come to the conclusion that, as regards property acquired from the subject, the Crown did intend to be bound by the restrictions in the Act, except in so far as it was exempted by the saving clauses, viz., sections 78 and 79.

Coming to clause 78, the clause upon which the Lord Ordinary has based his judgment, I am humbly compelled to differ from the learned Lord Ordinary, who, I think, has put too narrow a construction upon it. His Lordship's judgment comes to this: He agrees that section 67 does contain provisions which relate to buildings in the sense of section 75, and so far I agree with him. But then he goes on to say that, when he reads section 78, "what is exempted"—I am now reading his words—"is not all Crown property but every building, structure, or work vested in or in the occupation of His Majesty. Now, these words of themselves impose a limitation, for buildings which are not yet erected, but which it is only proposed to erect, cannot be described as vested in anyone." I think that that is much too narrow a view to take, and would really make the clause of exemption quite futile. Put in ordinary language, the meaning of the clause of exemption is this, that in so far as there are prohibitions in connection with buildings which are to apply to other people, they are not to apply to the Crown. Well, of course, nearly all the prohibitions about buildings deal with buildings that are to be erected. It is very rarely indeed that a power is given in any Town-Council Act to interfere with existing buildings; but there are a great many regulations as to what you may do, or may not do, with respect to buildings that are going to be erected, and to hold that the clause of exemption only applied to such provisions of the Act as deal with existing buildings, would be, I think, to cut down the exemption to nothing.

While, therefore, I agree with the Lord Ordinary in thinking that section 67, as well as section 78, both relate to buildings, I think the effect of section 78 is this, that it exempts from the provisions of section 67 every building, structure, or work vested in or in the occupation of His Majesty,

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¹ 20 R. 1050.

June 26, 1912. either for himself or in trust for the public service. That obviously means not only the existing buildings which are already erected in Inverleith Row, Magistrates of Edinburgh but any extension of these buildings. And therefore, in the circumstances of this particular case, it seems to me that the prohibition of section 67 does not prevent the Crown from completing their plans of two years ago and building upon the ground which is contiguous to the building which already exists.

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Accordingly, upon the whole matter, I think the interlocutor of the Lord Ordinary should be recalled, and that the defender ought to be assoilzied from the conclusions of the summons.

LORD KINNEAR.—I agree entirely with your Lordship, and I think that the question really depends upon the true construction of section 78 of the Act of Parliament. I cannot say that I see sufficient reason for attaching great importance to the proceedings in the Dean of Guild Court. It seems to me that, but for section 67, the Corporation had no good objection to the warrant; and until they had resolved to put that section into operation they had no title to object. Nor do I think they could be barred from taking the matter into consideration and determining, in the public interest, whether a new building should be allowed to encroach on the space reserved by the 67th section, by reason of their having abstained from opposing a warrant to erect other buildings to which the same objection might have applied.

On the merits of the objection, now that it is stated, I am not of opinion that the Crown is entirely exempted from the provisions of this statute by virtue of its prerogative. I do not think it necessary to pronounce any definite opinion as to the extent to which it might be affected by provisions other than those which we are considering; but I am not at this moment prepared to hold that property which the Crown has acquired from a subject is, by reason of its now belonging to the Crown, necessarily exempted from building restrictions, whether statutory or conventional, which undoubtedly applied to it in the hands of the private owner whose right has been acquired by the Crown. But, then, I think that section 78 does directly apply to the question we have to consider. I think, with your Lordship, that the Lord Ordinary has taken too strict a view of the section. His Lordship takes out of the clause a particular phrase and analyses it as if it stood alone, instead of reading the whole clause together and construing particular words with reference to the context. So reading it, I cannot say I am embarrassed by the term "vested," in the use of which the Lord Ordinary requires a greater degree of exactness than ordinary language will bear. It is true that buildings cannot be vested in anybody until they exist; but with great deference the point that is raised upon that truism seems to me to be merely a verbal puzzle. I take the plain meaning of the clause to be that buildings, structures, and works belonging to the Crown or in the occupation of His Majesty or any department of Government are to be exempted from the provisions of the Act relating to buildings. But there is a provision relating to buildings in the 67th clause which enables the Corporation to require that no house or building shall under certain conditions be erected within a certain distance of the centre

line of the street. Then, according to the argument, buildings belonging to June 26, 1912. the Crown would be exempted from this provision were it not that buildings belong to nobody before they exist. The Crown, therefore, cannot have the benefit of the exemption until the buildings are erected, and in the meantime it may be effectually prevented from erecting the buildings. I cannot accept a construction which makes the clause so utterly futile. The plain meaning of it, in my opinion, is that a provision which prevents the erection of buildings in certain circumstances does not apply to the Crown, which may therefore erect such buildings without regard to the prohibition.

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Lord Kinnear.

Now, the question is whether that is applicable only to existing buildings, so that no provision applicable to the extension or completion of an existing building could fall within the exemption. I think, in order to answer that, you must go back and read the clause which provided the restrictions from which the Crown is to be exempted in order to see what the exemption is. Now, clause 67, on which the Town founds its right to prohibit the completion of the buildings in question, provides for buildings being kept back from the centre line of the street to a certain distance under certain circumstances. That is the clause which the Corporation proposes to enforce. Section 78 says that the Crown is exempted from the provisions of this Act relating to buildings. Is the provision that a building is to be kept back to a certain distance from the centre of the street a provision that does not relate to a building? The argument is that it relates only to existing buildings. Well, then, if you find an existing building which does not encroach within the statutory distance of the centre line of the street, is it, or is it not, prohibited that the building shall be extended so as to make an encroachment? If the existing building is not to be extended towards the centre line of the street so as to encroach upon the prescribed area, then the proceedings of the Crown are not struck at at all. If it is, then that is a prohibition which is directly within the plain terms of the exemption.

I cannot say, therefore, that I have any hesitation really in reading this clause as being applicable to the whole provisions relating to buildings belonging to the Crown, or occupied by the Crown. I therefore agree with the interlocutor which your Lordship proposes.

LORD JOHNSTON.—Certain questions of great general importance have been argued in this case, and if I had to come to a conclusion either on the question of whether the Crown is exempt from all municipal legislation of the description of that of the Edinburgh Corporation Act, 1906, or even on the question how far the exemption in section 78 of that Act is to be carried, I should have asked your Lordship for an opportunity of considering the case further. But it seems to me that this case bears to be disposed of on very simple grounds and without entering upon these larger questions. It seems to me that, in the circumstances of this particular case, the Town have moved too late in their endeavour to stay the completion of the building, which they now see will slightly diminish for a short distance the free area available for the widening of Inverleith Row.

I take the case therefore entirely on the footing that I am not concerned

June 26, 1912. with the Crown's claim to exemption. I assume that the Crown is, just as much as a subject, subject to the provisions of section 67 of the Act, and the case appears to me thus: Three years ago, when in 1909 the Crown proposed to commence the building which they are now proposing to complete, the Town might have said, There is a long stretch from Goldenacre up to and including the ground proposed to be built upon which we want to keep free for road as far as the statute permits us, and, therefore, we must require you to keep back your building line. But I am not prepared to say that, after such buildings have been permitted to be erected in part, the Town are entitled to say, "You must stop. We have still got the statutory 200 yards from Goldenacre Toll up to the point which your building so far as completed reaches. Accordingly, we call upon you to keep back the remaining portion of your building to the statutory distance from the centre of Inverleith Row to meet our requirements."

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I think that this section 67 must be read reasonably, and when it says that where any ground, whether belonging to one or more than one proprietor, abuts on an existing street, and is for a continuous distance of 200 yards or upwards along the street unbuilt upon within a line parallel to and running at a distance of 30 feet from the centre line of the street, the Corporation may require that no houses or buildings shall be erected within the said 30-foot line, I conceive that that means that no building regarded as a completed whole shall be erected within that line. But a building may be fully planned, but gradually built, and I think it would be stretching the section beyond reason to conclude that it may be applied at any time before the building in the full length of its frontage is completed, and with reference only to a portion of that frontage, when it cannot be applied to the whole.

Even if I were wrong in that view, I should still hold that the Town were barred by the fact that in 1909 they were cited to the petition under which the Dean of Guild's warrant was obtained for the erection of the first portion of this building, and was obtained upon the submission of plans which showed, without question, not only that the buildings (warrant for which was then asked) were merely a portion of a larger whole, but gave exact information as to what that whole was to be. The Town, having been called to that petition, did take exception to one matter connected with the proposed building, and then took no further interest in the proceedings. It seems to me that having allowed—it is hardly fair to call it an encroachment—but having allowed the original portion of this building to extend on ground which they might have kept clear had they chosen, they cannot be heard to come forward and say, "You are not entitled to complete your building, because we have now awakened to the fact that we should like to keep this road a little wider than it is, and we now call upon you to alter the plan of your building and modify it so that, although part of your building impinges upon the statutory 30 feet, and we cannot now help that, the remainder shall not do so." I hold they cannot take up that position now, and I cannot say that I do so with very much regret, because the building having been already partly completed, and extending within the 30-foot line for about three-fifths of its length, it is really futile

to require the remaining two-fifths of its length, extending to about 40 feet, necessary for the completion of the building, to be set back from the line which must continue to be kept by the building so far as it is already up.

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I therefore think that the case may be disposed of without determining the larger questions to which I have adverted.

THE COURT recalled the interlocutor reclaimed against, and assailed the defender.

Sir THOMAS HUNTER, W.S.—THOMAS CARMICHAEL, S.S.C.—Agents.

WHYTE, RIDSDALE, & COMPANY, Petitioners.—*Hon. W. Watson.* No. 152.

Diligence—Decree—Service of charge on decree—Scarcity of messengers-at-arms—Service by post—Service by Sheriff-officer—Citation Amendment (Scotland) Act, 1882 (45 and 46 Vict. cap. 77), sec. 3. June 26, 1912.

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The Citation Amendment (Scotland) Act, 1882, provides for the service of a summons or citation by post, but contains no provision with regard to the service of a charge upon a decree, which according to the previous practice fell to be made by messenger-at-arms.

A pursuer who had obtained in the Court of Session a decree for payment against a defender in Thurso, presented a petition in which he stated that the nearest available messenger-at-arms resided in Inverness and craved the Court to authorise service by post of a charge upon this decree; or, alternatively, to authorise any sheriff-officer in Caithness to act as messenger-at-arms.

Held that the Court could not grant authority for service by post; but authority *granted* to a sheriff-officer to serve the charge and to carry through the diligence.

WHYTE, RIDSDALE, & COMPANY, warehousemen and importers in London, presented a petition to the Court in which it was stated:—

“That the petitioners have obtained decree in absence in an action at their instance in the Court of Session against William Murray, cycle-agent, Thurso, for payment of £55, 9s. 11d. sterling, with expenses, which decree they extracted on the 7th day of June 1912.

“That at the time of the passing of the Citation Amendment (Scotland) Act, 1882, there were sixty-six messengers-at-arms practising in Scotland. There are now only thirty-four, of whom fifteen are in Edinburgh and Glasgow.

“That there is now no messenger-at-arms in Caithness, the nearest messenger-at-arms being in Inverness, a distance of about 100 miles.

“That the nearest sheriff-officer is in Wick, which is distant about 20 miles from Thurso.

“By the Court of Session Act, 1868, section 19, services of summonses and citations of witnesses may be made by sheriff-officers in counties or districts of counties where there is no resident messenger-at-arms, but no provision is made for the execution of diligence in similar circumstances.

“By the Sheriff Courts (Scotland) Act, 1907, section 49, it is provided that ‘where a charge is necessary upon a decree for payment of money granted in the Small-Debt Court, and the place of execution of the charge is more than 12 miles distant from the seat of the

June 26, 1912. Court where such decree was granted, a charge may be given by post in the manner prescribed by the Citation Amendment (Scotland) Act, 1882.'"
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The prayer of the petition was :—"To grant warrant to charge the defender, the said William Murray, upon the said decree by post in the manner prescribed by the Citation Amendment (Scotland) Act, 1882; and further, to grant warrant to any sheriff-officer in Caithness on the expiry of said charge to carry into execution all legal diligence competent to follow upon said charge, should the same expire without payment having been made; or otherwise, to grant warrant to any sheriff-officer in Caithness to charge the said William Murray upon the said extract decree at the petitioners' instance, and thereafter to carry into execution all legal diligence competent to follow upon said charge, should the same expire without payment having been made; to dispense with the reading of the minute-book, and to authorise a certified copy of the interlocutor to follow hereon to be used in place of extract; or to do otherwise as to your Lordships shall seem proper."

The opinion of the Court (the Lord President, Lord Kinnear, Lord Johnston, and Lord Mackenzie) was delivered by the

LORD PRESIDENT.—I should like to bring to your Lordships' notice a serious grievance of the lieges disclosed by the petition. The petitioners obtained decree in absence against a defender resident in Thurso. They extracted the decree and desired to do diligence on that decree. In old days there would have been no difficulty, because the serving of the charge would have been effected by a messenger-at-arms; but, owing to the alterations introduced by the Citation Act of 1882 (45 and 46 Vict. cap. 77), the calling of a messenger-at-arms no longer pays. There are now only thirty-four messengers-at-arms in Scotland, fifteen of these being in Edinburgh and Glasgow. Thus there are many places where such a messenger cannot be obtained except at considerable expense. In the present case it would be necessary to incur the expense of bringing a messenger-at-arms from Inverness. The Act provides for the service of summonses by post, but there is no provision for the serving of a charge by post. Any alteration in the law must be brought about by Parliament. All that your Lordships can do is to grant the prayer of the petition so far as to authorise a sheriff-officer to act as a messenger-at-arms in the present instance.

THE COURT pronounced the following interlocutor :—"Grant warrant to any sheriff-officer in Caithness to charge the defender William Murray, named and designed in the petition, upon the extract decree at the petitioners' instance mentioned in the petition, and thereafter to carry into execution all legal diligence competent to follow upon said charge, should the same expire without payment having been made; dispense with the reading of the minute-book, and authorise a certified copy of this interlocutor to be used in place of an extract."

MACPHERSON & MACKAY, S.S.C., Agents.

DAVID DINGWALL, Pursuer (Respondent).—*Morison, K.C.—Guild.*
 GEORGE WILSON BURNETT, Defender (Appellant).—*Horne, K.C.—*
D. Anderson.

No. 153.

June 27, 1912.

Contract—Implement—Mutual obligations—Party in breach of his obligation—Title to enforce implement of counterpart. Dingwall v. Burnett.

Two persons agreed for the lease of an hotel, and stipulated that the tenant should take over the furniture and stock at a valuation, and should deposit £200 in bank in their joint names to account of the valuation price. After the money had been deposited, but before the furniture and stock had been taken over, the tenant intimated that he did not intend to carry out the contract, and brought an action against the landlord for delivery of the deposit-receipt.

The defender lodged a counter claim of damages for breach of the agreement.

Held that the pursuer, having declined to perform his part of the contract, could not call upon the defender to fulfil his obligations until the latter had had an opportunity of constituting his claim of damages, and, accordingly, that the pursuer was not entitled, *hoc statu*, to delivery of the deposit-receipt.

Contract—Breach—Damages—Penalty or liquidate damages—Penalty clause—Measure of damages—Claim for damages in excess of penalty.

An agreement between two persons for the lease of an hotel contained mutual obligations of different kinds and of varying degrees of importance. *Inter alia*, the tenant was taken bound to apply for a transfer of the licence, to manage the hotel for the landlord until the licence was transferred, and to take over the stock at a valuation. The minute of agreement also provided :—"Both parties hereto bind and oblige themselves to implement their part of this agreement under the penalty of £50, to be paid by the party failing to the party performing or willing to perform over and above performance."

The tenant having refused to go on with the lease or to carry out the agreement at all, the landlord claimed damages for breach of contract to the amount of over £300.

Held (1) that the sum stipulated in the agreement was not liquidate damages but a penalty, and (2) that the landlord's claim for damages was not limited to the amount mentioned in the penalty clause.

Johnstone's Trustees v. Johnstone, Jan. 19, 1819, F. C. ; *Hyndman's Trustees v. Miller*, (1895) 33 S. L. R. 359 ; and *Lord Elphinstone v. Monkland Iron and Coal Company, Limited*, (1886) 13 R. (H. L.) 98, *per Lord Fitzgerald*, at p. 108, *commented on and doubted*.

In November 1911 David Dingwall, hotel manager, brought an action in the Sheriff Court at Haddington against George Wilson Burnett, hotel proprietor, Dunbar. The action concluded for (1) an order on the defender to endorse and deliver to the pursuer a deposit-receipt for £200 with the Royal Bank of Scotland, dated 24th April 1911, and (2) payment of £58, 10s.

The pursuer averred that the defender was the proprietor of the St George Hotel, Dunbar, for which he had obtained a licence in his own name. On 18th April 1911 the pursuer and the defender entered into an agreement for a lease of the hotel. The minute of agreement provided :—(Art. 1) The defender let the hotel to the pursuer for four and a-half years from Martinmas 1911 at a rent of £80, conditional upon the granting of an application for a transfer of the licence held by the defender in favour of the pursuer, at the Licens-

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ing Court in October, which application the pursuer undertook duly to lodge and follow forth. In the event of the application being refused, the agreement was, *ipso facto*, to come to an end. (Art. 2) In the event of the application being granted, the pursuer was to take over from the defender at mutual valuation, as at the term of Martinmas 1911, the furniture and fittings and stock of liquors, &c., belonging to the defender which should then be in the hotel. To account of the valuation price, the pursuer thereby undertook to consign, within seven days from the date of the agreement, in the joint names of the defender and himself, the sum of £200, to be available to the party having right thereto. Failing this sum being deposited within the time stated, the defender should have the option of terminating the agreement. On the expiry of the lease, the defender was taken bound to take over from the pursuer the furniture and fittings at mutual valuation. (Art. 3) This article dealt with the execution of repairs and alterations. (Art. 4) The pursuer undertook to act as the defender's manager of the hotel from Whitsunday 1911 till Martinmas 1911, and to account to the defender for the whole drawings of the hotel during that period, or alternatively, in the event of his application for transfer being granted, he was to be entitled to pay to the defender a certain sum, and thereupon to demand a return of the free drawings of the hotel during the period, in which case the pursuer should not be entitled to any remuneration for his services as manager. The pursuer, as manager for the defender, was, week by week, to meet the expenses out of the drawings, and to consign the surplus in bank in name of the defender. The pursuer was to conduct the hotel on a proper businesslike footing, and to do nothing which was likely to prejudice the licence. In the event of the pursuer's application being refused, or in the event of his not exercising the option conferred on him in this article, the remuneration which he should receive from the defender for acting as his manager was to be a sum equal to £3 per week for the whole of the period. (Art. 5) "Both parties hereto bind and oblige themselves to implement their part of this agreement under the penalty of £50, to be paid by the party failing to the party performing or willing to perform over and above performance."

On 24th April 1911 the pursuer deposited £200 in the Royal Bank of Scotland in joint names of himself and the defender, in terms of the agreement. The subsequent actings of parties and the position taken up by the defender were narrated by Lord Salvesen in his opinion as follows:—"The pursuer entered on the management of the hotel on 29th May 1911, and continued to act as manager until 12th October. Some months prior to that date he apparently became disappointed with the turnover, and on 25th August intimated that he did not intend to fulfil his agreement. To this position he adhered. Negotiations were then opened for the cancellation of the agreement, but these fell through. With the view of avoiding loss it was ultimately arranged that the pursuer should cease to act as manager, and a new manager was installed on 12th October, without prejudice to the defender's rights under the agreement. The pursuer has now raised the present action in order (1) to obtain a decree ordaining the defender to endorse and deliver to him a deposit-receipt for £200, dated 24th April 1911, this sum having been deposited to account of the valuation price of the furniture, fittings, &c., belonging to the defender, which, under the agreement, the pur-

suer was to take over in the event of the licence of the hotel being transferred to him; and (2) for payment of the sum of £58, 10s. as wages for the period during which he acted as the defender's manager in the hotel. The defence is that the defender is not under any obligation to endorse the deposit-receipt in face of the pursuer's admitted failure to implement the agreement, and that no wages are due because of the pursuer's mismanagement of the hotel. The defender also counter claims for £250 as damages for breach of the agreement; and there is a further special claim of damage [with regard to a bad debt incurred under the pursuer's management] amounting to £79, 5s. 2d. . . . The defender also demands an accounting of the pursuer's intromissions during the period while he acted as manager of the hotel."

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The pursuer, without prejudice, tendered £50 to the defender as in full satisfaction of all claims against him under the agreement.

The pursuer pleaded, *inter alia*;—(1) The defences are irrelevant. (2) The said sum of £200 having been deposited by the pursuer in joint names of himself and defender to account of the price of the furniture, &c., to be taken over at valuation, and said furniture, &c., not having been so taken over at valuation, the pursuer is entitled to decree in terms of the first conclusion of the initial writ with expenses. (3) Said sum sued for in the second place being the amount of wages due to the pursuer at the agreed-on rate, the pursuer is entitled to decree in terms of the second conclusion of the summons with expenses. (4) The counter claim is irrelevant. (5) The defender's counter claim of damages, as stated, is incompetent, and otherwise falls to be dismissed as wanting in specification. (7) The defender having sustained no loss and damage through the pursuer's breach of agreement or otherwise, his counter claim should be dismissed with expenses; *et separatim*, in respect of the tender made by pursuer he should be assoilzied.

The defender pleaded, *inter alia*;—(3) The pursuer being in breach of said agreement, he is not entitled to decree. (8) The defender having sustained loss and damage through the pursuer's breach of said agreement to the amount mentioned in the defences, the defender is entitled to decree therefor. (10) The pursuer being bound to hold count and reckoning with the defender, decree should be granted in terms of the defender's counter claim for accounting, as contained in the defences, with expenses. (11) The pursuer having failed to implement his part of the said agreement, he is not entitled to enforce implement of the terms thereof against the defender.

On 21st February 1912 the Sheriff-substitute (Macleod) pronounced this interlocutor:—"As regards the first crave of the initial writ, repels the defences as irrelevant: Ordains the defender to endorse and deliver to the pursuer the deposit-receipt mentioned in the initial writ: As regards the second crave, repels the defences as irrelevant, and finds the defender liable to the pursuer in payment of the sum of £58, 10s. sterling: As regards the counter claim for £79, 5s. 2d., dismisses the same as irrelevant: As regards the counter claim for £250 damages, dismisses the same as irrelevant except to the extent of £50 sterling, and, of consent of the pursuer, finds the pursuer liable to the defender in payment of the said sum of £50 sterling: And as regards the counter claim for count and reckoning, ordains the pursuer" to lodge an account of his intromissions as manager of the hotel, and the defender to lodge objections thereto.

June 27, 1912. The defender appealed to the Court of Session, and the case was heard before the Second Division (without Lord Dundas) on 24th, 25th, and 28th May 1912.

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Argued for the appellant;—(1) The Sheriff had erred in ordering delivery of the deposit-receipt. The pursuer, being in breach of his part of the agreement, could not call upon the defender to fulfil the counter obligations, at any rate until the defender had had an opportunity of establishing any claims competent to him.¹ (2) The defender had relevantly averred a counter claim for damages in respect of the mismanagement of the hotel, and these averments should be remitted to probation. (3) The defender's claim was not limited to the sum of £50 mentioned in article 5 of the agreement. That sum was stipulated as the penalty for breach of the contract, not as the liquidate measure of damages for each and every infringement thereof. It was called "penalty" and not "damages." It bore no relation to the loss which the parties might sustain by breach of the contract, for there were many ways, some material and some trivial, in which it might be broken.² For some of these £50 might be too much, and for others it would be too little. It was just a random sum, and did not prevent the defender from recovering the full measure of the damage he had sustained.³ In the case of a contract secured by a penalty clause, each party had an option. He could either bring an action of debt for recovery of the penalty, or he could sue for damages under the contract. And if he elected to sue for damages, he could recover the actual amount of his loss, whether it was more or less than the penalty. This was well settled in English law and had frequently been applied, especially in cases under a contract of charter-party.⁴ There was no conflicting Scottish authority. The dictum of Lord Fitzgerald in *Lord Elphinstone v. Monkland Iron and Coal Company, Limited*,⁵ was *obiter* and unsupported. *Johnstone's Trustees v. Johnstone*⁶ was really a case of liquidate damages, and had been misapplied both by Mr Bell⁷ and in the case of *Hyndman's Trustees v. Miller*.⁸ It was admitted that the defender might only succeed in recovering less than the penalty. There was no reason in principle why he should not recover more if the facts justified his claim. Payment of the penalty did not excuse non-performance of the contract,⁹ and the only purpose of a penalty clause was to provide an easy remedy for the injured party if he chose to take advantage of it.¹⁰ This was not a case in which the defender could get a decree *ad factum præstandum*, and therefore he was entitled to damages.

¹ Ersk. Inst. iii. 3, 86.

² Reynolds v. Bridge, (1856) 6 E. & B. 528, *per* Coleridge, J., at p. 541.

³ Clydebank Engineering Co. v. Yequierdo y Castaneda, (1904) 7 F. (H. L.) 77; Bell's Com. (7th ed.), vol. i., p. 699.

⁴ Chitty on Contracts (15th ed), p. 818; Mayne on Damages (8th ed.), p. 289; Winter v. Trimmer, (1763) 1 W. Bl. 395; Lowe v. Peers, (1768) 4 Burrows, 2225, *per* Lord Mansfield, at p. 2228; Harrison v. Wright, (1811) 13 East, 343; *cf.* Stroms Bruks Aktie Bolag v. Hutchison, (1904) 6 F. 486, *per* Lord M'Laren, at p. 493.

⁵ (1886) 13 R. (H. L.) 98, at p. 108.

⁶ Jan. 19, 1819, F. C.

⁷ Prin. sec. 34.

⁸ (1895) 33 S. L. R. 359.

⁹ Gold v. Houldsworth, (1870) 8 Macph. 1006.

¹⁰ Craig v. M'Beath, (1863) 1 Macph. 1020, *per* Lord Justice-Clerk Inglis, at p. 1022.

Argued for the respondent;—(1) There was no answer to the pursuer's claim for delivery of the deposit-receipt. The money had been placed in bank to secure implement of a special term of the agreement which was separable from the other conditions, and as implement of this term was now out of the question, the money should be returned. In effect the defender was trying to compensate a claim under article 2 of the agreement by a counter claim under article 4. This would not have been a good defence at common law,¹ and it was not made a good defence by the Sheriff Courts (Scotland) Act, 1907.² Articles 2 and 4 of the agreement were not one contract, but two collateral contracts. (2) The defender's averments in support of his counter claims were irrelevant, and should not be remitted to probation. (3) In any event, the defender's claim for damages was limited to £50, which sum the pursuer was willing to pay. The sum mentioned in article 5 was not a penalty, but was the agreed-on measure of damages for breach of the agreement. In some cases a sum was stipulated *in terrorem*, to frighten the parties into performance, and had no relation to the actual or probable amount of damage.³ Such penalties were never enforced by way of punishment, and if necessary would be mitigated by the Court.⁴ In other cases the sum stipulated was the measure of damage, and would be awarded without modification.⁵ In deciding into which of these classes a particular clause fell, the use of the word "penalty" was not decisive.⁶ In the present case £50 fairly represented the probable loss which either party would sustain by a breach of the agreement. It made no difference that the contract contained several stipulations of varying importance.⁷ But even if article 5 were to be construed as a penalty clause, the defender could not recover more than the sum mentioned. A penalty clause limited the damage, though it did not assess it.⁸ The English authorities were not a safe guide, because specific performance, as an ordinary remedy, was not recognised in English, as it was in Scots law.⁹

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At advising on 27th June 1912,—

LORD SALVESSEN.—In this case the Sheriff-substitute has found it possible to dispose, without inquiry, of all the conclusions of the action, with the exception of the demand for accounting made by the defender. As I am

¹ Bell's Prin. sec. 573.

² 7 Edw. VII. cap. 51, First Sched., Rule 55; Christie v. Birrells, 1910 S. C. 986.

³ Bell's Com. (7th ed.), vol. i., p. 700.

⁴ Craig v. M'Beath, 1 Macph. 1020, *per* Lord Justice-Clerk Inglis, at p. 1022.

⁵ Johnston v. Robertson, (1861) 23 D. 646; Reilly v. Jones, (1823) 1 Bing. 302.

⁶ Johnston v. Robertson, 23 D. 646, *per* Lord Cowan, at p. 654.

⁷ Hinton v. Sparkes, (1868) L. R., 3 C. P. 161; Wallis v. Smith, (1882) 21 Ch. D. 243.

⁸ Johnstone's Trustees v. Johnstone, Jan. 19, 1819, F. C.; Hyndman's Trustees v. Miller, 33 S. L. R. 359; Lord Elphinstone v. Monkland Iron and Coal Co., Limited, 13 R. (H. L.) 98, *per* Lord Fitzgerald, at p. 108; Bell's Prin. sec. 34.

⁹ Stewart v. Kennedy, (1890) 17 R. (H. L.) 1, *per* Lord Herschell, at p. 5.

June 27, 1912. unable to reach the same result, I think it necessary to deal with the case in some detail.—[His Lordship then narrated the facts, and proceeded]—
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As regards the first crave the Sheriff-substitute has repelled the defences as irrelevant, and ordained the defender to endorse and deliver the deposit-receipt referred to ; as regards the second crave he also repelled the defences as irrelevant, and found the defender liable in payment of £58, 10s. in name of wages, although the agreement does not provide for the rate of wages in the event which has happened. He has further dismissed *in toto* the counter claim for £79, 5s. 2d., and also the counter claim for £250 except to the extent of £50 sterling. He has thus disposed of the whole cause with the exception of the defender's claim for an accounting with regard to which there is no dispute.

I am unable to agree with the Sheriff-substitute in any of his conclusions. The averments of negligence are, I think, quite relevant to be remitted to probation.—[His Lordship then dealt with the averments of mismanagement.]

There is more difficulty as to whether the pursuer is entitled to have the deposit-receipt endorsed and delivered to him. His counsel urged that this was a separable part of the agreement, and that the money having been consigned as security for the valuation price of the furniture, fittings, and stock in the hotel, now that he had resolved not to go on with the agreement or to take over these effects, the defender had no right to keep the pursuer out of his own money. It is true that the principle of compensation or set-off is not applicable to such a claim. But there is another principle equally well recognised which was expressed by Lord Justice-Clerk Moncreiff in *Turnbull v. M'Lean*¹ as follows:—"I understand the law of Scotland, in regard to mutual contracts, to be quite clear—first, that the stipulations on either side are the counterparts and the consideration given for each other ; second, that a failure to perform any material or substantial part of the contract on the part of one will prevent him from suing the other for performance ; and third, that where one party has refused or failed to perform his part of the contract in any material respect, the other is entitled either to insist for implement, claiming damages for the breach, or to rescind the contract altogether—except so far as it has been performed." The present case seems to me to fall within these rules. The pursuer has declined to perform his contract altogether, and he cannot therefore call upon the defender to fulfil his obligations until the latter has had an opportunity of constituting his claim of damages for the breach of the contract. As Lord Benholme said in *Turnbull's* case,¹—"In mutual contracts there is no ground for separating the parts of the contract into independent obligations, so that one party can refuse to perform his part of the contract, and yet insist upon the other performing his part. The unity of the contract must be respected." I am therefore of opinion that the Sheriff-substitute has erred in granting a decree ordaining the defender *de plano* to endorse the deposit-receipt.

The remaining part of the judgment raises an interesting question of law about which there has been an apparent variety of judicial dicta. The last

¹ 1 R. 730.

article in the mutual agreement between the parties is expressed in these terms:—"Fifth. Both parties hereto bind and oblige themselves to implement their part of this agreement under the penalty of fifty pounds, to be paid by the party failing to the party performing or willing to perform over and above performance." The Sheriff-substitute has held that this sum of £50 represents the maximum to which the defender is entitled in respect of the admitted breach by the pursuer of his part of the agreement; and that as the pursuer is willing to allow this sum of £50 to be deducted from any claim which he may establish to wages, no inquiry need be led as to the loss the defender has actually or potentially suffered. He says: "Realising the speculative nature of the enterprise, the parties were careful in advance to translate the situation of a breach into a figure, and that is the figure for which the pursuer admits liability." I understand the learned Sheriff to mean by this that the parties intended that the sum of £50 should represent the liquidate damages in case of a breach by either; and, if he were correct in so thinking, there is no fault to be found with his law. The intention, however, must be gathered from the words of the contract; and I confess that I do not find anything in the penalty clause to suggest that the sum of £50 there mentioned was an agreed-on pre-estimate of the damage which either might sustain by the failure of the other to perform his part of the contract. In the first place, the word used is "penalty" and not liquidate damages. I attach some importance to this, although the Courts have in special circumstances construed the word "penalty" as equivalent to liquidate damages, and conversely. A more important point is, however, that the penalty is to be "over and above performance." Now, it is also true that these words will be implied where the Court is of opinion that the sum agreed on for breach of the agreement is so agreed on by way of penalty merely, and is not to be treated as liquidate damages; but I do not know of any case, and we were referred to none, where such words, when expressed, were held to be consistent with an intention of parties to fix the liquidate damages. An even more important consideration in determining whether the sum stipulated to be paid in the event of a breach of contract is liquidate damages or merely represents a penalty, is to ascertain whether the sum conditioned to be paid bears (in the words of Lord Justice-Clerk Inglis in *Craig*¹), "a clear proportion to the amount of loss sustained by the party entitled to claim it"; and very similar language was used by some of the noble Lords who decided the case of *Elphinstone*.² The Lord Chancellor (Lord Herschell), in holding that the stipulated sum in that case represented liquidate damage, said: "The agreement does not provide for the payment of a lump sum upon the non-performance of any one of many obligations differing in importance. It has reference to a single obligation, and the sum to be paid bears a strict proportion to the extent to which that obligation is left unfulfilled." In this case the very opposite holds good. The agreement imposes on the pursuer many obligations of an entirely different kind. There is first an undertaking that he shall duly lodge and follow forth an application for a transfer of the licence to himself. Then he is taken bound to take over at mutual valuation certain furniture, fittings, and stock.

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¹ 1 Macph. 1020.

² 13 R. (H. L.) 98.

June 27, 1912. Further, he undertakes to act as the defender's manager, and account to him for the whole drawings of the hotel—also week by week to consign the surplus of drawings over expenses in bank in name of the defender, and to conduct the hotel on a proper businesslike footing, and do nothing likely to prejudice the licence. For a breach of any of these obligations—some of them of a kind which might not involve actual loss, and others a loss that could certainly not be material, as, for instance, the failure to consign in a single week the surplus drawings—the same penalty is prescribed. But I need not pursue the subject, for I do not think the clause with which I am dealing could have been more clearly expressed as a penalty clause or one which is less calculated to indicate an intention of the parties to treat the stipulated sum as liquidate damages, whether in respect of a partial or entire breach of the obligations undertaken by the pursuer.

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Even on the assumption, however, that this is a penalty clause, the pursuer argued that while it would be open to him to call upon the defender to prove his actual damage, the latter can never recover more than the stipulated penalty ; although he (the pursuer) is not bound to pay more than the actual damage if it be less. This is a somewhat startling proposition, but it is not unsupported by authority. The earliest case to which we were referred on the subject is that of *Johnstone's Trustees*.¹ In that case a property was exposed for sale under articles of roup which obliged the highest offerer within thirty days after the day of roup to grant a bond for the price offered by him to the satisfaction of the exposers, with a fifth part more than the price of liquidate penalty in case of failure ; “and if any purchaser shall fail in granting the said bond, he shall, besides incurring a penalty of a fifth part more than the price, forfeit his interest in the purchase ; and it shall be in the option of the exposers to compel the purchaser to implement his bargain or to hold the said lands and others themselves as being unsold, and of new to expose them to sale.” Dr Johnstone bought part of the lands at an upset price of £15,646, but having afterwards relinquished the purchase, the trustees brought an action against him concluding for a fifth of the purchase price, being the penalty incurred by his failure in implementing the conditions of the articles of roup, and also for £5000 damages. Lord Reston (Ordinary) found that the amount of the damage must be the difference between the sum of £15,646, the upset price at which the lands were purchased for behoof of Dr Johnstone, and the amount of the price which should be received by the pursuers when a sale of the whole lands had been effected, together with the difference between the interest on the price offered and on the actual proceeds of the lands. It is thus plain that he treated the clause on which the pursuers founded, not as one by which the damages were liquidated, but as a proper penalty, notwithstanding that it bore a certain relation to the price of the property. The report further bears that his Lordship afterwards found that the sum exigible from the defender could in no event exceed the penalty. A reclaiming petition was presented by the trustees, but the Court refused the petition, without answers. Unfortunately the report does not contain the opinions of the Judges in the Inner House.

¹ Jan. 19, 1819, F. C.

This case was followed by Lord Wellwood in the Outer House in the case June 27, 1912. of *Hyndman's Trustees*¹; although his Lordship stated that, but for that Dingwall v. Burnett. case, his decision would have been the other way. His decision was not Lord Salvesen. reclaimed against; but one main reason for not presenting a reclaiming note (as I happen to know, from having conducted the case in the Outer House) was that it was doubtful if even the sum decerned for could be recovered against the defender. It is further not to be left out of view that Mr Bell in his Principles (section 34) treats the case as authoritative; for he lays down as a proposition in relation to stipulated damages that "the obligation may be fortified by a penalty which is held to cover but not to assess the damage, to entitle the jury to find under it the true amount of damage not exceeding the penalty." Lastly, Lord Fitzgerald's opinion in the case of *Elphinstone*² contains the following passage: "We may take it, then, that by the law of Scotland the parties to any contract may fix the damages to result from a breach at a sum estimated as liquidated damages; or they may enforce the performance of the stipulations of the agreement by a penalty. In the first instance the pursuer is, in case of a breach, entitled to recover the estimated sum as pactional damages irrespective of the actual loss sustained. In the other, the penalty is to cover all the damages actually sustained, but it does not estimate them, and the amount of loss (not, however, exceeding the penalty) is to be ascertained in the ordinary way." This latter dictum was not necessary for the decision of the case before the House, as the sum stipulated in the event of a breach was held to be liquidated damages; and none of the other learned Lords referred to it in their opinions.

It is to be noted that in *Johnstone's* case³ the pursuers concluded for the penalty although they had a separate and additional conclusion for damages. They were thus founding on the penalty clause, and it may be that in such circumstances they were not entitled to ask any more than the penalty. Possibly this may afford a key to the decision, and also to the dicta of Mr Bell and Lord Fitzgerald. If that is not the true view, I confess that I am quite unable to reconcile these authorities with the other principle which has been firmly fixed in our law by a series of decisions and which is thus stated by Mr Bell in his Principles (section 34), "that the stipulation of a penalty (unless when expressly so declared) is not alternative, and does not discharge the obligation on payment of the penalty." I need only refer to one case as illustrating this principle, that of *Gold*.⁴ Suppose in the present case that, after the pursuer had obtained a transfer of the licence and had performed, or was willing to perform, all the obligations incumbent on him by the agreement, the defender proposed to let the hotel to some other person at a higher rent. According to the principle of the case last cited, would the pursuer not have been entitled to insist on specific implement, or could the defender have tendered him a sum of £50 sterling as in full of the damages claimable through his breach of contract? In my opinion he could plainly not do so. Or again, to take the decision in the case of *Johnstone's Trustees*,⁵ suppose the trustees

¹ 33 S. L. R. 359.

³ Jan. 19, 1819, F. C.

² 13 R. (H. L.) 98, at p. 108.

⁴ 8 Macph. 1006.

June 27, 1912. had attempted to resile from their bargain, is it not plain that it would have been open to the purchaser to have obtained a decree ordaining them to execute a disposition on payment of the price, or in default of their doing so granting an adjudication in implement of the sale? To my mind it is obvious that this latter remedy would have been open to the purchaser. It is true that in the case of the purchaser who resiles from his contract the remedy of a decree *ad factum præstandum* is not open, nor would it be available to the defender here. The only performance of the contract which can be obtained in such a case is full compensation for the breach. I cannot conceive any ground upon which it can be held consistently with principle that one of the parties should escape all the consequences of his breach on payment of a stipulated sum which is stated by way of penalty, when the other may be compelled to implement the contract in its entirety. That is to read a penalty clause, which *ex hypothesi* does not assess the damage, as nevertheless assessing it where the actual damage sustained is more than the stipulated sum.

I am fortified in this view by the circumstance that the rule has been fixed in England in a sense opposite to that indicated in the Scottish authorities I have quoted. In the case of *Harrison v. Wright*¹ a charter-party had been entered into between the parties for a voyage from Sweden to Hull. It contained a clause, "penalty for non-performance, £1300." The shipowner afterwards refused to allow the vessel to sail, and the charterers claimed £3000 damages for breach of contract. An arbiter awarded the plaintiffs £1860, though it was objected before him that not more than £1300, the amount of the penalty as liquidate damages, could be recovered. Lord Ellenborough, following a prior decision of Lord Mansfield in *Winter v. Trimmer*,² held that the penalty was auxiliary to enforcing performance of the contract, and that the party aggrieved might either take the penalty as his debt at law and assign his breach under the statute of William III. cap. 11, section 8, or he might bring his action for damages upon the breach of the contract, and that the arbitrator was warranted in awarding the sum which he had given to the plaintiffs. That decision has been recognised ever since as a correct statement of the law of England, and in the ordinary text-books on shipping and contracts the matter is treated as no longer open. Thus Mr Carver in "Carriage by Sea," section 722, says: "A clause such as 'penalty for non-performance estimated amount of freight' (or some fixed sum) is frequently found in charters, but practically it appears to have little effect. On the one hand, it does not limit the amount of damages which may be claimed; on the other hand, it does not entitle either party to claim the amount of the penalty for a partial breach of the contract." The decision of the Privy Council in the case of *Dimech v. Corlett*³ is not really inconsistent with the law as thus stated, although it was there held that, in the case of an entire non-performance of a contract of affreightment, the party aggrieved was entitled to recover as damages the full amount of freight stipulated for in the instrument. In effect the Court there decided that the estimated

¹ 13 East, 343.

² 1 W. Bl. 395.

³ (1858) 12 Moor P. C. Cases, 199.

amount of freight was to be dealt with as liquidate damages in the event of entire failure to perform the contract. In a later case, that of *Godard v. Gray*,¹ Blackburn, J., quoted with approval the following passage in Abbott on Shipping: "Such a clause is not the absolute limit of damages on either side; the party may, if he thinks fit, ground his action upon the other clauses or covenants, and may, in such action, recover damages beyond the amount of the penalty, if in justice they shall be found to exceed it. On the other hand, if the party sue on such a penal clause he cannot, in effect, recover more than the damage actually sustained." The decision in the case of *Craig*,² to which I have already referred, is not, as I read it, in the least degree inconsistent with the principle thus stated, but is entirely on the same lines. I think all the authorities that appear to be to a contrary effect in Scotland may be explained by the passages being elliptical and omitting what is clearly stated in the passage from Abbott, that a stipulated amount of penalty is the maximum amount recoverable if the party aggrieved sues on the penalty clause. It cannot be maintained that a different principle of construction is to apply to a contract of affreightment—which is, after all, the lease of a vessel—from that applicable to the lease of a heritable subject.

I have come, therefore, in the end to be very clearly of opinion that the laws of England and Scotland are the same as regards the matter; and that the defender is entitled to recover whatever loss he is able to qualify in respect of the pursuer's breach of contract. We ought, therefore, to recall the interlocutor appealed against; to repel the 1st, 4th, and 5th pleas in law for the pursuer and the second alternative of plea 7; and remit the case to the Sheriff-substitute to allow parties a proof of their respective averments.

Since this case was argued counsel for the pursuer has directed our attention to the case of *Webster v. Bosanquet*.³ I have accordingly considered the decision of the Privy Council, with the result that I do not think it in any way aids the pursuer's argument. The clause of the contract on which action was there taken is in marked contrast with the one which occurs in the contract between the parties here. It provided for a specified amount to be paid in the event of breach "as liquidated damages and not as penalty." The main value of the decision lies in this, that such a stipulation will be fairly construed; and that the stipulated sum of liquidate damages will not be due unless there has been a substantial breach of the contract; or, to put it another way, that the mere fact that on a literal construction of the clause it might be possible to say that it provided for payment of liquidate damages for any trifling breach was not to be held as converting it into a mere penalty clause, for the Courts must construe a contract according to the presumed intention of the contracting parties. The case lays down no new law but professedly follows the decision in the *Clydebank Engineering Company*,⁴ to which we were referred in the course of the argument. It does not support to any extent the view that when an action is laid on breach of contract the damages are to be held as limited to the amount stipulated in a proper penalty clause.

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¹ (1870) L. R., 6 Q. B. 139.

³ [1912] A. C. 394.

² 1 Macph. 1020.

⁴ 7 F. (H. L.) 77.

June 27, 1912. The LORD JUSTICE-CLERK and LORD GUTHRIE concurred.

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THE COURT pronounced this interlocutor:—"Sustain the appeal and recall the said interlocutor appealed against: Repel the 1st, 4th, and 5th pleas in law, as also the second head of the 7th plea in law, for the pursuer: Remit the cause to the Sheriff in order to allow the parties a proof of their respective averments, and to proceed therein as accords: Find the defender entitled to expenses since the date of the said interlocutor, and remit," &c.

DALGLEISH, DOBBIE, & Co., S.S.C.—A. C. D. VERT, S.S.C.—Agents.

No. 154. THE SCOTTISH SHIRE LINE, LIMITED, Appellants.—*Munro, K.C.*—*R. C. Henderson.*

June 27, 1912. DAVID CALLUM LETHAM (Surveyor of Taxes), Respondent.—*Sol.-Gen. Anderson—J. A. T. Robertson.*

Scottish Shire
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Revenue.

Revenue—Income-tax—Deductions for wear and tear—Unexhausted deductions—Purchase of old company by new company—Right of new company to unexhausted deductions—Finance Act, 1907 (7 Edw. VII. cap. 13), sec. 26 (3).

The Finance Act, 1907, enacts, section 26 (3), that, where full effect cannot be given to the deduction for wear and tear in any year owing to the profits chargeable with income-tax being less than the deduction, the part of the deduction to which effect has not been given "shall, for the purpose of making the assessment for the following year, be added to the amount of the deduction for wear and tear for that year."

A new company having purchased as a going concern the business of an old company was assessed for income-tax on the average profits of the old company for the three years preceding the purchase. The amount of deductions for wear and tear to which the old company was entitled during these three years had not been given effect to in full, owing to the fact that they exceeded the amount of the taxable income of the old company during that time. *Held* that the new company was entitled to deduct from its taxable income the balance of the deductions allowable to the old company.

Exchequer
Cause.
2D DIVISION.

THE SCOTTISH SHIRE LINE, LIMITED, was assessed for income-tax under Schedule D of the Income-Tax Acts * for the year ending 5th

* The Income-Tax Act, 1842 (5 and 6 Vict. cap. 35), enacts:—Fourth Rule applying to Cases 1 and 2 of Schedule D of sec. 100. "If amongst any persons engaged in any trade, manufacture, adventure, or concern, or in any profession, in partnership together, any change shall take place in any such partnership, either by death, or dissolution of partnership as to all or any of the partners, or by admitting any other partner therein before the time of making the assessment, or within the period for which the assessment ought to be made under this Act, or if any person shall have succeeded to any trade, manufacture, adventure, or concern, or any profession, within such respective periods as aforesaid, the duty payable in respect of such partnership, or any of such partners, or any person succeeding to such profession, trade, manufacture, adventure, or concern, shall be computed and ascertained according to the profits and gains of such business derived during the respective periods herein mentioned, notwithstanding such change therein or succession to such business as aforesaid. . . ."

The Customs and Inland Revenue Act, 1878 (41 and 42 Vict. cap. 15), enacts:—Sec. 12. "Notwithstanding any provision to the contrary contained in any Act relating to income-tax, the commissioners for general or

April 1911 on the sum of £31,737, less £23,691 (increased by con- June 27, 1912.
sent of parties to £23,885) allowed for wear and tear for the year of
assessment, and this assessment was sustained by the Commissioners ^{Scottish Shire}
on appeal. The Company, who maintained that the balance of the ^{Line, Limited,}
assessment, viz., £7852, should be allowed as a further deduction for ^{v. Inland}
wear and tear under the provisions of the Finance Act, 1907 (7 Edw. ^{Revenue.}
VII. cap. 13), section 26 (3), requested and obtained a case for the
opinion of the Court.

The case set forth the following facts as proved or admitted :—

“1. The appellant Company was incorporated on 7th January 1910, under the Companies (Consolidation) Act, 1908, as a private company, limited by shares.

“2. The objects of the appellant Company as set forth in the third article of its memorandum of association are, *inter alia*, as follows :—
‘(a) To acquire by purchase, as a going concern, the business of the Elderslie Steamship Company, Limited, registered under the Companies Acts, 1862 to 1880, and having its registered office in Glasgow, and the goodwill, and the whole heritable and real, and the

special purposes shall, in assessing the profits or gains of any trade, manufacture, adventure, or concern, in the nature of trade, chargeable under Schedule D, or the profits of any concern chargeable by reference to the rules of that Schedule, allow such deduction as they may think just and reasonable as representing the diminished value by reason of wear and tear during the year of any machinery or plant used for the purposes of the concern, and belonging to the person or company by whom the concern is carried on. . . .”

The Finance Act, 1907 (7 Edw. VII. cap. 13), enacts :—

Sec. 26. “(1) For the purpose of enabling deductions for wear and tear to be allowed by the additional Commissioners, claims in respect of those deductions shall be included in the annual statement required to be delivered under the Income-Tax Acts of the profits or gains of the concern for the purpose of which the machinery or plant is used, and the additional Commissioners in assessing those profits and gains shall make such allowances in respect of those claims as they think just and reasonable.

“(2) No deduction for wear and tear or repayment on account of any such deduction shall be allowed in any year if the deduction when added to the deductions allowed on that account in any previous years to the person by whom the concern is carried on, will make the aggregate amount of the deductions exceed the actual cost to that person of the machinery or plant, including in that actual cost any expenditure in the nature of capital expenditure on the machinery or plant by way of renewal, improvement, or reinstatement.

“(3) Where, as respects any trade, manufacture, adventure, or concern, full effect cannot be given to the deduction for wear and tear in any year owing to there being no profits or gains chargeable with income-tax in that year, or owing to the profits or gains so chargeable being less than the deduction, the deduction or part of the deduction to which effect has not been given, as the case may be, shall, for the purpose of making the assessment for the following year, be added to the amount of the deduction for wear and tear for that year and deemed to be part of that deduction, or, if there is no such deduction for that year, be deemed to be the deduction for that year, and so on for succeeding years.

“(4) In this section the expression ‘deduction for wear and tear’ means the deduction allowed, or which would be allowed, under section 12 of the Customs and Inland Revenue Act, 1878, as representing the diminished value, by reason of wear and tear during the year, of machinery or plant used for the purposes of any trade, manufacture, adventure, or concern.”

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whole moveable and personal property, assets, and rights of the said company; to take over the current contracts of the said company, and to undertake all or some of the burdens and obligations of the business so acquired, and to carry on and develop the said business. (b) To carry on the business of shipowners in all its branches, together with any business or acts or transactions which are either incidental thereto, or which shipowners or shipping companies are wont to carry on or do in connection with, or as auxiliary to, the business of owning and working ships.' The share capital of the appellant Company is £225,000, divided into 18,500 ordinary shares of £10 each, and 4000 five per cent cumulative preference shares of £10 each, of which 12,493 ordinary shares, fully paid, have been issued.

" 3. The Elderslie Steamship Company, Limited (hereinafter referred to as the old company), was incorporated on 27th August 1884, under the Companies Acts, 1862 to 1880, with an authorised capital of £45,000, which was ultimately increased to £200,000, divided into 10,000 shares of £20 each, of which 9375 had been issued and had been paid up to the extent of £16 per share; and by special resolutions passed and confirmed at extraordinary general meetings of members of the old company, held respectively on 10th December 1909, and 4th January 1910, it was resolved that the old company be wound up voluntarily, and that the liquidator be authorised to sell the assets and undertaking of the old company to a new company.

" 4. By agreement, dated 21st January 1910, between the appellant Company and the old company and the liquidator thereof, a copy of which is appended hereto, and forms part of this case, the appellant Company purchased, as a going concern, the whole of the business of the old company, including the fleet of steamships and all other assets.

" 5. The profits of the steamships of the old company have always been treated as a whole, and only one assessment has been made annually in respect of the whole fleet.

" 6. The prime cost of these steamships was £568,473; the deductions for wear and tear up to 1910-11 (inclusive) amounted to £249,486, of which £25,715 could not be given effect to owing to the profits chargeable for 1907-8, 1908-9, and 1909-10 being less than the deductions. The written-down value of the steamships for income-tax purposes was £318,987, after deducting from the prime cost the full depreciation of £249,486, which includes the before-mentioned £25,715 of unexhausted depreciation.

" 7. The steamships were acquired by the appellant Company at prices totalling £267,400, being the prices standing in the books of the old company.

" 8. The shareholders in the appellant Company and the old company and their respective holdings are as follows:—

Appellant Company.

Names of Shareholders.	No. of Shares.	Value £.
Turnbull, Martin, & Company,	12,051	120,510
David Inglis, nominee of Turnbull, Martin, & Company,	1	10
James Caird,	296	2,960
Henry H. Dawes,	133	1,330
Mrs H. A. Caird,	12	120
	<u>12,493</u>	<u>£124,930</u>

Old Company.

Names of Shareholders.	No. of Shares.	Value £.	June 27, 1912.
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Turnbull, Martin, & Company,	4,510	72,160	
Mrs Lang on behalf of Turnbull, Martin, & Company, in security for loan,	1,799	28,784	
D. C. Leck and Others on behalf of Turnbull, Martin, & Company, in security for loan,	2,855	45,680	
James Caird,	107	1,712	
Henry H. Dawes,	74	1,184	
W. A. Moore,	15	240	
A. S. M'Lean,	10	160	
Mrs H. A. Caird,	5	80	
	<u>9,375</u>	<u>£150,000</u>	

"9. The assessment was based on the average profits shown by the accounts of the Elderslie Steamship Company, Limited, for the three years ending 31st December 1909.

"10. During the three years ending the 5th April 1910 the sums allowable to the old company in respect of the annual wear and tear of the fleet were respectively £25,007, £24,564, and £24,111, but in respect that the old company's taxable income during each of those years was less than the said sums allowable, the amounts actually allowed were respectively £17,123, £16,554, and £14,290. The balance over the said three years not allowed was thus £25,715, of which £7852 is now claimed by the appellant Company as an additional allowance for the year ending 5th April 1911. . . ."

The case further stated ;—"The Commissioners, on consideration of the facts and arguments submitted to them, refused the appeal and confirmed the assessment, as they were of opinion that the appellant Company succeeded to the business of the old company within the meaning of the Fourth Rule of Rules applying to Cases 1 and 2 of Schedule D of the Act 5 and 6 Vict. cap. 35, section 100, and that there was no authority for allowing the appellant Company a deduction for wear and tear for a period during which their predecessors carried on the business."

The case was heard before the Second Division on 6th June 1912.

Argued for the appellants ;—"In assessing the appellants for income-tax on the three years' basis under Rule 4 of Cases 1 and 2, Schedule D, Income-Tax Act, 1842, section 100, the Commissioners had negatived the view that this was a new business set up within three years. That rule contemplated identity of the business, irrespective of any change in the personnel, and the words "trade or concern" used in section 26 (3) of the Finance Act, 1907, were to be construed in the same way as applying to the business and not to the persons who carried it on.¹ As the Crown for the purpose of assessment had treated the new company as being identical with the old company, it was bound to treat the two companies as identical in a question as to the deductions allowable. In point of fact, except in name and in the proportions in which the shares were distributed among the shareholders, the two companies were, to all intents and purposes,

¹ Ryhope Coal Co., Limited, v. Foyer, (1881) 7 Q. B. D. 485, *per* Grove, J., at p. 494.

June 27, 1912. identical. There was no reason for maintaining that depreciation was a personal allowance; and to construe the section thus would lead to absurd results, *e.g.*, the assumption of a clerk as a partner with a small share in the business would deprive the firm of its claim for depreciation. These deductions would have been allowed to the appellants' predecessors, and the fair reading of the section was that they were allowable to the person or company by whom in succession the business was carried on. Where it was intended to limit the right to deductions to individuals the language of the statutes was quite specific, as in subsection 2 of section 26 and in the Customs and Inland Revenue Act, 1878, section 12. There was nothing to show that the appellants had received any allowance on the purchase price for the diminished value claimed, or that they had not purchased the claim of the Elderslie Company against the Inland Revenue like any other asset. In any event, the respondent had nothing to do with arrangements made between the Elderslie Company and the appellants as to the disposal of these claims. Both in equity and on the statutes the respondent was wrong.

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Argued for the respondent;—Income-tax was a personal charge, and the deductions allowed for tear and wear were personal allowances. The assessment was made in advance, and was levied on the profits the taxpayer received, or expected to receive, in the year of assessment, *i.e.*, on the profits of the future year. It was not equitable that a purchaser should be allowed to deduct depreciation which had nothing to do with the property bought. The question was one of succession in each case, and the test was whether a business or only an asset of a business was purchased. This was always a question of circumstances.¹ The general effect of section 26 of the Finance Act, 1907, was that the deduction was to be allowed to the owner of the machinery who was carrying on the business with it. With each change in the partnership a new depreciation account was opened. Though for the purpose of assessing income-tax the statute allowed three years' profits of the old business to be taken as a basis, there was no similar provision with regard to depreciation. The relevant sections of the statutes clearly contemplated a personal account for depreciation, based on the depreciation which had actually taken place during the new ownership, and extending up to the price that had been paid for the property. The effect of this was that each new owner got a new fund for depreciation which was not open to his predecessor. In point of fact the whole depreciation up to the date of the purchase was accounted for, so far as the purchaser was concerned, in the diminished price he had paid for the depreciated assets. Subsection 4 of section 26 of the Finance Act, 1907, referred back to subsection 12 of the Customs and Inland Revenue Act, 1878, which expressly referred to machinery or plant "belonging to the person or company by whom the concern is carried on."

At advising on 27th June 1912,—

LORD DUNDAS.—In this case the Scottish Shire Line, Limited, Glasgow, appeal against an assessment to income-tax for the year 1910—being the year ending 5th April 1911—upon a sum of £7852. That sum is brought

¹ John Wilson & Son, Limited, v. Inland Revenue, (1895) 23 R. 18; Bell v. National Provincial Bank of England, [1904] 1 K. B. 149; Watson Brothers v. Inland Revenue, (1902) 4 F. 795.

out as the difference between £31,737, which represents the average profits June 27, 1912. of the Company (or rather of their predecessors in trade) in the years 1907, 1908, and 1909, and the amount allowed by the Commissioners (as increased by consent of parties) as a deduction for wear and tear in the year of assessment, viz., £23,885. The appellants claim that this difference of £7852 should be allowed as a further deduction for wear and tear, under the provisions of the Finance Act, 1907, section 26 (3). The Commissioners have negatived the claim. Hence the present appeal.

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—
Lord Dundas.

The facts proved or admitted are fully set out in the case. The appellant Company was incorporated in 1910 for the purpose of taking over as a going concern and carrying on the business of the Elderslie Steamship Company, Limited. It is not disputed that the appellants' business is the same business, though the legal *persona* is different; that the shareholders are practically (though not identically) the same; and that the assessment for the year 1910 was based on the average profits shown by the accounts of the Elderslie Steamship Company for the three years ending 31st December 1909. It is common ground that, if the present question had arisen between the Crown and the Elderslie Company, the claim for deduction would be good.

The statutory enactments bearing on the matter are printed in the case. By section 12 of the Customs and Inland Revenue Act, 1878, the Commissioners were directed to allow such deduction as they might think just and reasonable as representing the diminished value by reason of wear and tear during the year of any machinery or plant used for the purposes of the concern, "and belonging to the person or company by whom the concern is carried on." The Finance Act, 1907, section 26 (3), provides that "where as respects any trade . . . or concern, full effect cannot be given to the deduction for wear and tear in any year . . . owing to the profits or gains" chargeable with income-tax "being less than the deduction, the deduction or part of the deduction to which effect has not been given, as the case may be, shall, for the purpose of making the assessment for the following year, be added to the amount of the deduction for wear and tear for that year and deemed to be part of that deduction . . . and so on for succeeding years." It is on the subsection from which I have just quoted that the appellants found.

It was urged for the Crown that income-tax is a personal tax; that the deduction for wear and tear is a personal allowance; and that the appellants are not entitled to an allowance in respect of the deductions for wear and tear to which full effect could not be given in preceding years while the plant and machinery were the property of their predecessors. I cannot accept this view. The language of the subsection is conceived in broad and general terms and does not (I must assume, intentionally) strike any personal note. The references in subsection 2 to the "person" seem important rather by way of contrast than as supporting the Crown's contention. Again, subsection 4, while it takes one back to section 12 of the 1878 Act, does not repeat, but omits, the words of personal limitation with which that section concludes. The Crown has treated the appellant Company as the old company by taking that company's profits during the preceding years as the basis for assessing the appellants' profits for 1910. I think it would be

June 27, 1912. **Scottish Shire Line, Limited, v. Inland Revenue.** anomalous if we were to permit the Crown to treat the appellants as a new and different concern when it comes to the matter of the wear and tear deduction. For the reasons now shortly summarised, I think the determination of the Commissioners was wrong, and that the appellants are entitled to succeed.

LORD SALVESEN.—The material facts in this case are within short compass. The appellants' company was formed in January 1910 for the purpose of acquiring by purchase as a going concern the business of the Elderslie Steamship Company, Limited, and the whole assets of that company, undertaking at the same time all its liabilities. The shareholders of the new company were substantially the same as those of the old company, but it is not disputed that it constituted a different *persona*.

During the three years ending 5th April 1910 the Elderslie Company were entitled to deduct from their taxable income the sums of £25,007, £24,564, and £24,111 in respect of the annual wear and tear of their fleet; but their taxable income was less than the depreciation by £25,715 over the three years.

It is common ground that the new company succeeded to the concern belonging to the Elderslie Company within the meaning of the Fourth Rule applying to Cases 1 and 2 of Schedule D, Income-Tax Act, 1842, section 100; and accordingly fell to be assessed on the average profits and gains of the former company during the three years ending 5th April 1910. It is also common ground that if there had been no change of *persona* the Elderslie Company would, in returning their profits on this basis, have been entitled to deduct not merely depreciation for the year in which the duty fell to be paid, but also, under the Finance Act, 1907, section 26, subsection 3, the sum of £7852 as a further deduction for wear and tear. The question in this case is whether, owing to the change of *persona*, this deduction is inadmissible in favour of the appellants; or, in other words, whether, as counsel for the Inland Revenue argued, the additional deduction for wear and tear is an allowance personal to the particular company or copartnership with respect to the depreciation of whose property the claim has arisen. The Commissioners decided that the appellants succeeded to the business of the old company within the meaning of the Fourth Rule already referred to, "and that there was no authority for allowing the appellant Company a deduction for wear and tear for the period during which their predecessors carried on the business."

The main argument in support of this decision was rested on the Customs and Inland Revenue Act, 1878, section 12, which empowers the Commissioners to allow such deductions from the profits of any concern "as they may think just and reasonable as representing the diminished value by reason of wear and tear during the year of any machinery or plant used for the purposes of the concern and belonging to the person or company by whom the concern is carried on." If there were no further provision, I agree with the respondent that all that the appellants would be entitled to deduct would be depreciation in respect of wear and tear on plant of which they were the owners, and this would of course exclude the additional deduction which they are now claiming. But subsection 3 of section 26 of the

Finance Act of 1907 gives the taxpayer the right to carry forward against June 27, 1912. assessable income any deduction to which effect had not been given owing to the profits or gains being less than the deduction. That provision is absolutely general, and there is no proviso that it is not to apply in the case of a person who has succeeded to any concern, and is thus liable to be assessed according to the profits of his predecessor's business. This limitation is said to be implied by subsection 4, which defines the expression "deduction for wear and tear" as "the deduction allowed . . . under section 12 of the Customs and Inland Revenue Act, 1878, as representing the diminished value, by reason of wear and tear during the year, of machinery or plant used for the purposes of any trade, adventure, or concern." It was argued that this reference to section 12 imported the last clause of the section, and excluded any claim for depreciation except in respect of property which belonged to the claimants.

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Lord Salvesen.

I am unable to assent to this argument. Section 12 of the 1878 Act is only referred to in order to define the expression "deduction for wear and tear"; and it is significant that the clause itself stops short just at the point where reference is made to the question of property in the other Act. Subsection 2 of the same section was also appealed to, but the words there used are extremely precise, and are made applicable only to the person by whom the concern is carried on so as to exclude expressly from its operation a new concern which has acquired or succeeded to the machinery and plant of a previously existing trader. The new concern is apparently not affected for the purposes of the claim for depreciation by the aggregate amount of depreciation which has been previously allowed to its predecessors. Where a distinction of this kind is intended to be made it would, therefore, appear that those who framed the Act knew how to express it in clear and distinct terms. On a construction of the various sections, therefore, I have come to be of opinion that there is no ground for holding, as the Commissioners have in effect done, that the privilege introduced by subsection 3 was personal to the old company and did not transmit to the appellants as their successors.

Even in a taxing statute it is legitimate to consider which of two possible constructions is most in accordance with the spirit and intention of the Act. Now the appellants admittedly fall to be assessed for income-tax exactly on the same footing as the Elderslie Company, to whose concern they succeeded. If so, can any reason be suggested why they should not be entitled to the same deductions from those profits as their predecessors, had they remained in business, admittedly would have been entitled to? None was suggested, except that they had acquired depreciated assets for which it was to be assumed that allowance had been made in fixing the purchase price. But the appellants are not liable to be taxed upon their capital, but only upon their profits, and these are not affected in any way for the purposes of income-tax by the amount of capital which they possess. The particular mode of assessing the profits of what is in form a new concern is adopted because of the substantial identity of the new concern with the one that has previously carried on business. If the respondent's argument is good for anything, it would result in this, that an entirely immaterial change in a partnership, either by the death of an existing partner, however

June 27, 1912. small his interest, or by the assumption of a new partner, who was entitled to a share of the profits however fractional, would deprive the remaining partners of the benefit of a deduction to which they were otherwise entitled. I cannot imagine that the Legislature had this in view. On the contrary, it seems to me that the mode of assessing the new concern provided for by the 1842 Act proceeds on the assumption of the substantial identity between it and its predecessor, and that there is no indication of any intention that the new concern is to pay income-tax upon a larger amount than would have been exigible from the old concern if it had continued unchanged in the persons of its owners. I have therefore come to the conclusion that we must reverse the determination of the Commissioners and allow the further deduction claimed by the appellants.

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—
Lord Salvesen.

LORD GUTHRIE.—I concur. It appears to me that the argument of the Surveyor of Taxes has neither probability nor equity in its favour, because he proposes to treat the appellant Company as identical with or as the successors of the Elderslie Steamship Company, Limited (called the old company in the case), for one revenue purpose, and neither as identical with nor as the successors of the old company for another and not remotely related revenue purpose. The question would be entirely different if the parties had been at issue on the question of the appellant Company's identity with or succession to the old company, but this question, so far as the Act of 1842 (Fourth Rule applying to Cases 1 and 2 of Schedule D) is concerned, is foreclosed by the action of the Surveyor, acquiesced in by the appellant Company. But this consideration can only throw an onus on the Surveyor, for many revenue cases have been decided in favour of the Revenue contrary both to all the probabilities of the case and to equity.

In the sections of the statute of 1907 (including the reference in section 26, subsection 4, to section 12 of the 1878 Act), founded on by the Surveyor, I do not find what he calls the "personal note," on which he relies. On the contrary, where, as in the latter part of section 12 of the 1878 Act, the personal note may be said to occur, the reference to that section in section 26, subsection 4, of the 1907 Act does not incorporate the whole of it, but only such part as contains no such note. I read the words "trade, manufacture, adventure, or concern," used in the 1907 Act, when providing for the mode of dealing with past due deductions, as co-extensive with the same words used in the 1842 Act, when providing for the ascertainment of profits and gains. I therefore think the Commissioners were in error in refusing the appeal.

LORD JUSTICE-CLERK.—When the debate in this case was closed, I formed a very strong opinion in favour of the view which has been expressed by your Lordships. I have had an opportunity of perusing the opinions which have been written, and they so entirely express my views that I do not propose to add anything.

THE COURT reversed the determination of the Commissioners, and allowed the deduction claimed by the appellants.

JAMES GIBSON, S.S.C.—SIR PHILIP J. HAMILTON GRIERSON,
Solicitor of Inland Revenue—Agents.

JOHN BROUN BROUN MORISON, Petitioner (Respondent).—

No. 155.

Sandeman, K.C.—J. Smith Clark.

MARSHALL MILLAR CRAIG (Curator *ad litem* to Eve Muriel de Annand

June 27, 1912.

Broun Morison and Another), Respondent (Reclaimer).—*Mac-*

Morison v.
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millan, K.C.—A. R. Brown.

Entail—Disentail—Consents—Entail executed under Private Act—Old or new entail—Entail Amendment Act, 1848 (11 and 12 Vict. cap. 36), sec. 28.

Under the directions of a trust-deed which came into operation in 1842 certain lands were entailed. In 1873 a private Act of Parliament was obtained, under which part of the lands were sold, and others purchased in substitution therefor and entailed on the same series of heirs and under the same conditions and prohibitions. The Act provided that the heirs entitled to succeed to the lands originally entailed, and to the lands directed by the Act to be entailed, should, “notwithstanding anything in this Act contained, be entitled to avail themselves of all the benefits and privileges conferred upon heirs of entail” by the Entail Acts then in force.

In a petition presented in 1912 by the heir of entail in possession for disentail of the substituted lands, the petitioner maintained that he was entitled to disentail under the conditions applicable to an “old” entail dated prior to 1848, viz., with the consent of the next heir only.

Held (1) that the lands in question were entailed under the authority of the private Act of 1873 and not of the trust-deed of 1842, and were accordingly held under a “new” entail; and (2) (*rev. judgment of Lord Skerrington*) that there was no provision in the private Act of 1873 that the lands in question were to be in the same position as regarded proceedings for disentail as the lands originally entailed; and, accordingly, that the lands could be disentailed only with the consent of the three nearest heirs.

ON 29th February 1912 John Broun Broun Morison presented a petition to the Court of Session for authority to disentail the estate of Murie in the county of Perth.

2D DIVISION.
Lord
Skerrington.

The petition stated that David Morison died in 1842 leaving a trust-disposition and settlement by which he conveyed his whole estate to trustees with directions to invest it in the purchase of lands and to settle the lands by deeds of strict entail upon a series of heirs. In pursuance of the trust the lands of West Errol, Whiteriggs, and Cupargrange were purchased, and deeds of entail were executed in 1856 and 1861. In 1866 the petitioner succeeded to the entailed estate of West Errol, Whiteriggs, and Cupargrange.

In 1873 a private Act of Parliament was obtained, called Morison's Estate Act, 1873.¹ The Act was entitled “an Act for vesting the lands and estate of Cupargrange, in the county of Perth, in trustees for the purposes of being sold, and for the purchase of other lands to be entailed and for other purposes,” and narrated that, as the estates of Cupargrange and of West Errol and Whiteriggs were distant from each other, and there was no mansion-house on either, it was expedient and for the advantage of the petitioner and the heirs of entail in the estate of West Errol and Whiteriggs to sell the estate of Cupargrange, and in lieu thereof to purchase a portion of the estate

¹ 36 and 37 Vict. cap. i.

June 27, 1912. of Murie, which adjoined the estate of West Errol and Whiteriggs and had a convenient mansion-house thereon, and that the estate of West Errol and Whiteriggs, and the portion of the lands of Murie thereto adjoining, would form one compact estate. The Act accordingly authorised the sale of Cupargrange and the purchase and entail of Murie upon the same series of heirs and subject to the same restrictions as the entail of Cupargrange. This was done, and in 1875 a deed of entail of Murie was executed in terms of the Act and recorded.

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The Act also contained this provision :—Section 20. “The said John Broun Broun Morison and the heirs of entail entitled to succeed to him in the said entailed estate of West Errol, and the said portion of the estate of Murie hereby directed to be entailed, shall, notwithstanding anything in this Act contained, be entitled to avail themselves of all the benefits and privileges conferred upon heirs of entail by any public Act now in force, and in particular by the Acts 11 and 12 Victoria, chapter 36; 16 and 17 Victoria, chapter 94; 23 and 24 Victoria, chapter 95; and 31 and 32 Victoria, chapter 84.”

The petition further stated that the petitioner was born in 1840, that the only heir of entail whose consent was required to the application was Guy Edward Broun Morison, his eldest son, who was born in 1867, and that he was willing to consent to the application.

The petition was served on Guy Edward Broun Morison. It was also served, according to practice, upon his two children, Eve Muriel de Annand Broun Morison and Rosemary de Annand Broun Morison, who were the two heirs for the time next entitled to succeed to the estate, and as they were both in pupillarity Mr M. Millar Craig, Advocate, was appointed to be their curator *ad litem*.

The curator *ad litem* having examined the process lodged a minute in which he submitted that the petition was incompetent in respect that in virtue of the Entail Acts, and in particular the Entail Act, 1848, sections 1, 2, 3, and 28,* and the Entail Act, 1882, section 3, the date of the entail under which the petitioner was heir of entail in possession of Murie was the date on which the Morison Estate Act, 1873, came into operation, namely, 21st July 1873, and that therefore the petitioner was not entitled to acquire the estate of Murie in fee-simple without the consents of his wards, and craved to be heard by counsel at the bar.

On 3rd April 1912 the Lord Ordinary on the Bills (Skerrington) pronounced this interlocutor :—“Finds that the Morison Estate Act, 1873, must be construed as enacting that the heirs of entail in possession of the estate of Murie, by virtue of the entail executed under authority of the Act, shall have the same benefits and privileges under the Public Entail Acts, 1848-1868, available to them with reference to that estate as were available to them with reference to the estate of West Errol, which was entailed pursuant to the trust-

* The Entail Amendment Act, 1848 (11 and 12 Vict. cap. 36), enacts :—Sec. 28. “For the purposes of this Act, the date at which the Act of Parliament, deed, or writing, placing such money or other property under trust, or directing such land to be entailed, first came into operation, shall be held to be the date at which the land should have been entailed in terms of the trust, and shall also be held to be the date of any entail to be made hereafter in execution of the trust, whatever be the actual date of such entail.”

deed of 1842, and which remained so entailed: Therefore repels the objection stated by the curator *ad litem* in said minute, and decerns." * June 27, 1912.

The curator *ad litem* reclaimed, and the case was heard before the Second Division (without Lord Salvesen) on 22nd June 1912. Morison v.
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Argued for the reclaimer;—The petition was presented on the supposition that the date of the entail under which Murie was held was the date of the original trust-deed in 1842.¹ This view was clearly wrong, and was not now insisted on. The trustees had exhausted their powers under the trust before the private Act was obtained in 1873. The date of the entail was accordingly either 1873, the date of the private Act,² or 1875, the date of the deed executed in terms of the Act.³ The only question which remained was whether there was any provision in the Morison Estate Act, 1873, to the effect that the new entail of Murie "should be taken as of the date of the old entail."⁴ Section 20 of the Act, upon which the petitioner relied, did not have this effect. It was merely a general

* "OPINION.—I have come to the conclusion that the petition to dis-entail the estate of Murie is competent, but I dissent from the assumption of fact made in the petition to the effect that the entail was executed under the authority of a trust-deed which came into operation in the year 1842. The very opposite is the truth. The entail was executed under the authority of a private Act of Parliament which came into force in the year 1873, and which rode rough-shod over the trust-deed of 1842 and what had lawfully followed thereon. It is, however, within the power of Parliament to enact that 'the thing which is not' shall be deemed to exist, and *vice versa*. I construe section 20 of the private Act not as idle verbiage, but as enacting that the heirs of entail in possession of the estate of Murie, by virtue of the entail to be executed under its authority, should have the same 'benefits and privileges' under the Public Entail Acts, 1848-1868, available to them with reference to that estate as were available to them with reference to the estate of West Errol, which had been entailed pursuant to the trust-deed of 1842 and which remained so entailed.

"In 1873 heirs of entail in possession by virtue of new entails enjoyed only a fraction of the 'benefits and privileges' which the public Acts conferred upon heirs in possession by virtue of old entails. Further, it is implied in the preamble and clauses of the private Act that the estates of West Errol and Murie were intended to form 'one compact estate,' with its mansion-house on Murie, and that they were intended to be held and enjoyed as one estate.

"Three questions therefore had to be determined by the private Act, viz :—(1) Ought the heirs of entail to have different and larger powers as regards West Errol in comparison with their powers as regards Murie? or (2) ought Murie to be considered as held under the original entail? or (3) ought West Errol to be considered as held under the new entail which, for the first time, provided a mansion-house and a compact estate? I interpret section 20 as answering the second question in the affirmative and as deciding in favour of unity and liberty. I accordingly repel the objection stated for the curator *ad litem* in his minute, No. 15 of process, but as the objection was one which it was his duty to state, I find him entitled to his expenses.

"Counsel for the *curator ad litem* cited the case of *Buchanan*, (1883) 10 R. 809. The earlier case of *Buchanan*, (1864) 2 Macph. 1197, seems to me to be more in point."

¹ Entail Amendment Act, 1848, sec. 28.

² *Buchanan v. Jameson*, (1883) 10 R. 809.

³ *Duke of Athole*, (1866) 1 S. L. R. 102.

⁴ *Buchanan v. Jameson*, 10 R. 809, *per* Lord Shand, at p. 813.

June 27, 1912. declaration that the entail of Murie should be under the provisions of the Entail Acts. The case of *Buchanan*,¹ referred to by the Lord Ordinary, was distinguishable. In that case the question arose under the Lands Clauses Consolidation Act, 1845,² and the Rosebery Act,³ and it was held that these Acts directed the lands under the new entail to be held as part of the old entail. There was no such direction or provision in the Morison Estate Act, 1873. The entail of Murie being neither an "old" entail, nor in the same position as the original entail, it followed that the consent of the next heir was not sufficient, and that the consents of the curator's wards were also required.

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Argued for the respondent;—The respondent did not now maintain that the date of the Murie entail was the date of the original trust-deed. But having regard to the whole circumstances, and in particular to section 20 of the private Act of 1873, the Murie entail fell to be treated as part of the original entail. Murie was bought in substitution for Cupargrange, which was entailed under the deed of 1842. Section 20 placed West Errol and Murie on the same footing, and provided that they were to have equal privileges under the Entail Acts, and West Errol had the privileges of an "old" entail. There was no other construction which gave effect to the section. The petitioner was therefore entitled to disentail Murie with the same consent as would be required for the disentail of West Errol, and the petition was competent.

At advising on 27th June 1912,—

LORD DUNDAS.—The point here raised is a short and sharp one. The petitioner maintains that he is entitled to disentail with the sole consent of his son, who is his heir-apparent. The curator *ad litem* appointed to the two pupil children of that son, who are the next heirs of entail for the time being, contends that the petitioner cannot lawfully disentail unless the consents not only of his son, but of the two grandchildren, be obtained, or duly dispensed with in terms of the Entail Acts. To put the matter in other words, the question is, whether the lands sought to be disentailed are held by the petitioner, as heir of entail in possession, under an "old" or a "new" entail. *Prima facie* the latter is the case; for the deed of entail is dated in 1875, and proceeds upon the narration and under the authority of the private Act of Parliament obtained in 1873. But the theory of the petition is based upon section 28 of the Rutherford Act, by which it is enacted that, for the purposes of that Act, the date at which the Act of Parliament, deed, or writing, placing money or other property under trust, or directing land to be entailed, first came into operation, shall be held to be the date at which the land should have been entailed in terms of the trust, and shall also be held to be the date of any entail to be made thereafter "in execution of the trust," whatever be the actual date of the entail. The Lord Ordinary has held that this section has no application to the present case, because the deed of entail in 1875 was not executed under the authority of the original trust-deed of 1842, but under the authority of the private Act of 1873, which, as his Lordship puts it, "rode

¹ (1864) 2 Macph. 1197.

² 8 and 9 Vict. cap. 19.

³ 6 and 7 Will. IV. cap. 42.

rough-shod over the trust-deed of 1842, and what had lawfully followed June 27, 1912. thereon." I understood Mr Sandeman, for the petitioner, ultimately to concede that this view could not be successfully resisted; and whether he did so or not, it is, in my judgment, plainly right. The basis of the petition, as framed, is therefore undermined.

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The Lord Ordinary, however, has decided in the petitioner's favour upon another and different ground. He "finds that the Morison Estate Act, 1873, must be construed as enacting that the heirs of entail in possession of the estate of Murie, by virtue of the entail executed under the authority of the Act, shall have the same benefits and privileges under the Public Entail Acts, 1848 to 1868, available to them with reference to that estate as were available to them with reference to the estate of West Errol, which was entailed pursuant to the trust-deed of 1842, and which remained so entailed." I am unable to agree with the Lord Ordinary in this view. The matter turns upon the construction to be put upon section 20 of the private Act. There is, in my judgment, no need to construe the language of that section as "idle verbiage" if it is not to be read as the Lord Ordinary seeks to read it. I think the section may quite possibly have been introduced in order to make it clear that the deed of entail which was to be executed, though not of the normal kind but proceeding upon the terms and authority of a private Act of Parliament, was to be deemed and treated as in all respects falling under the provisions of the Public Entail Acts. Such a provision may have been unnecessary, but it is intelligible; and a similar anxiety to be upon the safe side may be noticed elsewhere in the private Act, *e.g.*, in sections 21 and 22. But assuming the intention of the private Act, and particularly section 20, to have been what the petitioner now says it was, one must, I apprehend, in order to give effect to his contention, find words in the Act sufficient to give effect to the intention either expressly or by reasonably clear implication; and these are, I think, wanting. I am unable to attribute such effect to the words occurring in section 20, "notwithstanding anything in this Act contained," or to read the section as definitely assimilating the rights and position of the heirs under the contemplated deed of entail of Murie to those of the heirs of entail under the subsisting deed regulating the succession to West Errol. The petitioner's construction of section 20 seems to me to be violent and inadmissible. I find support for the view I hold in the case of *Buchanan*,¹ and particularly in the observations of Lord Shand. If the petitioner's view is correct, it might very easily have been expressed in section 20; but this has not been done.

The curator *ad litem* in his minute submits that, if his contention is correct, as I hold it to be, the petition is incompetent. It would be unfortunate if all the trouble and expense which have been incurred must be thrown away, and proceedings begun *de novo*, because a mistake has been made as to the conditions upon which the petitioner is legally entitled to disentail these lands. I do not see that we are driven to the necessity of throwing the petition out of Court. I think we ought to recall the interlocutor; find that the petitioner is not entitled to acquire the estate in fee-

¹ 10 R. 809.

June 27, 1912. simple unless the consents of the two wards respectively are obtained, or
are legally dispensed with as provided for by the Entail Acts; and remit
the petition to the Junior Lord Ordinary to proceed therein as seems to
him just. His Lordship will consider whether it may not be possible, as
I should think it may be, to utilise the framework of the existing petition, adapting it, with the aid of such amendments as he may judge necessary, to the situation involved in our present judgment. The curator *ad litem* must have his expenses in both Courts.

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LORD GUTHRIE.—I concur. If I had thought the Lord Ordinary right in holding that the petitioner's construction of section 20 of the Morison Estate Act of 1875 was the only construction which was intelligible in its origin and effect, and that the construction put upon it by the curator *ad litem* for the petitioner's grandchildren reduced the section to what the Lord Ordinary calls "idle verbiage," I should have decided as he has done. But I think the view Lord Dundas has taken of its origin and of its probable, or at least reasonably possible, effect removes the section, as construed by the curator *ad litem*, from the category in which the Lord Ordinary has placed it. The Lord Ordinary enforces his view thus:—"Further, it is implied in the preamble and clauses of the private Act that the estates of West Errol and Murie were intended to form 'one compact estate,' with its mansion-house on Murie, and that they were intended to be held and enjoyed as one estate." I agree with the Lord Ordinary's statement of fact, but I do not see any assistance to be had for the construction of the section from this consideration which is as fully satisfied under the one view as the other. What the petitioner needs is to find expression of the view that Murie was to be put in all respects, including all proceedings for disentail, into the same position as Cupargrange, for which it was, no doubt, in several ways, a surrogatum. That might have been natural, but it did not necessarily follow. It could have been easily said, but it is not said in section 20, nor elsewhere in the Act; and I do not think there is sufficient reason for inferring it when there is another intelligible view of the meaning of the section.

LORD JUSTICE-CLERK.—That is my opinion also.

THE COURT pronounced this interlocutor:—"Recall the said interlocutor reclaimed against: Find that the petitioner is not entitled to disentail the lands and estate of Murie without the consents of Eve Muriel de Annand Broun Morison and Rosemary de Annand Broun Morison, and with this finding remit the petition to the said Lord Ordinary to proceed therein: Find the curator *ad litem* entitled to his expenses between agent and client, and remit," &c.

M. J. BROWN, SON, & Co., S.S.O.—COCKBURN & MEIKLE, W.S.—Agents.

THE GOVERNORS OF GEORGE HERIOT'S TRUST, Pursuers
(Respondents).—*Constable, K.C.—Chree—Thorburn.*
MRS FRANCES ELIZABETH PATON AND OTHERS (James Paton's
Trustees), Defenders (Reclaimers).—*Murray, K.C.—*
Hon. W. Watson.

No. 156.

June 29, 1912.

Governors of
George
Heriot's Trust
v. Paton's
Trustees.

Superior and Vassal—Composition—Mid-superiority—Part redemption of subfeu-duty—Measure of composition due on entry to mid-superiority.

In 1817 a vassal subfeued his lands for a feu-duty of £20, which was an adequate return on the value of the lands as at that date. The feu-duty was subsequently redeemed to the extent of £19, 15s., in virtue of a proviso in the feu-disposition, by payment at the rate of twenty years' purchase.

On the entry of a singular successor to the mid-superiority in 1908 the superior, on the ground that the existing subfeu-duty of 5s. was illusory, demanded payment of a composition of one year's rent of the lands, amounting to £936. The singular successor tendered £20, either as representing the original subfeu-duty, or as representing the existing subfeu-duty of 5s., plus 5 per cent on the redemption price paid.

Held that the superior was not entitled to a composition of a year's rent, but was bound to accept the £20 tendered,

Campbell v. Westenra, (1832) 10 S. 734, *approved*.

City of Aberdeen Land Association v. Magistrates of Aberdeen, (1904) 6 F. 1067, *overruled*.

Earl of Home v. Lord Belhaven and Stenton, (1903) 5 F. (H. L.) 13, *commented on and distinguished*.

ON 7th December 1910 the Governors of George Heriot's Trust, the superiors of certain subjects at the corner of Shandwick Place and Queensferry Street, Edinburgh, brought an action against Mrs Frances Elizabeth Paton and others, the trustees of the late James Paton, for payment, *inter alia*, of £936.

1st Division,
with three
consulted
Judges.
Lord
Skerrington.

The following narrative is quoted from the opinion of the Lord President :—

"This is an action for payment of a composition by Heriot's Hospital, the superiors of ground now forming part of the houses and streets of Edinburgh, directed against the trustees of the late James Paton, who are the mid-superiors of the same, and liable in a composition as singular successors of the last-entered vassal, the said James Paton.

"The lands consist at present of various houses, all held under feu-contracts and charters of subinfeudation. No question arises except as respects one part of the lands ; as regards the rest the pursuers are content to demand a payment of a sum equal to a year's feu-duty receivable by the defenders. But as regards one portion of the lands now known as 1 Shandwick Place, being those originally subfeued to one Andrew Ferris, the parties are at issue.

"The history of these lands is as follows :—By feu-disposition, of date 14th and 16th August 1816 and 1st October 1817, Mr Russell, commissioner and factor for Cockburn Ross, the then proprietor of the *dominium utile* of the said subjects, subfeued to A. Ferris the stance No. 1 for the feu-duty of £20. The deed contained a clause allowing the feuar to redeem the feu-duty at any time up to the extent of £19, 15s., at the rate of twenty years' purchase. This power

June 29, 1912. was, at certain dates ending in 1841, taken advantage of, and the feu-duty at present stands at 5s.

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"The pursuers contend that, as the existing feu-duty is only 5s., which sum does not represent the yearly value of the lands at the time they were feued, they are entitled to demand a sum equal to a year's rent of the lands as they would let at the present time, a sum which may be taken as fixed by the Valuation-roll. In other words, they demand as a condition of entry to an estate which can only bring in to the vassal 5s. a year a payment of the capital sum of £936.

"The vassal tenders the sum of £20, being content to admit that to the 5s. he yearly receives he must add £19, 15s.—which may be looked upon either as making up the original feu-duty of £20, or as representing 5 per cent on the redemption price paid."

The pursuers pleaded, *inter alia*;—3. The composition payable by the defenders being (1) the subfeu-duties payable to them for subjects feued out without payment of grassum, and of which no part has been redeemed, and (2) the year's rent where the subfeu-duties now payable to the defenders do not form the whole consideration for which the subfeu-rights were granted, the pursuers are entitled to decree as concluded for. 4. In the event of it being found that the pursuers are not entitled to a full year's rent of those parts of the defenders' feu in respect of which the feu-duty has been commuted or redeemed, the pursuers are entitled to interest upon the redemption price of, or other compensation for, the loss of such feu-duties.

The defenders pleaded, *inter alia*;—3. The sum payable by the defenders, as trustees foresaid, to the pursuers in respect of the defenders' implied entry in the subjects referred to in the summons being (a) the amount of the subfeu-duties actually received and payable to the defenders as trustees foresaid in respect of said subjects, under deduction of the said over feu-duty and sums in commutation of casualties, or *separatim* (b) the amount of the original subfeu-duties, or alternatively the amount of the subfeu-duties actually payable to the defenders as trustees foresaid, together with a sum equal to a year's interest at 5 per centum per annum on the sum received by the defenders' predecessor in redemption of the subfeu-duty on Ferris's feu to the extent foresaid under deduction as aforesaid, and the defenders having previously tendered, and having now consigned, the amount thereof, the pursuers are only entitled to decree for the sum consigned, and the defenders are entitled to expenses.

On 25th May 1911 the Lord Ordinary (Skerrington) pronounced an interlocutor finding that a casualty of composition was due, and that, as regarded the subjects referred to, "the composition is to be measured by the actual rent, subject to the usual deductions"; continued the cause, and granted leave to reclaim.*

* "OPINION.—[After narrating the facts]—The pursuers' counsel maintained that, in measuring the composition due to his clients, the subfeu fell to be disregarded, and that upon two grounds. He maintained, in the first place, that it appeared from the narrative of the feu-disposition in favour of Ferris that Ferris had paid his superior a grassum of £105. If such was the real nature of the transaction the feu-duty cannot be accepted as the measure of the casualty. Though a feu-duty of £20 is not illusory, it seems to follow from the ratio of the decision as to the 'brown lands' in the case of *City of Aberdeen Land Association, Limited, v. Magistrates of Aberdeen*,

The defenders reclaimed, and the case was heard before the First June 29, 1912. Division on 13th and 14th December 1911.

On 19th December 1911 the Court ordered the cause to be argued before seven Judges, and the case was accordingly re-heard before the First Division, with Lord Dundas, Lord Salvesen, and Lord Guthrie, on 2nd and 9th February 1912.

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Argued for the reclaimers;—The ascertainment of the composition due was regulated by the Act 1469, cap. 36, and was therein fixed at "a year's mail, as the land is set for the time." The fact that the original subfeu-duty had been partly redeemed did not exclude inquiry as to whether the remaining 5s. was the year's mail as the land was set for the time. In determining the amount of composition two questions arose, viz., (a) Is the land "set for the time"? and (b) Can the superior claim more than the vassal can draw for himself? An examination of the Scots Acts¹ showed that the first

(1904) 6 F. 1067, that £20 cannot be regarded as the true rent or annual value of the subjects if, in point of fact, a capital sum was paid by the feuar to the mid-superior in return for obtaining the feu right. [His Lordship then examined the circumstances with regard to the payment of £105, and stated his reasons for holding that the payment was not of the nature of a grassum.]

"Assuming, however, that £20 is to be regarded as the full annual value of the subjects at the date of the feu-disposition, the pursuers' counsel further argued that the presently existing rate of feu-duty was only 5s., which could not be so regarded, and that accordingly the actual present rental of the subjects must be resorted to in fixing the composition. The point would be decided in terms by the judgment of the Second Division in the *Aberdeen* case with reference to certain of the 'brown lands' were it not for the fact that in the present case the redemption of the greater part of the feu-duty took place under a reserved power contained in the original feu-disposition, whereas in the *Aberdeen* case the redemption involved a new contract between the mid-superior and the vassal. I confess that I am unable to appreciate the importance of this distinction. The material fact is that the feu-duty now actually exigible from the subjects is an illusory one and cannot possibly be regarded as representing the just annual value. It seems to me irrelevant to inquire how that state of matters has been brought about. The defenders' counsel argued that the feu-duty of £20 must be regarded as still continuing, and that what had taken place was really of the nature of an anticipatory payment of that feu-duty. This suggestion seems to me to be erroneous in fact and in law. There is all the difference in the world between a payment in advance of rent or feu-duty which has not yet accrued due and an alteration in the amount of rent or feu-duty exigible under a lease or feu-charter. In the present case what the feuar had right to do, and purported to do, was to redeem the feu-duty of £20 to the extent of £19, 15s., and unless on the footing that the transaction was invalidly carried out, I do not see how it can be successfully maintained that there was merely a payment of feu-duty in advance. I am accordingly of opinion that the present case is ruled by the decision in the *Aberdeen* case, and I shall pronounce a finding to the effect that as regards the subjects included in the feu-disposition to Ferris, the composition is to be measured by the actual rent subject to the usual deductions.

"Two other alternative views are stated by the defenders in their third plea in law, but counsel for the defenders admitted that the *Aberdeen* case directly ruled these two points, and that accordingly he felt unable to argue them before me."

¹ Acts 1449, cap. 18, 1469, cap. 36, 1669, cap. 18, 1672, cap. 19, 1681, cap. 17, and 20 Geo. II. cap. 50, sec. 13.

June 29, 1912. **Governors of George Heriot's Trust v. Paton's Trustees.** question must be answered in the affirmative and the latter in the negative. The Act 1449, cap. 18, secured fixity of tenure for tenants, and the Act 1469, cap. 36, protected their moveables from being carried off for their landlord's debts by a brieve of distress, and restricted the liability to the amount of the debtor's interest.¹ These benefits were extended to lands set in feu-farm, under authority of the Act 1457, cap. 71,² though not to those held blench. Consequently a superior entering on his vassal's feu took it, for better or worse, as it stood in the vassal's hands. These provisions applied to the present case, because this subfeu was a feu in feu-farm for an adequate return at the time it was granted, and the subsequent redemption of part of the feu-duty did not make it a blench holding, which to be effective must be so described in the grant thereof.³ It was maintained against the reclaimers that the words of the statute were not exhaustive, but were to be qualified by the proviso that the lands must be set for an adequate return. The dicta, however, to that effect in *Cockburn Ross v. Heriot's Hospital*⁴ were merely *obiter*, and there was nothing in the Act itself to infer such a qualification.⁵ The only question under the Act was, Is there a "year's mail," and if so, what is its amount? The Court had, indeed, dealt with the matter of composition in certain circumstances without reference to the terms of the Act. As, for instance, in cases not provided for by the Act, such as where the vassal himself was in possession,⁶ or where the lands were unlet,⁷ or where there was a grassum.⁸ There were also cases of renunciation or discharge or redemption, all of which were discussed in *Home v. Belhaven*.⁹ But in none of these instances did the decisions or the opinions of the Court justify the claim made by the respondents here. The Court had also, in fixing the amount of the composition due, given effect to equitable modifications of the sum that was *prima facie* exigible.¹⁰ But in none of these cases was authority to be found for the respondents' extravagant demand. The circumstances in which the Court would exercise its jurisdiction in extending an old statute by construction were laid down in *Johnston v. Stotts*,¹¹ and there were

¹ Ersk. ii. 8, 33.

² Stair, ii. 4, 32, iii. 2, 27; Cowan v. Elphinston, (1636) M. 15,055; Monkton v. Yester, (1634) M. 15,020; Cockburn Ross v. Heriot's Hospital, (1820) 2 Ross's L. C. 193, F. C., June 6, 1815, 6 Pat. App. 640; Earl of Home v. Lord Belhaven and Stenton, (1903) 5 F. (H. L.) 13, Lord Davey, at p. 16.

³ Stair, ii. 3, 33; Ersk. ii. 4, 7; Bankton, ii. 3, 52.

⁴ 2 Ross's L. C., Lord Meadowbank, at p. 198-9, F. C., June 6, 1815, Lord Justice-Clerk Boyle, at p. 410.

⁵ Alison v. Ritchie, (1790) M. 15,196.

⁶ Aitchison v. Hopkirk, (1775) M. 15,060, 5 Brown's Supplement, 613, 2 Ross's L. C. 183.

⁷ Stewart v. Bulloch, (1881) 3 R. 381.

⁸ Anderson v. Marshall, (1824) 3 S. 334 (N. E. 236); Campbell v. Westerra, (1832) 10 S. 734, 2 Ross's L. C. 206, F. C., June 28, 1832, 8vo, 560, at p. 562.

⁹ 5 F. (H. L.) 13.

¹⁰ Aitchison v. Hopkirk, M. 15,060; Reid v. Fullerton, (1819) 2 Ross's L. C. 189; Thomson v. Simson, (1825) *ibid*; Paterson v. Murray, (1637) M. 15,055; Almond v. Hope, (1639) M. 15,056.

¹¹ (1802) 4 Pat. App. 274, Lord Chancellor Eldon, at p. 285.

no circumstances here calling for the exercise of that jurisdiction. June 29, 1912. On a strict view of the statute all that the superior was entitled to was what the vassal drew—in this case 5s.—entirely independently of whether it was more or less than a fair value for the lands.¹ But in the present case the vassal had tendered £20, and that was the utmost—in view of every equitable consideration that might be given effect to—to which the superior could lay claim. There was no question that £20 was an adequate return for the lands at the time they were subfeued; and if the redemption of the feu-duty fell to be regarded as a grassum, the £20 tendered was the proper return calculated on the basis that was approved in *Campbell v. Westenra*.² The grounds of the decision in the case of *The City of Aberdeen Land Association v. Magistrates of Aberdeen*,³ with reference to the brown lands, could not be supported and should be reconsidered.

Argued for the respondents;—(1) The subfeu-duty of 5s. actually received by the defenders was not a “year’s mail, as the land is set for the time,” within the meaning of the Act 1469, cap. 36, because, having regard to the value of the subjects either at the date when the subfeu was granted or when the implied entry took place, it was not a fair return for the subjects, but was illusory. If the consideration had been payable under a lease instead of a subfeu, it would not have satisfied the statute. An illusory consideration would not protect a lease under the statute 1449, cap. 18.⁴ In a question under the statute 1469, cap. 36, a subfeu was in no better position than a lease. Until 1815 it was a disputed point whether vassals holding in feu-farm had any right to subfeu at all.⁵ In any case, in 1469, and long afterwards, feu-farm tenure was practically unknown.⁶ The earliest decision as to the right of an appriser to tender a subfeu-duty as composition under the statute 1469, cap. 36, was in 1634.⁷ In 1636 came the decision in *Cowan v. Elphinston*, the reports of which absolutely contradicted one another.⁸ The rule on the subject was not authoritatively established until the case of *Cockburn Ross v. Heriot’s Hospital*,⁹ and it was then conceded in argument, and approved by the Court, that in order to satisfy the statute the duty must be fair in amount. The principle that the subfeu-duty must be “full adequate value at the time” was also affirmed in *Campbell v. Westenra*,² and the offer of the vassal to pay 5 per cent on the grassums originally paid for the subfeus was based on its recognition. The rule that the feu-duty must be fair in amount probably arose from the origin of feu-farm tenure as a species of location,¹⁰ and the earliest statutory reference to it was in the Act of 1457, cap. 71, which authorised freeholders to set in feu-farm for “a competent avail.” It was in accordance with this rule that the duty under

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¹ *Campbell v. Stuarts*, (1884) 22 S. L. R. 292; *Earl of Home v. Lord Belhaven and Stenton*, 5 F. (H. L.) 13.

² 10 S. 734.

³ (1904) 6 F. 1067.

⁴ *Craig*, ii. 10, 2; *Bankton*, ii. 9, 6 and 7; *Ross’s Lectures*, ii. 494; *Bell’s Com.* i. 69; *Alison v. Ritchie*, (1730) M. 15,196; *Sir George Mackenzie*, i. 209.

⁵ *Ersk.* ii. 5, 7; *Cockburn Ross v. Heriot’s Hospital*, F. C., June 6, 1815, *Lord Bannatyne*, at p. 408, *Lord Meadowbank*, at p. 409.

⁶ *Ersk.* ii. 4, 5; *Ross’s Lectures*, ii. 142, 156-7.

⁷ *Monktoun v. Yester*, M. 15,020.

⁸ M. 202, 15,055.

⁹ F. C., June 6, 1815, 2 *Ross’s L. C.* 193.

¹⁰ *Stair*, ii. 3, 34.

June 29, 1912. a subaltern blench infeftment would not satisfy the statute.¹ Similarly in the tenure of ward-holding recognition was incurred by subinfeudation "for an elusory or an inconsiderable or unproportionable feu-duty."² The main ground of judgment in *The City of Aberdeen Land Association, Limited, v. Magistrates of Aberdeen*³ was thus well founded on principle and authority. It was not affected by the dicta of Lord Davey and Lord Robertson in *Earl of Home v. Lord Belhaven and Stenton*⁴ to the effect that the superior could not draw more than the vassal in the year of entry, because the question of an illusory rent or duty was not there under consideration. (2) The defenders were equally out-with the statute in tendering as composition the original subfeu-duty of £20. That was no longer the year's maill as the subjects were set at the time of implied entry. The rule laid down in *Campbell v. Westenra*⁵ that the interest on a grassum might be added to the existing duty in order to satisfy the statute had been overturned by the House of Lords in *Earl of Home v. Lord Belhaven and Stenton*,⁴ which had conclusively settled that under the statute the year of entry was the only time that could be considered. (3) If neither the illusory duty of 5s. nor the original duty of £20 would satisfy the statute the result was that, in accordance with a well settled rule⁶ which had been approved of by the House of Lords,⁴ the value of the subjects in the year of entry must be taken as the composition. The result would involve no real hardship, because in the case of a subfeu with an illusory duty the mid-superior might simply stand aside and allow the subvassal to enter directly with the over-superior.⁷

At advising on 29th June 1912,—

LORD PRESIDENT.—[After the narrative quoted *supra*—]The demand as made is a startling demand, and is a complete departure from the demand made by the pursuers on the last entry, namely, that of the deceased Mr Paton in 1904, when the pursuers were content to accept the sum now tendered. It is admitted that no instance of such a demand being made can be found in any known practice, nor is there any authority to support it until the case of *The City of Aberdeen Land Association v. The Magistrates of Aberdeen*,³ decided by the Second Division, which reversed the judgment of the Lord Ordinary. The Lord Ordinary has held the present case to be ruled by the decision as to the parcel of what were called the Brown Lands in that case, and he is clearly right in so doing. It is to reconsider the soundness of that decision that this case has been sent to a Court of seven Judges.

I wish to explain again what I mean in saying that the demand is supported by neither authority nor practice. I mean that there is no instance in practice, or authority in the books, for a person who seeks an entry from his superior being called on to pay in composition more than he gets or could get in yearly value from the estate to which he seeks an entry.

¹ Stair, iii. 2, 27.

² Stair, ii. 11, 13, 14.

³ 6 F. 1067.

⁴ 5 F. (H. L.) 13.

⁵ 10 S. 734

⁶ Aitchison v. Hopkirk, M. 15,060; Lord Blantyre v. Dunn, (1858) 20 D. 1188, Lord Curriehill, p. 1198; Stewart v. Bulloch, (1881) 8 R. 381.

⁷ Bell's Lectures, ii. 788.

Only two of the learned Judges of the Second Division delivered opinions June 29, 1912. in the *Aberdeen* case.¹ The decision admittedly was counter to and therefore overruled a decision of the same Division more than seventy years previously—a decision which had regulated the practice of the profession ever since, and was quoted in every text-book on conveyancing—the case of *Campbell v. Westenra*.² Lord Trayner did so on the ground, first, that *Campbell*² was a case which had no authority to warrant it in either the decisions or the text-writers; and, secondly, that it had been disapproved in the House of Lords in the recent case of *Belhaven*.³ Lord Moncreiff based his judgment on the latter point alone. I shall examine each of these grounds; but before I do so it will perhaps be better first to set forth historically the enactments and decisions on which the determination of the question turns. Much of this is trite law, and to be found in many decisions with greater fulness. I shall therefore do no more than recapitulate what may be found at length elsewhere, and notably in the opinions of the majority of the Judges in the well-known case of *Cockburn Ross*,⁴ decided in 1815, and affirmed in the House of Lords.

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It is notorious that in very early times a feu was a mere personal right, and that the first encroachment upon that position was to consider a feu as descending of right to heirs, but with no power in the vassal to transfer his feu to a singular successor. It is equally certain that the original and proper feudal tenure was that of ward, and that feu-farm was, so to speak, an innovation. It is also certain that the rigour of the proper feudal casualties, and in particular of recognition, and the severity of the laws as to the recovery of feudal debts, brought as a concomitant extreme hardship upon the persons who actually cultivated the land. The trend of progress was to affirm the full right of property in the vassal and to protect the cultivator. That progress may be traced in the Acts of the Scots Parliament. The first of the series is the oft-quoted Act of 1449, cap. 18, in favour of "the puir people that labouris the ground," which made tacks enure against the purchaser. The next is the Act of 1469, cap. 36, which is headed, "That the puir tennentes sall pay na farther, then their termes maill for their lordis debt, be the briefe of distresse," and is mainly concerned with that topic. As a compensation to the creditor whose right was thus being curtailed, it went on to provide for an apprising, and then, only as a concomitant to that, concludes with the words, "And also the over-lord sall receive the creditour or ony uther byer, tennent till him, payand to the over-lord a zeire's maill, as the land is set for the time. And failzieng thereof, that he take the said land till himselfe and undergang the debtes." Of this statute Lord Stair says (ii. 4, 32) that before it "no superior could be compelled to receive any other vassal than the heir of the first vassal provided by the investiture." He goes on to relate how by custom this compulsitor upon the superior to receive the new proprietor as his vassal came to be extended to the newer form of action—adjudication—which was introduced, and gradually superseded apprising. Yet at first it seems that the custom introduced the compulsitor without the concomi-

¹ 6 F. 1067.

² 10 S. 734.

³ 5 F. (H. L.) 13.

⁴ 2 Ross's L. C. 193, F. C., June 6, 1815, 6 Pat. App. 640.

June 29, 1912. **Governors of George Heriot's Trust v. Paton's Trustees.** **Ld. President.** tant solatium in the form of the payment of the year's rent. Probably the practice as to this varied, and though the Lords of Session (after the Session was established), who, as Stair says, had always taken a latitude in the modification of the year's rent, thought that the equity of the matter demanded equal treatment of the superior whether the entry was forced upon him by means of adjudication or apprising, yet, when put to solemn decision, they decided that upon adjudication no composition was due—*Grier v. Laird of Closeburn*.¹ For remeid whereof the Act of 1669, cap. 18, was passed, which fixes the payment in adjudications at one year's rent in the same manner as in apprisings. So matters remained for one hundred years, practice (that is, practice as to payment on obtaining a voluntary entry), as Duff puts it, following the analogy of the statutes, till the matter was finally regulated by 20 Geo. II. cap. 50, which forced the superior to give an entry, on production to him of a disposition flowing from the former proprietor and containing a procuratory of resignation, provided (section 13) that he was paid or tendered "such fees or casualties as he is by law entitled to receive upon the entry of such . . . purchaser." This therefore legally relegated the measure of composition to the fees commonly exacted over a practice of two hundred years, which had based the determination of the composition on the sum which had been fixed by the old Act of 1469.

Now land, so far as the vassal of the overlord is concerned, might be in one of three positions: (1) it might be set in tack to the poor people that labour the ground (that is the position directly dealt with by the Act of 1469); or (2) it might be in personal possession; or (3) it might be subfeued. As regards both of these latter positions, the matter came to controversy and decision.

As regards personal possession, the Court, holding that they were entitled equitably to interpret the statute, held that "set" was equivalent to "might be set," and that consequently whatever enhanced value the lands bore, the superior got his year's rent as they could be let by the superior or proprietor at the time. This was finally settled by the case of *Aitchison*,² and has never been doubted since. Now, it is noticeable in that case that in the Faculty Reports it is added that it was reports on the practice which chiefly weighed with the Court.

As regards lands which had been feued, the matter was decided as early as 1634 in the case of *Monktoun v. Yester*,³ and the judgment was repeated two years later in *Cowan v. The Master of Elphinstoun*.⁴ In both cases the judgment was put on the same ground, namely, that the superior could not ask for more than the yearly value of the estate to which alone an entry was sought. Accordingly this is treated by Stair (iii. 2, 27) as settled, though he goes on to give his view that if lands were feued blench, the result might be different. It is probable that in the early cases the difference of value between the value of the ground at a yearly rent and the feuduty was not great. The regular building feu was at that time practically unknown; but when towns began to grow, and the professional builder

¹ (1637) M. 15,042.

³ M. 15,020.

² F. C., Feb. 14, 1775, M. 15,060.

⁴ M. 15,055.

came on the field, the practical interest in the question altered, and it is June 29, 1912. therefore not to be wondered at that, in spite of the authority of these older cases and of Stair, another attempt was made by the superior (the same superior as in this case, and in respect of the very same ground) in the case of *Cockburn Ross v. Heriot's Hospital*.¹

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I need not take up your Lordships' time describing that case. It is dealt with in great fulness by Mr Ross in his *Leading Cases*. The majority of the Court included Lord Justice-Clerk Boyle and the first Lord Meadowbank, both eminent feudalists who had been brought up in the practice of the feudal system of conveyancing as yet untouched by modern reforms. It was affirmed in the House of Lords, and settled the question so far authoritatively. The actual fact, however, was that the feu-duty in that case represented an admittedly competent rent as at the time it was fixed, and the entry of the subvassal was taxed. Now, that the decision in *Cockburn Ross*¹ was in accordance with the understanding of the profession is certain. It is instructive to see the view of the profession at the time as to what the decision really amounted to. The conveyancing book of the period, indeed the only one of authority that had been published since Walter Ross's lectures, was Bell's treatise on the Sale of Land to a Purchaser, which was published just at the time *Cockburn Ross*¹ was decided, viz., in 1815. Mr Bell was the first lecturer on conveyancing appointed by the Writers to the Signet when the lectureship—which afterwards became the professorship—was founded in 1793, and he is well known as the compiler of the Law Dictionary and as the author of various treatises, and what he says (at p. 294) is,—“It is further to be considered that the person who has feued out the ground for building, and who has the mid-superiority, has no other estate than the feu-duty arising from that mid-superiority; and, therefore, when he sells that feu-duty, all that the purchaser acquires is the feu-duty; and when he offers its amount as entry-money, he gives a year's rent of the estate, to which he demands a title from the superior. This is all that the statute requires; and all that the decisions of the Court have authorised, though under circumstances very different from the present.” So far the text. He adds in a note,—“On these grounds I many years ago gave an opinion relative to the entry-money in some very valuable urban property of this description in this city. And I am happy in finding that while these sheets are going through the press, judgment has been pronounced by the Court of Session, holding the feu-duty to form the only rent which the superior is entitled to demand.” This is *Cockburn Ross's* case,¹ and he goes on to quote from Lord Meadowbank's judgment. This was written in 1815, and repeated in the second edition in 1828.

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In 1832 the question of what was to be done when a grassum had been paid arose in the case of *Campbell v. Westerra*.² The mid-superior offered the feu-duty plus five per cent on the grassum. The superior contended that he should have the yearly value of the subjects not as they were to the mid-superior, but to the owner of the *dominium utile*, and the Court decided in favour of the mid-superior. Two of the Judges who formed the

¹ 2 Ross's L. C. 193, F. C., June 6, 1815, 6 Pat. App. 640.

² 10 S. 734.

June 29, 1912. Court were survivors of the same Court as decided *Cockburn Ross*,¹ Lord Justice-Clerk Boyle and Lord Glenlee. It is very important to see that they and the two others, Lord Cringletie and the second Lord Meadowbank, all treated the case as the logical result of the judgment in *Cockburn Ross*.¹ I shall deal hereafter with the question upon principle; at present I am only speaking of authority. Lord Glenlee was the Judge who in *Cockburn Ross's* case¹ read the passage from the old annotated edition of Stair, the notes to which have always been understood to be written by Lord Elchies. It is quoted in Ross's *Leading Cases*, and will be found to be an admirable statement of the argument on both sides, ending with a determination in favour of the vassal mid-superior. That the case was at once accepted by the profession is certain. It was, as I have already shown, in accordance with the opinion of the teaching authority of the day in conveyancing. It was repeated in his second edition, and it was stated as undoubted law in the next book—a book of high authority, which has been quoted again and again by generations of Judges, and was indeed the foundation of all the regular conveyancing treatises—I mean Duff's *Feudal Conveyancing*. Duff's work in time was followed by that of Menzies, and that again by the work of Montgomery Bell. In all of these the point is treated as indubitably settled, and *Campbell v. Westerra*² recognised as undoubted authority; and this is the case which Lord Trayner says is devoid of authority. Not only did it rule the teaching of the profession and the practice for seventy years without a question, but, apart from that, and from the question whether it is not the necessary sequel to the opinions of Stair and Erskine and the older cases and the case of *Cockburn Ross*,¹ there is the authority of the Court itself which decided it. Lord Justice-Clerk Boyle and Lord Glenlee, not to speak of Lord Cringletie and the second Lord Meadowbank, were men who had been brought up under the untouched and unmodified feudal system at a time when the bulk of the work in Court consisted of cases of that description. We are of a generation which cannot pretend to such experience, and if *testimonia ponderanda sunt*, I cannot help saying that, upon a question which is nothing but one of correct feudal practice, the opinion of the Second Division in 1832 far outweighs the dictum of the most eminent of commercial lawyers in 1904.

It is said, however, that the case of *Campbell*² is overruled by the decision of the House of Lords in the case of *Belhaven*³ decided in 1902. Now, whatever might be one's view of the soundness of a House of Lords decision, if it really decided the point, we should be bound in this Court loyally to follow it in other cases. It is equally true, however, that we are not bound by the dicta of noble Lords however eminent, and a recent example is given of this position by the decision of the House of Lords in the case of *Thompson v. Goold & Company*,⁴ where they reversed the judgment of the Court of Appeal in England, and incidentally of both Divisions of this Court, although in the case of *Powell v. Main Colliery Company*⁵ Lord Halsbury in the House of Lords had expressly approved

¹ 2 Ross's L. C. 193, F. C., June 6, 1815, 6 Pat. App. 640.

² 10 S. 734.

³ 5 F. (H. L.) 13.

⁴ [1910] A. C. 409.

⁵ [1900] A. C. 366.

of the case of *Bennett v. Wordie & Company*,¹ the case in the Second Division which was overruled. June 29, 1912.

But it is perfectly clear that the decision in the *Belhaven* case² did not touch the question. The question in that case was as to the amount of the composition to be paid in respect of the minerals. There was no subfeud. The vassal was himself in possession of some of the lands let, but the minerals were set to a tenant, who paid a large sum, as is often the case in mineral lets, by way of royalties. The superior contended that he was entitled to the actual return or royalty which the vassal got in the year of entry. The vassal contended for an average of years, and further, offering to prove that the minerals in the field were on the point of exhaustion, said that that fact should be taken into account. The majority of the Court gave effect to the vassal's contention, and this judgment was reversed by the House of Lords. Now all that was decided in that case was that the superior in the year of entry is entitled to get what the vassal gets. So far, therefore, as it is a decision, it seems to me against, and not in favour of, the superior's contention in the present case. It was natural that the case of *Campbell v. Westenra*³ should be attempted to be used by the vassal in *Belhaven's* case² in argument as an illustration of the power—which he contended resided in the Court—of equitable modification, and it was in consequence of this that the case was commented on by Lord Davey and Lord Robertson. It was not necessary to attack the case in order to justify the decision of the House in the *Belhaven* case.² The ground of that judgment is plain enough. The words of the statute were directly applicable to the case. The estate of the vassal was set at the time, and the vassal actually received the sum sued for in the year of entry. There had been no long-continued interpretation in the matter of mineral rents, which, as Lord Davey said, would have made him follow that interpretation, whatever he had thought of it if he was approaching it *de novo*. The earliest case was only in 1878, and a report obtained in it disclosed that there was really no practice to guide the Court.⁴ In these circumstances the House of Lords held that the Court was bound to follow the words of the statute.

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Lord Robertson dismisses the case of *Campbell v. Westenra*³ with the remark that the Court of Session had omitted to notice that the payment of the interest on the grassum was a concession on the part of the vassal. But with deference, the case cannot be thus dismissed, for the superior contended that he was not bound to accept the feu-duty plus interest on the grassum, but that since it was shown that the feu-duty did not represent the whole value, then the lands were not set for the feu-duty, but must be held to be set for the yearly value as that value existed, not to the vassal who craved an entry, but to his subvassals, who held the *dominium utile*. That was decided against the superior, as I have already set out. Lord Davey simply says he cannot reconcile the case with the statute. Now, if you are to take the statute, and keep close to the words used, the result would not be, when the feu-duty is inadequate, to throw the whole thing loose and allow the superior to inquire as to what is the actual value

¹ (1899) 1 F. 855.

² 5 F. (H. L.) 13.

³ 10 S. 734.

⁴ Allan's Trustees, 5 R. 510.

June 29, 1912. to the subvassal, but would be to take the feu-duty, however inadequate it might be; and this really seems Lord Davey's view, for he says,—“The importance of these cases is, first, that they affirm that a feu is within the expression ‘as the lands are set’; and, secondly, they affirm that what the superior is to get for this composition are only the fruits for the year which the vassal himself would be entitled to, notwithstanding that the lands may have been covered with buildings producing a vastly higher rent to the subfeuar; or, in other words, that the superior stands in the place of the vassal as regards the maills or rent for the year, for better or for worse.” And again,—“The superior is entitled to the year's fruits which the vassal himself receives, or is entitled to receive, in the year of entry. The superior is confined to this when it is to his disadvantage, as in the case of a subfeu, and he is entitled to the benefit of the principle when it is in his favour.” And indeed the superior in his argument here seems to me to blow hot and cold. He says *Campbell v. Westenra*¹ is wrong, because the Court exercised a power of equitable modification, which, he says, they have not got. But when then asked to take the exact sum at which the lands are set, namely, 5s., he says that is not equitable, because “set” must mean “set for an adequate rent,” and accordingly he really asks the Court to modify equitably the sum due in his favour. In any view, and with great respect to the Lords Davey and Robertson, they had no need to attack *Campbell v. Westenra*,¹ and I think they did not do justice either to the authority or to the ratio of the case.

I do not myself quarrel with the decision of *Belhaven*,² though that is immaterial, because it would be binding upon me whatever my own opinion might be. But it seems to me to be clearly based upon sound principle, and to have two reasons for it, either of which would be sufficient: first, that it was a case to which the words of the old statute directly applied and required no construction at all. The lands which formed the estate to which the entry was sought were set, and set at an adequate rent. The moment that you settle that mineral royalty is truly rent for the lands, the result follows. Second, the decision merely affirmed what the Court had held more than two hundred years ago in *Monktoun*³ and *Cowan*,⁴ namely, that the superior should get just such a composition as he would get out of the lands if for the year of entry he was in the vassal's shoes.

But there are cases to which the words of the old statute do not directly apply. Lord Davey himself admits this when he deals with the case of land in the vassal's own possession. If you had to take the literal words used they would not apply: it would be a *casus improvisus*, and the superior would get nothing; in point of fact you would pronounce a judgment analogous to that of *Grier*,⁵ where, an adjudication not being an apprising, the superior was left without a composition. But the Court did not do this. Practice, as it was said, cleared the point, and *Aitchison's* case⁶ was decided with the approval of all, and of Lord Davey. I think the Court behaved in exactly the same way in *Campbell v. Westenra*.¹ In

¹ 10 S. 734.² 5 F. (H. L.) 13.³ M. 15,020.⁴ M. 15,055.⁵ M. 15,042.⁶ F. C., Feb. 14, 1775, M. 15,060.

truth, what lies behind it all is the question of the interpretation of a very old statute of the Scots Parliament. Such statutes were passed under a totally different state of affairs, with language that does not always fit modern life. The function of the Court in interpreting them is not that of modification: it is truly interpretation, but necessarily, in such a case, of the spirit and not of the letter. The books are full of instances of this. Look at the decisions on the triennial prescription and the interpretation of "men's ordinaries." That this is legitimate has been again and again recognised not only by the Court but by the House of Lords; e.g., Lord Eldon in the case of *Johnstone v. Stotts*.¹ It is necessarily the case when any Court deals with a very old statute. The English decisions on the Statute of Frauds form a good example, and the Scottish Courts had to deal with a body of statute law which was passed by a Parliament whose powers were never constitutionally defined, and whose political power and influence varied by much at different epochs. In view of this undoubted fact, it is difficult to understand Lord Robertson's allusion to the case of *Wardlaw*² which, he says, brings its own lesson against the Court meddling with the terms of a statute. In the first place, the Court of Session did not give effect to the argument of the losing counsel on the clause in the Trusts Act, and their judgment was affirmed (not reversed) by the House of Lords. But apart from that, it is, I think, impossible to treat the interpretation of the Trusts Act, 1867, by a Court in 1882 as *in pari materia* with the interpretation of a Scots Act of 1469.

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Let me now come, last of all, to the principle of the thing. The whole secret, I think, lies in the idea that the superior should get what is equivalent to an escheat of the vassal's property for a year. That is what is meant by the term "a year's mail" as the lands are set: for, be it remembered, this is not a proper casualty or prestation. The superior's rights in proper casualties or prestations cannot be affected by anything the vassal can do. In so far as his rights are represented by money (which they always are in the tenure of feu-farm), he has his poinding of the ground, and his irritancy *ob non solutum canonem*, and they are untouched by anything the vassal can do. Composition, on the other hand, is a mere acknowledgment to the superior for his trouble in granting an entry to a vassal who is a stranger to the standing investiture. It is a payment for what the vassal gets. Now, all the vassal can get is an entry to the estate to which he enters, and if this estate is a mid-superiority, why should he pay more than a year's value of that mid-superiority? It is true that if value was rising the superior would have got more if the lands had not been subfeued; so would the mid-superior, if I may so express it, if he had never turned himself into a mid-superior. But the reason of all this is the power of subfeuing lands in feu-farm, and that was part of the gradual march of the law which I described at the outset. The early history of subinfeudation as given in Walter Ross need scarcely be taken into account: first, because he is then dealing with a period when ward was the regular holding; and secondly, because he wrote before the days of Thomas Thomson, and it now seems doubtful whether the statute of

¹ 4 Pat. App. 274.

² 9 R. 725, 10 R. (H. L.) 65.

June 29, 1912. Robert I., equivalent to *quia emptores*, ever existed. Lord Stair¹ gives a history of subinfeudation from which it appears that the practice was sometimes allowed and sometimes attacked by the Legislature. But all this legislation had only to do with ward holdings. As regards feu holdings, no prohibition of subinfeudation was ever made by statute. It is probably safe to say that the precise position which we have here was never in the minds of those who framed the statute of 1469. We are dealing with a very early period, nearly 150 years before the institution of the Register of Sasines, and I cannot say I am able to state with certainty how matters stood. How far subinfeudation was common at that date I hesitate to say. It is certain, however, that the tenure of feu-farm was at that period not very common. Ward was still the regular holding, and it is only when you have the conjunction of feu-farm with subinfeudation that this question can arise. I would not like to say that in 1469 such a conjunction necessarily existed at all; that it was not common may be inferred from the fact that the case of *Monktoun*² did not occur till 1635, that is, 165 years after the statute. It does not, however, become necessary to find out these matters, because once the case of *Monktoun*² settled as it did that the words of the statute "as set" by their own force included the position of a subinfeudation of a feu-farm tenure, the inquiry becomes immaterial. In so settling, *Monktoun*² was put upon the right principle as expressed in the judgment, namely, that the superior could not ask for more than the yearly value of the estate to which alone an entry was sought. That being the true view, the question was solved as regards lands feued for a competent avail.

But what of the case where a grassum was given? I think the Court of Session took the view that the grassum must be looked on as a capitalisation of the feu-duty, and that therefore the true yearly value to the mid-superior was the feu-duty plus the interest on the grassum. In so holding, in my humble opinion, they were not modifying the statute of 1469, but interpreting it to fit the state of changed circumstances, being no more than they had done in the case of *Aitchison*.³ I therefore think that *Campbell v. Westenra*⁴ is good law, and that it was not overruled by the House of Lords judgment in *Belhaven*,⁵ though it cannot now be cited as an authority for a general power of modification being supposed to reside in the Court, to enable the Court to override the exact words of the statute of 1469.

As regards the present case, I am further of opinion that it is not necessary actually to apply the case of *Campbell v. Westenra*.⁴ When the mid-superior feued out the lands for £20, it seems to me that he fixed the true yearly value of the estate of mid-superiority which by his act he created, and that the power of redemption which he gave to the subvassal did not alter the value of the estate, though it did give the subvassal a power of getting rid by a capital payment of all further liability on his part. In either view it follows, in my opinion, that the claim of the superior as made is bad; that the case of the Brown Lands in the *Aberdeen* case⁶ was wrongly decided; and that, £20 being tendered by the mid-superior vassal, he should be assoilzied from the conclusions of the summons.

¹ II. 11, 13, *et seq.*

⁴ 10 S. 734.

² M. 15,020.

⁵ 5 F. (H. L.) 13.

³ F. C., Feb. 14, 1775, M. 15,060.

⁶ 6 F. 1067.

LORD KINNEAR.—I have had the advantage of reading the opinion which June 29, 1912, has just been delivered, and also of repeated conferences with the Lord President upon the question which we have got to decide, and I content myself, therefore, with saying that I agree entirely with what the Lord President has said.

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LORD DUNDAS.—I am of the same opinion. Your Lordship has probably expressed all that need be said upon the matter; but, as I had prepared a separate opinion of my own, I shall deliver it.

It is admitted that a composition is due and payable by the defenders, Paton's trustees, to the pursuers, the Governors of Heriot's Hospital. But the parties differ widely as to the basis on which the composition is to be ascertained, and consequently as to the amount to be paid. The defenders' position is that of mid-superiors, between their over-superiors, the pursuers, on the one hand, and their own subvassals on the other hand. The pursuers' demand is for a year's rent of the subjects, which, as these are situated in a busy part of the city of Edinburgh, amounts to a large sum—over £900. The defenders take up alternative lines of defence. They say that, in strict law, the amount of the composition due is 5s., which was, when Mr Paton acquired the mid-superiority in 1893, and still is, the subfeu-duty exigible in each year by the mid-superior from the actual proprietors. But they have offered on record to pay £20, being the amount of the feu-duty stipulated in the original feu-disposition in 1816-17 by the defenders' predecessor in title, Mr Cockburn Ross, of the subjects now in question, which contained a power (since exercised) to redeem the feu-duty to the extent of £19, 15s. at twenty years' purchase. The defenders alternatively state their willingness to pay the actual subfeu-duty of 5s., together with a sum representing interest at 5 per cent on the capital value of the redemption price of the redeemed portion of the original feu-duty, which sums would together work out at £20.

The Lord Ordinary decided that "the composition is to be measured by the actual rent subject to the usual deductions." He considered (and rightly) that he was bound so to hold in accordance with the decision of the Second Division in the *Aberdeen* case,¹ and that case in its turn bore to proceed upon the decision of the House of Lords in *Home v. Belhaven*.² We are in a position to review the *Aberdeen* case,¹ but the judgment of the House of Lords is, of course, binding upon us. One must, therefore, consider what it was that the House of Lords decided in the important case of *Home v. Belhaven*.² Upon a *prima facie* view of it, there would certainly seem to be some ground for holding that in *Home v. Belhaven*² much that had for a very long time previously been considered to be law was decided by the House of Lords to be not law, and that the manner in which this Court had been in use to consider and deal with Scots Acts such as 1469, cap. 36, as well as some of the methods by which compositions had been in use to be ascertained or adjusted, were erroneous. But though there are passages in the opinions of some of the noble and learned Lords which seem to support such a view, I have come to think that the actual decision of

¹ 6 F. 1067.

² 5 F. (H. L.) 13.

June 29, 1912. the House in *Home v. Belhaven*¹ was not of so far-reaching a character. It seems to me that all that was decided (apart from what may have been expressed by way of opinion or illustration) was that, in arriving at "a zeires mail, as the land is set for the time," there must be included money rents or royalties from minerals, actually due to the vassal for the year in question, without regard to the state of exhaustion of the minerals. I shall revert later on to this matter.

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In the *Aberdeen* case,² Lord Trayner, who gave the leading opinion, deduced from the authorities down to and including *Home v. Belhaven*,¹ two rules which formed the basis of his judgment so far as here relevant. These rules were stated at length by his Lordship,³ and I need not here quote them. But I am, with all respect, unable to accept them as correctly embodying the result of the decisions. Lord Trayner does not analyse these, and one cannot, therefore, pursue the matter in detail. But I know of no warrant for the view that, if the subfeu-duty is illusory, the superior is *eo ipso* entitled to a year's actual rent in name of composition. I humbly think that the decision in the *Aberdeen* case,² so far as it affects the present question, was wrong. It seems to me that the learned Judges fell into error because they attributed too wide and sweeping a result to the decision of the House of Lords in the *Belhaven* case.¹

The most important case, prior to *Home v. Belhaven*,¹ upon this matter, is probably that of *Cockburn Ross v. Heriot's Hospital*.⁴ It may be said, by the way, to warrant the main portion (though not, I think, the last sentence) of Lord Trayner's second "rule." The rubric, which seems to me to give correctly the gist of what was decided in the Court of Session, bears that, when a vassal subfeus his possession for its full adequate value at the time, it is only a year's subfeu-duty, not a year's rent, which he is bound to pay his superior as a composition for an entry to a singular successor. It is unfortunate that we have no adequate record of the grounds upon which the House of Lords affirmed the judgment, beyond a bare statement by the Lord Chancellor (Eldon) that he could not find reason to advise the House to disturb it. But it is, I think, clear that the fact that the subfeu-duty represented the "full adequate value at the time" was not a mere incident in the case, but entered materially into its decision. The interlocutor of the Lord Ordinary (Meadowbank) bears on its forefront that it was not controverted that the subfeus were "made for a full and adequate avail of the subject." In the Second Division, the Lord Justice-Clerk (Boyle) expressly said: "I have always looked at the case under the special circumstances in which it presents itself, in which I find nothing but the utmost *bona fides* on the part of the pursuer, a full and adequate duty having been stipulated and offered by him to his over-lords. . . . Everything has been fair on his part; no elusory feu-duties are stipulated, but a full and valuable consideration is secured, for the advantage of the superior. I certainly wish it to be understood, as my opinion, that if there had been any attempt to diminish the interest of the superior, by taking grassums or a price, and making the feu-duties elusory, a very different

¹ 5 F. (H. L.) 13.² 6 F. 1067.³ 6 F., at p. 1085.⁴ 2 Ross's L. C. 193, F. C., June 6, 1815.

question might have arisen, but one which we are not here called upon June 29, 1912. to decide." Seventeen years later, the decision of *Campbell v. Westenra*¹ was pronounced, in which two of the learned Judges who had decided *Cockburn Ross*,² took part—viz., Lord Justice-Clerk Boyle and Lord Glenlee—and which formed, indeed, the logical sequel of the earlier judgment. Lord Meadowbank *secundus* said³: "The pursuer admits in the record, that the reserved feu-duty and grassum together were the full value of the lands at the time when the subfeus were granted. I therefore cannot see that he is entitled to demand more than the defender has already offered, under the principle of the decision in the case of *Cockburn Ross*.²" The Lord Justice-Clerk, also alluding to that case, said⁴ it was "decided that no more was exigible than the annual feu-duty." I think, therefore, that *Cockburn Ross*² is a binding authority for the proposition that the superior cannot exact more in name of composition than the subfeu-duty, where it is admitted or proved (and in the present case the admission was expressly made at the bar) that it represents the full adequate value of the subjects at the time of the subfeu.

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If, then, the feu-duty of £20 had still been exigible, a tender of its amount would, I apprehend, have been a complete answer to the pursuers' demand for a composition. But the fact that it has been redeemed, except to the extent of 5s., gives room, on the one hand, for the pursuers' suggestion that the subsisting feu-duty being plainly inadequate and illusory, they are entitled (as Lord Trayner held) to a full year's rent; and, on the other hand, to the defenders' contention that the 5s., being in fact the subsisting yearly maill or avail received by them, must—equitable considerations having been ruled out of account by the recent decision in the House of Lords—be accepted by the pursuers in full of their composition.

As regards the first of these views, I think that in accordance with the "principle" of *Cockburn Ross*,² as explained by Lord Meadowbank, £20 must represent the maximum of the pursuers' claim, being the "full adequate value" of the subjects when subfeued. The case of *Cockburn Ross*² and (its logical sequel) that of *Westenra*,¹ to which I shall again advert in a moment, afford, to my mind, a sufficient answer to the pursuers' demand for a full year's rental; and I think the *Aberdeen* case,⁵ which the Lord Ordinary followed, must be overruled, in so far as it forms a precedent for such a demand.

But the question remains whether, looking to the most recent decision, *Home v. Belhaven*,⁶ in the Court of last resort, the pursuers can, in this case, legally claim even £20; or whether they must not, apart from tender, be content with 5s. I was at first disposed to think that the latter alternative was the correct one. In *Cockburn Ross*² it was held that a feu was a "set" of the lands; and that, if the subfeu-duty represented their full value at the time, the superior could thereafter claim no higher amount in name of composition. I thought, at first, that in *Home v. Belhaven*⁶ the House

¹ June 28, 1832, 10 S. 734, also reported 7 Fac. (8vo.), 560.

² 2 Ross's L. C. 193, F. C., June 6, 1815.

³ 7 Fac. (8vo.), at p. 563.

⁵ 6 F. 1067.

⁴ 10 S., at p. 736.

⁶ 5 F. (H. L.) 13.

June 29, 1912. of Lords had carried the matter a long step further; and decided that the amount of the subfeu-duty actually exigible during the year in question—whether adequate or illusory, permanent or temporary—forms the measure of the superior's claim, such being the rule prescribed by statute, and considerations of supposed equity *hinc inde* being out of place and inadmissible. There are passages in the opinions of Lord Davey and Lord Robertson which appear to justify the conclusion indicated. But having studied the case of *Home v. Belhaven*¹ as carefully as I can, with the endeavour to discriminate between actual decision, on the one hand, and matters of opinion merely, on the other, I have come to think (as earlier stated), that the actual decision involved no more than the propositions (1) that (as the Court of Session had laid down in *Allan's Trustees v. Duke of Hamilton*²), the annual value of minerals in course of being worked is not to be excluded in the computation of "a zeires mail," within the meaning of the Act 1469, cap. 36; and (2) that the actual amount of the rents or royalties due to the vassal for the particular year must be taken, without having regard to approaching exhaustion of the minerals, or recourse to "equitable" methods of estimating, by a calculation based on averages or otherwise, what might be a fair and reasonable payment in the whole circumstances of the case. If this view is correct, *Home v. Belhaven*¹ seems really to have no bearing whatever, as a direct decision, upon the case now before the Court, and, in particular, to afford no support to the defenders' argument, that they are liable in no higher payment than the 5s. subfeu-duty.

It would, I apprehend, be open to us to apply here, if it were necessary to do so, a method corresponding to that adopted by the Court in *Campbell v. Westenra*,³ as the defenders, according to one of their alternative pleas, invite us to do so, viz., to fix the composition payable at £20, on the basis of the actual subfeu-duty of 5s., together with interest at 5 per cent on the capital value of the redeemed portion of the original feu-duty of £20. It is true that in *Home v. Belhaven*,¹ *Westenra's* case³ was commented on with some measure of disapproval. Lord Davey said that he did not pretend to explain it, or reconcile it with the terms of the statute. Lord Robertson observed that "It was not the Court that decided, but the vassal who conceded, that interest on a grassum should be included in the composition, this being done to parry a demand for a year's rent." His Lordship's view would apparently result in this, that the superior was not legally entitled to receive as composition more than the subfeu-duty, whatever it was, apart from the "conceded" interest. But I think these observations must be read *secundum subjectam materiam*, and their Lordships' condemnation of *Westenra's* case³ limited to it being founded on as in justification of an estimate or calculation, by which the supposed yearly value of a wasting subject was sought to be substituted, in computing the amount of a composition, for the actual return from that subject in the year of assessment. In this sense, and to this extent and effect, it seems that *Westenra*³ was disapproved by the judgment as well as by the opinions in *Home v. Belhaven*¹; but I cannot hold it to have been utterly and to

¹ 5 F. (H. L.) 13.² 5 R. 510.³ 10 S. 734.

all effects written out of our books. On the contrary, I regard it as being June 29, 1912. (subject to the observation just made), a subsisting decision of very high authority, looking not only to the eminence of the learned Judges who decided it, but also to its place (which your Lordship in the chair has fully explained) in the history of our law and the practice of the legal profession in Scotland. I think *Westenra's* case¹ still stands as illustrating what might, under given circumstances, be a legitimate and proper method of arriving at the full and adequate annual value of lands at the time when the subfeu was granted, which, according to the principle of *Cockburn Ross's* case,² is the maximum that the superior is entitled, when the lands have been so set, to receive as composition. Here, however, there is no need to rely on such cases as *Westenra*¹; for we know, and it is admitted, that £20 not only was the actual amount of feu-duty stipulated for the subjects in question, but represented their full and adequate annual value at the time. For the reasons stated, I think the pursuers are entitled to a composition of £20, but no more.

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LORD JOHNSTON.—The question in the present case is, What effect is to be attributed to a partial redemption of a subfeu-duty in estimating the composition to be paid on the entry of a singular successor in the mid-superiority?

The predecessor of the mid-superior granted in 1817 a feu-disposition in favour of a subvassal in consideration of a feu-duty of £20, which *ex hypothesi* was an adequate value of the lands at the time. But the grant contained the proviso that the vassal might at any time redeem this feu-duty to the extent of £19, 15s. at twenty years' purchase.

In the case of *Cockburn Ross*,² on a combined consideration of the right, on the one hand, of a vassal to subfeu, introduced by the Act of 1457, cap. 71, and extended by the common law, and of the right, on the other hand, of a singular successor to require an entry on payment of "a year's maill, as the land is set for the time," established by a series of Acts commencing with 1469, cap. 36, it was decided that where lands are subfeued for their adequate value at the time, all that the superior can demand in name of a "year's maill" is the subfeu-duty which the mid-superior receives. It is obvious that were such construction not to be put on the superior's right to exact a composition for an entry, the vassal's right to subfeu, if not rendered nugatory, would, at least in the case of building land, be seriously prejudiced. The rule of *Cockburn Ross's* case,² which has regulated conveyancing practice since that date, was a simple application of the statutory provision regarding the consideration to be paid for an entry to the case where the vassal has granted a subfeu.

I do not think that in the present case it is necessary to go beyond this authority. The original feu-duty here was admittedly adequate at the time the subfeu was granted. It is no concern of the superior that his vassal has debarred himself by agreement with his subvassal from exacting it in full. He undertook, by the terms of the feu-disposition, that he would debar himself on demand. He might have done so at any time by a

¹ 10 S. 734.

² 2 Ross's L. C. 193, F. C., June 6, 1815.

June 29, 1912. subsequent voluntary agreement. He might have done so even for a limited term of years. He has done so in perpetuity. But the full feu-duty of £20 still stands disclosed on the face of the title, and is the law of the title. The deed of restriction is not a link in the title. It is only a discharge *ab ante*, and in perpetuity, of the recurring feu-duty so far as the £19, 15s. redeemed is concerned, which, on its entering the Register of Sasines, is notice to anyone dealing with the mid-superior.

Governors of
George
Heriot's Trust
v. Paton's
Trustees.
Ld. Johnston.

I have confined myself to the consideration of the case of *Cockburn Ross*,¹ because I think that its authority is all that is necessary for the judgment in the present case. But the object of consulting the present Court was that the decision in the case of *Westenra*² might be reconsidered. I have experienced much difficulty—though in view of your Lordship's exhaustive exposition of the law, concurred in as it is by my learned brother on your Lordship's right [Lord Kinnear], I hesitate to express that difficulty—in satisfying myself, that the judgment in the case of *Westenra*² was, having regard to the terms of the statutes 1469, cap. 36, &c., a justifiable extension of the decision in *Cockburn Ross's* case¹ in a different set of circumstances. But I am sensible of the difference, to which your Lordship has adverted, between the manner in which the Scots Courts have regarded the statutes of the Scots Parliament, and particularly the earlier ones, and that in which we are bound to regard the fruits of modern legislation. The decision in the case of *Westenra*² leads to an equitable result; it has ruled practice for seventy years; and it ought not, I think, to be lightly disturbed, particularly where the question is not one of principle, but of the application of accepted principle to particular circumstances.

LORD SALVESEN.—I concur with your Lordship in the chair.

LORD MACKENZIE.—The amount of the composition demanded by the pursuers from the defenders, who are vested in the mid-superiority of the subjects in question, is a year's rent. The year's rent is £936, all that the defenders receive is 5s., the amount of the subfeu-duty. The pursuers' demand is based on the Act 1469, cap. 36. Now, if the superior was in a position to say that the subfeu was not binding upon him, he could disregard the reddendo under which the defenders now draw 5s.; but admittedly he cannot, for the subfeu is binding on him. The true test is what could the superior himself draw if he entered into possession? If the subfeu is binding on him he could draw no more than the mid-superior was entitled to get, and in no view could he be entitled to the full year's rent of £936. A question arises however as to whether he is entitled to 5s., the present amount of the subfeu-duty, or £20, the amount of the subfeu-duty when the subfeu was originally given off—the difference of £19, 15s. has been redeemed under powers in the feu-contract. The argument in favour of the £20 is based on the case of *Campbell v. Westenra*,² where the superior was held entitled to get from the mid-superior a year's feu-duty and a year's interest of the grassums paid. In the present case the year's interest on the grassums would be represented by the year's interest on the redemption money. The argument in favour of the 5s. is based on the

¹ 2 Ross's L. C. 193, F. C., June 6, 1815.

² 10 S. 734.

judgment of the House of Lords in the *Earl of Home's* case,¹ which pro- June 29, 1912.
 ceeded on the view, as expressed by Lord Davey, that "the superior is entitled to the year's fruits which the vassal himself receives, or is entitled to receive, in the year of entry. The superior is confined to this when it is to his disadvantage, as in the case of a subfeu, and he is entitled to the benefit of the principle when it is in his favour." Logically, therefore, the superior is only entitled in the present case to 5s. The dicta, however, in *Lord Home's* case,¹ which disapprove of the principle laid down in *Campbell v. Westenra*,² are *obiter*. The latter is a decision on an old Scottish statute which laid down a rule of practice, and is in a different position from a case upon a modern Act of Parliament. The distinction is pointed out by Lord Eldon in *Johnstone, &c., v. Stotts, &c.*³ The case of *Westenra*² provided for a situation in regard to which the statute was silent, just as has been done in other classes of cases, *e.g.*, when the lands are unlet or in the natural possession of the vassal. I therefore consider it a precedent for allowing £20 here—the amount tendered. If, on the other hand, it were not open to found on that case, then I should consider the pursuers are entitled to 5s. It follows that, in my opinion, the view taken in the *Aberdeen* case⁴ in regard to the brown lands is not supported by previous authority. I therefore agree with your Lordship in the chair that the pursuers are only entitled to £20.

Governors of
 George
 Heriot's Trust
 v. Paton's
 Trustees.
 Lord Mac-
 kenzie.

LORD GUTHRIE.—I agree with your Lordship in the chair.

THE COURT pronounced an interlocutor in the following terms:—

"Recall said interlocutor: Find that there is a casualty of composition due to the pursuers by the defenders, the trustees of the late James Paton mentioned in the summons, in respect of his death, and that as regards the subjects included in the feu-disposition by John Cockburn Ross in favour of Andrew Ferris, dated 14th and 16th August 1816 and 1st October 1817, the composition is to be measured by the sum of £20 tendered by the defenders to the pursuers, and with this finding remit the cause to the Lord Ordinary to proceed. . . ."

PETER MACNAUGHTON, S.S.C.—MACPHERSON & MACKAY, S.S.C.—Agents.

¹ 5 F. (H. L.) 13.

³ 4 Pat. App. 274, at pp. 283-4.

² 10 S. 734, 2 Ross's L. C. 206.

⁴ 6 F. 1067.

No. 157. MRS ISABELLA JOINER OR ANDERSON, Petitioner.—*Dunbar.*

July 3, 1912. *Process—Proof—Deposition of witness to lie in retentis—Divorce—Pursuer going abroad—Pursuer's evidence and oath de calumnia taken on commission before case called.*
Anderson.

The pursuer in an action of divorce, who was employed abroad but had returned to Scotland for the purpose of raising her action and had been admitted to the poor's-roll, presented a petition in which she stated that she was compelled to return to her employment before the summons could be called (which, owing to the fact that her husband resided in Australia, could not be done within three months), and craved the Court to appoint a commissioner to take her oath *de calumnia* and her evidence, her deposition to lie *in retentis* subject to the orders of the Court.

The Court *granted* the prayer of the petition.

2D DIVISION. THIS was a petition at the instance of Mrs Isabella Joiner or Anderson, domestic servant, New Haven, Connecticut, U.S.A., but residing at the date of the petition at Arbroath, in which she craved the Court to appoint a commissioner to administer to her the oath *de calumnia*, and to take her evidence, her deposition to lie *in retentis*, in an action of divorce at her instance against her husband, Alexander Matthew Anderson, tanner, residing formerly in Arbroath, and, at the date of the petition, at Botany, Sydney, Australia.

The petition set forth:—"That of this date (15th June 1912), the petitioner was found entitled to the benefit of the poor's-roll to raise an action of divorce on the ground of adultery against the said Alexander Matthew Anderson, her husband. The petitioner is employed as a domestic servant at New Haven, Connecticut, and recently returned to this country in order to raise the said action. That after their marriage in 1904 the parties resided together for some time in Arbroath but the defender is now resident in Australia. The petitioner has discovered an address which may possibly find him, and edictal citation is accordingly inappropriate. That, of this date (1st July 1912), the summons in said action was signeted, and a service copy of the summons was posted to Australia with a view to service upon the defender. Before the summons can call it is probable that at least three months must elapse. That the petitioner has left her only child in New Haven, Connecticut, and has to pay for her board. Her money is nearly done, and she cannot afford to stay in this country for more than a few weeks. Moreover, her employer in New Haven has informed her that unless she can sail for America by the middle of July, her situation must be forfeited."

On the petition appearing in Single Bills of the Second Division on 3rd July 1912, the petitioner moved the Court to grant the prayer.

THE COURT pronounced the following interlocutor:—" . . .

Remit the cause to Lord Dewar to take the evidence of the petitioner, said evidence to lie *in retentis* subject to the orders of the Lord Ordinary, or to appoint a commissioner to administer to the petitioner the oath *de calumnia* and to take her evidence; to dispense with interrogatories and with the reading in the Minute-book, and to order the deposition of the petitioner and productions, if any, to be sealed up by the commissioner and transmitted to the Clerk of Court to lie *in retentis* subject to the orders of the Lord Ordinary."

ROBERT GIBB, W.S., Agent.

CHARLES FREELAND, Appellant.—*Moncrieff, K.C.—Fenton.*
 SUMMERLEE IRON COMPANY, LIMITED, Respondents.—*Munro, K.C.—*
Carmont.

No. 158.

July 5, 1912.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), sec. 1 (3)—Act of Sederunt, 26th June 1907, (2)—Arbitration—Competency—"Question" as to duration of compensation.

Freeland v.
 Summerlee
 Iron Co.,
 Limited.

The employers of a workman who had been totally incapacitated by an accident admitted liability under the Workmen's Compensation Act, tendered the amount of compensation due (as to which there was no dispute), and requested the workman to sign a receipt which contained this clause:—"At the first or any subsequent payment liability is admitted only for the compensation to date of payment. Further liability, if any, will be determined week by week when application for payment is made." The workman objected to this clause on the ground that he was entitled to have an unqualified admission of liability, refused to sign the receipt, and initiated arbitration proceedings. The employers maintained that the arbitration was incompetent as no question had arisen between the parties.

Held that there was a question between the parties as to the duration of the compensation which had not been settled by agreement, and, accordingly, that the arbitration was competent.

In an application for arbitration under the Workmen's Compensation Act, 1906, at the instance of Charles Freeland, miner, Larkhall, against The Summerlee Iron Company, Limited, coalmasters, Larkhall, the Sheriff-substitute of Lanarkshire at Hamilton (Shennan), dismissed the application, and at the request of the workman stated a case for appeal.

2D DIVISION.
 Sheriff of
 Lanarkshire.

The case set forth:—

"This is an arbitration under the Workmen's Compensation Act, 1906, in an application by the appellant to recover compensation in respect of injuries sustained by him through an accident to his right eye in the course of his employment with the respondents as a miner in their Summerlee Colliery at Larkhall.

"I heard parties' procurators on the 30th January 1912, when the following facts were admitted:—(1) The accident occurred on 13th December 1911, and it arose out of and in the course of the appellant's employment with the respondents as a miner. The appellant has been totally incapacitated since said date. (2) The respondents are liable to pay the appellant compensation at the rate of 14s. 9d. per week in respect of total incapacity. (3) On 29th December 1911 the respondents admitted liability and tendered payment of the compensation then due. They requested the appellant to sign a receipt therefor, but the appellant objected to the terms of the receipt and refused to sign it. (4) The part of the receipt to which the appellant objected was contained in a note printed above the columns provided for a record of the dates and the amounts paid week by week. The part of the note objected to was the following:—'At the first or any subsequent payment liability is admitted only for the compensation to date of payment. Further liability, if any, will be determined week by week when application for payment is made.' Copy of the form of receipt is given in the appendix hereto.

"The appellant objected to the form of the receipt on the ground that he was entitled to have from the respondents a simple and

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unqualified admission of liability, such as he could embody in a memorandum of agreement for the purpose of recording. He therefore invoked arbitration on the ground that a question had arisen as to the duration of the compensation."

The Sheriff-substitute was of opinion that no question had arisen between the parties which fell to be settled by arbitration, and, accordingly, he dismissed the application.

The questions of law for the opinion of the Court were:—"1. Do the foregoing facts disclose any question between the parties on which arbitration can competently be invoked? 2. Was the Sheriff-substitute right in dismissing the appellant's application for arbitration?"

The case was heard before the Second Division (without Lord Dundas) on 5th July 1912.

Argued for the appellant;—There was a question between the parties which fell to be settled by arbitration, since it had not been settled by agreement. This dispute was as to the duration of compensation. The employers had made an offer which in effect meant that the workman would get compensation, not during incapacity, as was his right,¹ but only so long as the employers thought he was incapacitated. This offer was not one which the workman was bound to accept, for it would give him less than he was entitled to under the Act. Under the Act the employers were bound to continue paying compensation till an application for review had been presented,² whereas in the present case the employers were frankly seeking to place themselves in the position of being able to stop the compensation at their own hand. An agreement to pay compensation which introduced conditions other than those contained in the statute could not be recorded.³ If, then, there was any agreement at all, it was not a recordable agreement, and the workman was entitled to apply for an award, since in one way or the other he was entitled to have the means of enforcing his claim to compensation.⁴

Argued for the respondents;—It was common ground that the workman was entitled to compensation only so long as his incapacity lasted, and it followed that his employers were entitled to stop paying as soon as he had recovered. So far as his present condition was concerned—which was all that could be considered in the meantime⁵—there was no question between the parties either as to his right to compensation or as to the amount of it; and accordingly arbitration was excluded.⁶ If and when the employers stopped payment, a question might arise as to the duration of the compensation, but that was a future and hypothetical question, and all that arbitration was provided for was an existing question. No such question was to be found here, for the employers and the workman were agreed on all the essential points, and a memorandum of this agreement, even

¹ Workmen's Compensation Act, 1906, First Schedule (1) (b).

² Donaldson Brothers v. Cowan, 1909 S. C. 1292, *per* Lord President Dunedin, at pp. 1297, 1298.

³ M'Ewan v. William Baird & Co., Limited, 1910 S. C. 436, *per* Lord Kinnear, at p. 442.

⁴ Hunter v. John Brown & Co., Limited, *supra*, p. 996.

⁵ Allan v. Thomas Sprowart & Co., Limited, (1906) 8 F. 811.

⁶ Workmen's Compensation Act, 1906, sec. 1 (3); Act of Sederunt, June 26, 1907, (2); Gourlay Brothers & Co., Limited, v. Sweeney, (1906) 8 F. 965; Field v. Longden & Sons, Limited, [1902] 1 K. B. 47.

though there might be a qualification as to the future, could have July 5, 1912. been recorded.¹

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LORD JUSTICE-CLERK.—The case stands in this position. The appellant met with an accident and has been totally incapacitated since its date, and the respondents are liable to pay him 14s. 9d. per week in respect of total incapacity. These are facts found about which there is no dispute. On 29th December the respondents admitted liability, and tendered payment of the compensation then due,—that is to say, they admitted to the injured man that they were liable and tendered the payment which was due up to that date. They requested the appellant to sign a receipt therefor, but the appellant objected to the terms of the receipt, and refused to sign it.

In these circumstances, the question is—were the parties in agreement so that a memorandum of agreement could be registered? In my opinion they were not.

The appellant comes forward and says that, as there is no agreement of which he can make use for the purpose of enforcing his claim, he has the right to raise an arbitration in the ordinary way, a question having arisen as to the duration of the compensation. I can see no ground whatever for excluding him from that. He is perfectly entitled to proceed by arbitration, as I am satisfied that there has been no agreement made between the parties which he is entitled to register.

LORD SALVESSEN.—I am of the same opinion. A workman who is injured in the course of his employment is entitled, by the Workmen's Compensation Act, to present an application to an arbitrator to determine whether he is entitled to compensation under the Act, and the amount of that compensation. If the employers admit liability, then we have held that he is not entitled to put them to the expense of such an application. But the admission must be an unqualified one, and not a qualified admission which would debar him from the right of going to the Sheriff-clerk with a memorandum of his agreement and getting it registered, so as to be able to charge upon it.

It is said that he may record a qualified agreement if it has been come to. I do not doubt that he can, but a qualified agreement will not give him the rights that he possesses either under an unqualified agreement or under an award which he has obtained from the arbitrator. The respondents here made no secret of the fact that they desired, by the qualification which they put into this receipt which they wished the man to sign, to invert the position of the workman and put him *in petitorio* when he partially recovered from his accident, instead of being themselves in the position of having to pay him compensation until they presented an application to have his compensation diminished or ended.

It is obvious, therefore, that there is here a very substantial question, and one which is of interest to both employers and employed, but it is not a question that appears to me to be attended with any difficulty. One could conceive of difficulty arising if there had been payments made and

¹ M'Lean v. Allan Line Steamship Co., Limited, *supra*, p. 256.

July 5, 1912. accepted; but in the present case we were informed, without contradiction, that the employers refused to make any payments except upon the terms of the receipt, which qualified their obligation, putting them in the position of being able to terminate the compensation when they judged the workman to be partially or wholly recovered, whereas the Act gives the workman the right, after his position has been formulated either by an unconditional agreement or by an award, to have his compensation continuously paid until the employer presents his application for review.

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Lord Salvesen.

I think here the employers were quite wrong. There was a question between the parties as to the duration of the compensation which had not been settled by agreement. Therefore the workman was entitled to proceed by way of arbitration, and is not excluded by the admissions of the employer as regards two only of the three points on which there must be agreement if arbitration is to be excluded.

LORD GUTHRIE.—I agree. It is common ground that in a sense there is a question between the parties, but the Sheriff-substitute seems to have held that the only question that the workman raised was so frivolous that it could not be dealt with as a question in any real or substantial sense. It seems to me, agreeing with your Lordships, that the question raised between the parties is a very substantial question. It is perfectly natural that the employers should seek by such a receipt as we have before us to bring about a very favourable state of matters for them, namely, that they should be entitled, whenever they think a workman has recovered, to stop payment, putting it upon the workman then to take arbitration proceedings, which might be very lengthy before any decree was given. On the other hand, it is equally clear that the workman has a very substantial motive for getting an agreement which could not only be recorded but on which he could charge, so that his compensation should run on until the employer had to take proceedings to end or alter it.

The result is that if there was a substantial question then the parties are agreed that it cannot be held that there was an agreement, and agreeing as I do with your Lordships that there was a substantial question, I think the only course open to the workman, in the absence of agreement, was to take proceedings for arbitration.

THE COURT answered the first question of law in the affirmative, and the second in the negative, and remitted to the arbitrator to proceed.

SIMPSON & MARWICK, W.S.—W. & J. BURNES, W.S.—Agents.

ROBERT WALKER, Pursuer (Appellant).—*Fenton*.

No. 159.

JOHN JAMES SMITH, Defender (Respondent).—*D. Anderson*.

July 6, 1912.

Poor's-Roll—Reporters equally divided in opinion—Appeal from Sheriff Court.

Walker v.
Smith.

Where the reporters on *probabilis causa* reported to the Court that they were equally divided in opinion as to the admission to the poor's-roll of an applicant who desired to prosecute an appeal against two adverse judgments in the Sheriff Court, the two advocates being in favour of, and the two law agents against, the applicant's admission,—

The Court *refused* the application.

IN an action in the Sheriff Court at Perth at the instance of Robert Walker, labourer, Perth, against John James Smith, baker, Pitlochry, the Sheriff-substitute (Sym) assolzied the defender, and on appeal the Sheriff (Johnston) adhered. 2D DIVISION.
Sheriff of
Perth.

The pursuer appealed to the Court of Session, and presented an application for admission to the poor's-roll.

This application having been remitted to the reporters on *probabilis causa litigandi*, they reported that they were equally divided in opinion as to whether the applicant had or had not a *probabilis causa litigandi*, and appended a note in which they stated: "Mr Thomson, Advocate, and Mr Boase, Advocate, are of opinion that the applicant has, while Mr Lorimer, W.S., and Mr Whyte, S.S.C., are of opinion that the applicant has not, a *probabilis causa litigandi*, and we respectfully crave your Lordships to dispose of the remit in the circumstances. We beg respectfully to refer your Lordships to the following cases:—*Edgar v. Johnston*, (1904) 6 F. 825; *Ormond v. Henderson & Sons*, (1897) 24 R. 399; *Marshall v. North British Railway Company*, (1881) 8 R. 939; *Carr v. North British Railway Company*, (1885) 13 R. 113; and *Watson v. Callander Coal Company*, (1888) 16 R. 111."

The case was heard in the Single Bills of the Second Division (without Lord Guthrie) on 6th July 1912, when, in addition to the authorities noted by the reporters, the case of *Clark v. Campbell*,¹ was cited.

LORD JUSTICE-CLERK.—The difficulty in this case arises from the decision in *Marshall v. North British Railway Company*,² where the Court admitted a person to the poor's-roll, although there was not a majority of the reporters in favour of her admission. But, when the facts of that case are examined, I think the difficulty disappears; for the report of the case shows that the applicant there was suing in the Supreme Court, and was not in the position of the applicant here of having two judgments standing against her by the Sheriff and his substitute.

Now where, as here, the action is brought in the Sheriff Court and both the Sheriff-substitute and the Sheriff have decided against the party applying for the benefit of the poor's-roll, it is decided by *Carr*³ and *Watson*⁴ that the party is not entitled to be admitted to the roll. In the former case,

¹ (1833) 11 S. 908.

² 13 R. 113.

³ 8 R. 939.

⁴ 16 R. 111.

July 6, 1912.

Walker v.
Smith.

Lord Justice-
Clerk.

which was exactly the same as the present, the Lord President observed:—
“I think there are very clear grounds for distinguishing between this case and the case of *Marshall*.¹ The applicant there asked the Court for admission to the poor's-roll for the purpose of carrying on an action in this Court. The reporters were equally divided in opinion, and in the circumstances we admitted the applicant”; and then his Lordship pointed out that in the case before the Court there were two judgments against the applicant and concluded that the application should be refused. In *Watson's* case,² again, the decision was the same, the Court holding itself bound by the decision in *Carr*.³ Since those cases there have been two other cases, both in this Division, namely, *Ormond*⁴ and *Edgar*,⁵ in which the earlier decisions were held to settle the rule in this matter. Now here the applicant, as I have stated, has two judgments against him, and this being so, I can only say, in the words of Lord Rutherford Clark in *Watson's* case,² that we are bound to follow the decisions, unless we send the case to the whole Court. I am not prepared to do so here, and, therefore, the only course open to us is to refuse the motion, and I so move your Lordships.

LORD DUNDAS.—I agree. I think the rule as your Lordship has put it, is sound and salutary; and if the current of previous decisions has not been absolutely uniform—and I am not satisfied that it has been so,—the decision in the present case will go to strengthen and establish the rule.

LORD SALVESEN.—I am of the same opinion. There are four decisions—three in this Division and one in the First Division—to the effect that where there is an equal division of opinion among the reporters, the applicant is not to be admitted to the poor's-roll if there are adverse decisions by the Sheriff-substitute and Sheriff. I do not think that there is any specialty in the fact that the two advocates among the reporters were in the applicant's favour, while the two who were against him are the members of the other branch of the profession. The special facts of this case we are not entitled to consider; they have already been considered by the reporters, whose duty it was to do so. The decisions lay down the rule that when, under the circumstances that we have here, there is an equal division among the reporters the onus placed on the applicant of showing a *probabilis causa* has not been satisfied.

THE COURT pronounced the following interlocutor:—“ . . .

Refuse the benefit of the poor's-roll to the applicant and appoint the applicant to print his appeal and that within fourteen days from this date.”

ROBERT GIBB, W.S.—J. MILLER THOMSON & Co., W.S.—Agents.

¹ 8 R. 939.

² 16 R. 111.

³ 13 R. 113.

⁴ 24 R. 399.

⁵ 6 F. 825.

THE SOCIETY OF PROPRIETORS OF THE ROYAL EXCHANGE BUILDINGS, No. 160.
GLASGOW, LIMITED, Petitioners (Respondents).—*Constable, K.C.*—
C. H. Brown.

July 9, 1912.

MARY SMYTHE COTTON AND ANOTHER, Objectors (Appellants).—
D.-F. Dickson—D. P. Fleming.

Proprietors of
Royal
Exchange
Buildings,
Glasgow,
Limited, v.
Cotton.

Servitude—Altius non tollendi—Property—Building restriction—Title and interest of singular successor in dominant tenement to enforce.

A proprietor disposed to two purchasers two adjacent portions of his property, the dispositions containing mutual restrictions *altius non tollendi* imposed on each portion for the benefit of the other. On one of the purchasers proposing to erect buildings on his portion beyond the specified height, the singular successor of the purchaser of the other portion, which was situated *ex adverso* of the proposed buildings, and was separated therefrom by a distance of 60 feet, objected to the erection. He did not aver that any specific injury would be done to his property if the buildings were erected beyond the specified height.

Held that the dispositions had created a servitude *altius non tollendi*, which the singular successor in the dominant tenement had both a title and, in virtue of the propinquity of his property, an interest to enforce.

Observations in Gould v. M'Corquodale, (1869) 8 Macph. 165, commented on and explained.

ON 22nd March 1911 the Society of Proprietors of the Royal Exchange Buildings, Glasgow, Limited, presented a petition in the Dean of Guild Court there for warrant to make certain alterations on and additions to the Royal Exchange Buildings, which involved increasing their height.

1ST DIVISION.
Dean of Guild
Court,
Glasgow.

Objections were lodged by Mary Smythe Cotton and another, proprietors of subjects *ex adverso* of one side of the Royal Exchange Buildings.

In a statement of facts for the objectors it was averred :—(Stat. 1) “ In the year 1827 the Royal Bank of Scotland were proprietors of a large piece of ground on the west side of Queen Street, Glasgow, comprising not only the ground now belonging to the petitioners, but also the ground surrounding said ground on the north, south, and west, including the ground on the north now belonging to the objectors.”

(Stat. 2) “ By contract of sale, dated 20th, 21st, 26th, and 27th days of September, and 2nd, 9th, and 25th days of October, all in the year 1827, entered into between the Royal Bank of Scotland of the first part, and petitioners' predecessors, the subscribers for establishing Exchange Buildings in Queen Street, Glasgow, of the second part, the first party thereto in consideration of the price therein mentioned bound themselves to deliver to the second party thereto a valid disposition of All and Whole that area or plot of ground on the west side of Queen Street, Glasgow, . . . now belonging to the petitioners, together with the buildings then erected on the said area or plot of ground. These buildings consisted of a building fronting Queen Street that was then occupied as a bank and which is now the eastern portion of the present Royal Exchange, belonging to the petitioners.” (Stat. 3) “ In the said contract of sale it was provided that, for the mutual accommodation of both parties to said deed, in securing light, air, access, and amenity to their respective properties ” a space of 60 feet in width on the north and

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south sides of the plot of ground should be left vacant and formed into a carriageway and pavement, and "the building then occupied on the area or plot of ground by the first party as aforesaid should not thereafter be raised to a greater height than it was then, unless for the sake of a centre cupola or ornament to be approved of by the first party thereto, and that the side walls and the west end front of any buildings to be erected to the west of the said building should not exceed 40 feet in height, excepting a space in the centre thereof not exceeding 35 feet wide, which might be raised to the height of the then bank, unless it should be deemed advisable to carry the said new erections 2 feet higher for the sake of architectural effect or ornament, and unless the same should be first approved of by the first party, and that in like manner the buildings to be erected by the first party or their successors upon their property fronting each of the north, south, and west sides of the plot or area of ground should form a handsome range of buildings not exceeding three storeys in height above the sunk storey, unless where it might be deemed expedient and proper to carry the said buildings higher for ornament or architectural effect . . ."

(Stat. 4) "By the said contract of sale it was stipulated that the said provisions and declarations, with the servitudes, restrictions, and conditions therein before written and in the foregoing articles of this condescendence specified, should be as they were declared to be real burdens and liens affecting the said subjects thereby sold in so far as applying to them, and also affecting the subjects belonging to the said first party adjacent in so far as applying to them, and should as such be inserted in the disposition to be granted by the first party to the second party, and in any disposition to be granted by the first party of any part of the said subjects adjacent, and in the infestment on the disposition foresaid, and in the whole other dispositions, charters, and infestments of the said premises, otherwise the dispositions, charters, and infestments in which they might be wholly or partially omitted should be void and null."

(Stat. 5) "By disposition, dated 12th November 1833, granted by the Royal Bank of Scotland in favour of the petitioners' predecessors, the Proprietors of the Royal Exchange Buildings of Glasgow, the said Royal Bank, in implement of the foregoing contract of sale disposed to the petitioners' predecessors the said area or plot of ground containing 3871 square yards or thereby (on which the Exchange buildings had then been erected in consequence of the undertaking contained in the foregoing contract of sale)." (Stat. 6) "In the said disposition the provisions, declarations, servitudes, restrictions, and conditions above set forth as contained in the said contract of sale are repeated *ad longum*; and . . . it was provided and declared that the whole provisions, declarations, burdens, servitudes, restrictions, and conditions therein before recited and as therein above explained were and should be real liens and burdens affecting the subjects thereby disposed in so far as applicable to the subjects thereby disposed, and affecting also the subjects then belonging or which belonged to the Royal Bank bounding the plot or area of ground thereby disposed on the north, south, and west in so far as applicable to the said surrounding subjects, and in so far as applicable to the said respective subjects, should as such be inserted in the instrument of sasine to follow thereupon, and in any disposition to be granted by the Royal Bank of any part of the said subjects adjacent, and in all the other and future

infestments, dispositions, and conveyances of the whole or of parts of the said respective subjects, and in the instruments of sasine to follow thereon in so far as applicable to the said respective subjects, under the pain of nullity: And it was further provided and declared that the buildings already erected . . . on the ground purchased from the Royal Bank by John Smith, situated on the north side of the said square (now the property of the objectors), should be maintained and upheld in exact conformity with the present elevations thereof. . . .”

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(Stat. 8) “By contract of ground-annual, dated 1st, 19th, and 20th August, all in the year 1835, entered into between the Royal Bank of Scotland on the one part, and” certain disponees “of the other part, the said first party, under the burden of a ground-annual of £575 sterling, sold and disposed with consent of the said John Smith to the second party All and Whole that piece of ground situated on the west side of Queen Street, Glasgow, containing 1969 square yards and 2 square feet or thereby, being the said subjects on the north side.” (Stat. 9) “By said contract of ground-annual it was declared that the same was granted with and under the whole provisions, declarations, restrictions, conditions, and servitudes contained in the titles of the subjects, and with and under the burdens, limitations, provisions, and declarations contained in the said contract of sale between the new Exchange Company and the Royal Bank . . . the second party being always entitled to the benefit of the privileges or burdens stipulated or imposed by the said contract with the new Exchange Company on the said Royal Bank and the new Exchange proprietors; and it was also provided that the said contract of ground-annual was further granted under the conditions, provisions, declarations, restrictions, and prohibitions thereafter written which were thereby declared to be real liens and burdens affecting the subjects disposed, namely, that the tenements erected on the subjects should be maintained and upheld in exact conformity with the then elevation thereof so as the said tenements might form one entire and uniform compartment in all time coming . . . all which provisions, declarations, restrictions, prohibitions, and servitudes were appointed to be inserted as real liens and burdens affecting the subjects in the instrument of sasine to follow on the said contract of ground-annual, and in all the future dispositions and conveyances of the said subjects and infestment following thereon, otherwise the same should be void and null. . . .”

(Stat. 12) “The objectors have succeeded to the said piece of ground on the north side of Royal Exchange Square, containing 1969 square yards and 2 square feet or thereby, conform to the deeds, an inventory of which is annexed hereto.”

(Stat. 13) “The plans produced by petitioners disclose that petitioners are proposing to raise the height of their buildings very considerably above the present height and otherwise alter the style and elevations of their buildings; and the objectors intimated to the petitioners, prior to their presenting this petition, that they objected to the said alterations on and additions to these buildings. To these objections the objectors adhere.”

The petitioners pleaded, *inter alia*;—(1) The objectors’ averments are irrelevant. (2) No title to sue.

The objectors pleaded, *inter alia*;—(2) In respect of the servitude *non altius tollendi* under which the petitioners are in a question with

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infestments, dispositions, and conveyances of the whole or of parts of July 9, 1912.
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 thereon in so far as applicable to the said respective subjects, under Proprietors of
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 Company and the Royal Bank . . . the second party being always
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 by the said contract with the new Exchange Company on the said
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the objectors, the petitioners are not entitled to raise their buildings as they are proposing to do without the consent of the objectors. (3) In respect of the real liens, burdens, conditions, restrictions, servitudes, and others contained in the titles of the petitioners and objectors, or one or other of them, all as condescended on, the petitioners are not entitled to make the alterations on or additions to their buildings which they are proposing to do without the consent of the objectors.

On 25th April 1912 the Dean of Guild pronounced an interlocutor, in which, after findings in fact to the same effect as the passages above quoted from the objectors' statement of facts, he found in law as follows:—"Finds in law that as the objectors do not aver that the proposed operations of the petitioners will, if carried out, damage or injuriously affect the property belonging to them, they are not entitled to object to these proposed operations being carried out: Therefore sustains the plea in law for the petitioners that the objections are irrelevant: Repels the objections, and grants the lining craved."*

* "NOTE.—The parties were heard upon an open record, and in the course of and at the conclusion of the debate the agent for the objectors was asked whether he wished to add to the objections an averment or averments to the effect that the proposal of the petitioners if carried out would damage or injuriously affect the property belonging to his clients; but he declined to do that, and maintained that it was not necessary in order to entitle him to plead servitude or real burden to say that he would be injured by a contravention of the servitude or real burden. The Dean is advised that that position is not sound. It is trite law that to enforce a real burden interest is necessary, and as regards the position under servitude proper the Dean of Guild thinks it only necessary to refer to the case of *The Braid Hills Hotel Company, Limited, v. Manuels*, 10th November 1908, 1909 S. C. 120. There the matter is put in this way by the Lord President,—‘If you find a known servitude in the titles of a servient tenement, I think, in order to show a title to sue, you have only really got to discover two things. You have first of all got to discover from the servitude itself that there is a proper dominant tenement. Nobody coming forward without something to which he can appeal as a proper dominant tenement would have a title to enforce this right. And then, secondly, over and above that, he must also, of course, show interest, or else he will fail on the well-known doctrines laid down in the case of *Gould v. M'Corquodale*, 8 Macph. 165, where it was held that the servitude was perfectly well constituted, but that if the pursuers could not show an interest their right to enforce it fell.’ It is to be noted that in the case of *Gould v. M'Corquodale* the proprietor pleading the servitude expressly averred that the buildings there proposed would injuriously affect his property; and in the case of *Cowan v. Stewart*, (1872) 10 Macph. 735 (founded on by the objectors here), injurious interference with the lights of the complaining proprietor is expressly mentioned in that proprietor's answers. It may be that the provisions founded on here do not on the ground suggested by the Lord President at the end of his opinion in the *Braid Hills* case constitute a servitude proper. If they do not, then the objectors are thrown back upon real burden. Their pleas in law deal only with real burden and servitude, and an averment of damage or injurious affection being necessary in either case the Dean has sustained the petitioners' plea that the objections are irrelevant. It may be, of course, that the objectors declined to aver damage or injurious affection, because they may not be confident that they would be able to prove, if a proof were allowed, or to convince a practical Court, that there

The objectors appealed to the Court of Session, and the case was heard before the First Division (without the Lord President) on 2nd and 3rd July 1912.

Argued for the appellants ;—The respondents could not raise the height of their buildings without the appellants' consent. By the disposition to the respondents a mutual servitude had been imposed upon, and submitted to by, both parties thereto. The appellants, as disponees of the Royal Bank, were entitled to enforce that servitude or real burden, because, on parties' titles, it was clearly enforceable for the benefit of the heritable subjects, and not merely as a personal right.¹ It was not necessary, therefore, for the appellants to aver or show an interest to enforce it ; but, in any case, the fact that they were *ex adverso* proprietors was sufficient to qualify an interest.² Further, the respondents did not aver that there had been any change of circumstances, and accordingly the position was the same as if the present question had been raised immediately after the respondents had acquired their property from the Royal Bank, at which time it could not have been maintained, in face of the terms of their disposition, that an *ex adverso* proprietor had no interest to enforce the contract. The appellants' right was not a *jus quæsitum*, but rested upon direct contract with those whom they now represented ; and the burden of proving interest was not on them, but it was for the respondents in pleading release from the contract to show that any interest that the appellants had had ceased to exist.³ In point of fact, in their pleadings the respondents had nowhere averred that the appellants had no interest.

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Argued for the respondents ;—Whatever view might be taken of the restrictions there was undoubtedly an onus upon the appellants to show an interest to enforce them. On a sound construction of the deeds here in question there was no contractual relationship between the appellants and the respondents. The appellants had only a *jus quæsitum* to enforce the restrictions ; and to enable them to do so they must qualify an interest.⁴ The question in the case of *Nicholson v. Glasgow Blind Asylum*⁵ was one of title, not of interest, and that case therefore did not affect the present question. Further, it was necessary for the appellants to show that their interest to enforce was a

would be damage. The Dean is very familiar with the neighbourhood and the properties of the parties, but he has thought it better not to apply his mind to that matter at present. He will deal with the points involved if and when the question comes before him.

"The cases cited by the parties at the debate were—by the objectors, *Cowan v. Stewart*, quoted *supra* ; and by the petitioners, *Mactaggart v. Roemmele*, 1907 S. C. 1318, and *Hislop v. MacRitchie's Trustees*, 3 R. (H. L.) 95."

¹ *Nicholson v. Glasgow Asylum for the Blind*, 1911 S. C. 391 ; *Braid Hills Hotel Co., Limited, v. Manuela*, 1909 S. C. 120 ; *Mayor, &c. of Bradford v. Pickles*, [1895] A. C. 587, Lord Watson, at p. 598 ; *Finnie v. Glasgow and South-Western Railway Co.*, (1857) 3 Macq. 75.

² *Gould v. M'Corquodale*, (1869) 8 Macph. 165.

³ *Mactaggart & Co. v. Roemmele*, 1907 S. C. 1318, Lord President, at p. 1322.

⁴ *Maguire v. Burges*, 1909 S. C. 1283, Lord President, at pp. 1290, 1291 ; *Braid Hills Hotel Co., Limited, v. Manuela*, 1909 S. C. 120, Lord President, at p. 126.

⁵ 1911 S. C. 391.

July 9, 1912. substantial interest,¹ and such an interest could not be implied in favour of any subjects. As there were no averments here to support a substantial interest, or, indeed, any interest, the objections fell to be repelled. The appellants ought to make specific averments of the damage that would be done to them, and it would then be for the Dean of Guild to consider whether they had qualified a sufficient interest or not.

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At advising on 9th July 1912,—

LORD KINNEAR.—I am unable to agree with the Dean of Guild in this case, and I think that his decision cannot be upheld.

The case begins with an application for a lining at the instance of the Proprietors of the Royal Exchange Buildings of Glasgow, who desire to make certain proposed additions and alterations upon their buildings according to a plan. Certain proprietors of the property lying immediately to the north of the Exchange Buildings object, on the ground that they have a right of servitude against raising the Exchange Buildings higher than they are at present, which would be violated were the lining to be granted. The Dean of Guild has repelled the objections and granted the lining.

The first question, therefore, to be considered is whether the objectors have a substantial right and interest to enforce the servitude against the building. Now, that depends upon the title of the petitioners. We have on record a history of the title, from which it appears that the former proprietors of the ground now belonging to the Royal Exchange and of some adjoining ground entered into a contract of sale with the persons whom the present petitioners now represent, and the record sets forth at some length certain conditions which were contained in the contract of sale for the purpose of imposing mutual servitudes, conditions, and restrictions upon vendor and vendee. It is not really material to examine the terms of the contract, because it is completely superseded by the disposition which was granted by the sellers to the buyers. But then that disposition narrates at full length all the conditions contained in the contract and imposes them upon the disponees. Therefore there is no inconvenience in taking the terms of the condition, which is the subject of consideration, from the contract, because it is printed at full length, whereas we have got only excerpts from the disposition before us.

I take it, therefore, without going into the matter in any more detail, that the disponers set out, in the first place, that, for the mutual accommodation of both parties in securing light, air, access, and amenity to their respective properties, they conveyed to the disponees under certain restrictions. To come to the particular restriction that is now applicable—that the side walls and the west-end front of any building to be erected to the west of the said building should not exceed 40 feet in height, excepting a space in the centre thereof not exceeding 35 feet wide, which might be

¹ Rankine on Land Ownership, 4th ed., pp. 465, 473, 474; Corporation of Tailors of Aberdeen v. Coutts, (1834) 13 S. 226, 2 Sh. & M.L. 609, 1 Rob. 296; Gould v. M'Corquodale, 8 Macph. 165, Lord President Inglis, at p. 170, Lord Deas, at p. 171; Hislop v. MacRitchie's Trustees, (1881) 8 R. (H. L.) 95, Lord Watson, at p. 102.

raised to the height of the then bank, unless it should be deemed advisable July 9, 1912. to carry the said new erections two feet higher for the sake of architectural effect or ornament.

The application to the circumstances is this, that at the time of the sale a certain portion of the ground was occupied by the disponers as the Royal Bank Buildings, and the restrictions began, in the first place, by saying that that portion is not to be raised to a greater height than it was at the time except for a certain purpose; and then they go on to impose the restriction which I have read as to the building to be erected on the remaining ground, which, as a matter of fact, formed a continuation of the buildings already erected belonging to the Royal Bank. The material point is that the restrictions are, in terms, made real burdens affecting the subjects thereby disposed. That restriction, however, was imposed, as I have already said, as part of an arrangement whereby restrictions were to be imposed in like manner upon ground retained by the sellers, because the whole restrictions on the buildings were set out to be for the mutual accommodation of both parties in the respect specified. And accordingly the disponers, in laying these real burdens upon the subjects disposed, undertook also that they should burden the subjects which they still retained in the same way.

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Now, if nothing had followed upon that disposition by way of explaining the full extent and meaning of the restriction, the only question that could have been raised would have been whether, upon a fair construction of the disposition, the restrictions imposed upon the disponees were intended for the benefit of the disponent personally or for the benefit of his property. And I apprehend there cannot be the slightest doubt, upon the construction of the disposition, that the object was to make restrictions upon the property sold for the benefit and advantage of the property which was not sold but still retained, into whose hands soever it might come. There is nothing personal between disponent and disponee, but there is a real burden imposed upon the subjects preventing the erection of buildings above a certain height for the benefit of a certain specified tenement. Now, that is simply the servitude *altius non tollendi*. The question whether the present owners are entitled to enforce it would *prima facie*, to my mind, depend upon whether they are singular successors of the disponers in the property for the benefit of which the servitude was laid on; in other words, are they now the proprietors of the dominant tenement, because the moment it is settled that the burdens are intended for the benefit of a property and not for the benefit of a person, you have then in that specific property all that is necessary to constitute a right of servitude.

But, then, the appellants rely further upon the terms of their own title—and I think their argument upon that point was perfectly legitimate, although I am not prepared to say that it was absolutely necessary for the establishment of their right—because they say that when the disponers, the Royal Bank, came to sell to them or their predecessors the property on the north of the Royal Exchange Buildings, they in the first place assigned to them their rights in the burdens and restrictions imposed on the property previously sold to the predecessors of the petitioners, and in the second place they imposed burdens, conditions, and regulations for the purpose of

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restricting building upon the property sold and now belonging to the appellants, in performance of their obligation to their previous disponees whose property they had made subject to the same restrictions.

I cannot say that there seems to me to be any question, in that state of the titles, that the appellants have a right and title to object to the lining in respect that it violates restrictions imposed upon the subjects themselves for the benefit of the property belonging to them. I think the Dean of Guild has so far accepted this view, because, after setting out in somewhat more detail than I have done the condition of the title, he goes on to find "That the proposed operations of the petitioners for which authority is asked will raise the height of the petitioners' buildings and alter the style and elevation of these buildings, and will contravene the restrictive provisions before mentioned." I do not think that that finding was seriously challenged by the respondents, who, otherwise, are maintaining the Dean of Guild's judgment. But then he goes on to say that the objectors do not aver that the proposed operations of the petitioners will in any way damage or injuriously affect the property belonging to the objectors, and then he finds that, as they do not make that averment, they are not entitled to object to these proposed operations being carried out.

That, at first sight, appears to be a finding rested upon a technical point of pleading rather than anything else; but it is obvious, on reading the Dean of Guild's judgment, that he had no intention of proceeding upon any such ground as that, but that he intended to decide, as matter of substantial right, that the objectors could not prevail in this objection because they had no interest to maintain the restrictions. Now, I apprehend that there can be no question—it is perfectly well-settled law, and, indeed, is elementary and fundamental—that there can be no effective prædial servitude in favour of anybody who has not an interest to enforce the restrictions which the servitude creates. The servitude must be for the benefit and advantage of a dominant tenement; and unless it can be shown that the enforcement of it is for such benefit there is no effective servitude. But that there is a right in the proprietor of the dominant tenement appears to me to be made clear upon the statement of the facts to which everybody has agreed. It depends upon the relation of two pieces of ground to one another. The appellants' ground lies to the north of the area occupied by the respondents' buildings. The two lines of buildings are separated by a space of 60 feet from building line to building line. The appellants' ground is directly opposite the building which it is intended to raise, and, upon that statement alone, it is to my mind obvious that there is a sufficient interest to support a servitude *altius non tollendi*. That is the benefit to these specific buildings which the servitude was intended to protect.

That that is an interest recognised by law is beyond all question—it is not open to dispute. It is indeed so obvious and clear an interest that the servitude, being one of the known servitudes, might have been imposed upon the servient tenement by instruments which did not enter the infestment at all, or did not enter the records just because the mutual interests of the owners of buildings, separated from one another by a narrow space in a town, are so clear and notorious that a purchaser must take into account the probability of such an interest having been protected by a servitude,

and must make his own inquiry as to the existence of such a servitude, July 9, 1912. although he finds no notice of it on the records, if he is to escape the burden which it imposes. I am therefore of opinion that there is really no ground for the Dean of Guild's rejection of the objections on the ground of want of interest.

But then it was said that, besides the general interest which is necessary to support a servitude, or to support a right to enforce a building restriction which is founded upon *jus quæsitum tertio*, or again to support a real burden, you must have, over and above, an interest which enables the complainer to show that there is some special damage or injury to be done to his property in the actual circumstances of the case by the erection of the building of which he complains. I am not aware of any authority or any reason to support that argument. I think it was founded altogether upon a misleading practice of picking out a single sentence from a judgment without reference to the circumstances or the context in which it was said, and founding upon it as if it had been propounded as a solitary dogma to be followed in all cases without qualification.

The cases in which it has been held that notwithstanding an apparently well-constituted servitude or real burden the person founding upon it could not be allowed to enforce it in respect of no interest, have, as I think, been resolvable, all of them, into the question whether the particular thing complained of was or was not within the scope of the servitude, or whether the complainer's tenement was so placed as to be exposed to the mischief which the servitude was intended to guard against. I see no authority for holding that you have first to find that there is a sufficient interest to support a real burden or a servitude and then affirm that, in the special circumstances of the case, the party in whom that interest is vested will suffer some special damage if it is not enforced. If he has a right recognised by the law, it is for him to consider whether in any particular case he will enforce it; and I cannot hold that any Court of law or Dean of Guild Court can have any authority to decide that if, in the whole circumstances, it appears to the Court that the thing he complains of will do him no serious harm and will be for the benefit of his neighbours, therefore his right is not to be enforced.

I think that is brought out very clearly in the case to which the Dean of Guild refers us (although we had a long series of decisions quite properly brought before us, I think it is enough to refer to this one), namely, *Gould v. M'Corquodale*,¹ where Lord President Inglis laid down the doctrine very clearly. In that case it was said that a singular successor had not an interest to enforce a certain restriction against building. The Lord President said that he thought that the title did effectually create a servitude *altius non tollendi* in favour of the property on the south of Fox Street (the street in question) as a burden on the subjects on the north. Then he goes on to say: "To what extent such a restriction can be enforced is another matter"—whether the right thus given could be enforced all along the side of the street, that is, enforced not only in favour of the subjects directly on the south as against subjects directly on the

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¹ 8 Macph. 165.

July 9, 1912. north, but against other subjects further along the street which did not face the dominant tenement. And he says: "I am inclined to think that, in the case of a servitude *altius non tollendi*, if the owner of the dominant tenement had no interest to enforce it, the Court would not be disposed to sustain it, if nimiously sought to be enforced *in æmulationem vicini*," that is, they would not enforce a restriction which hurts the servient owner and does not benefit the dominant owner. But then his Lordship goes on to say: "But that question does not occur here, for the buildings objected to are *ex adverso* of the advocator's property; and, therefore, if this servitude is good for any purpose, it must be effectual to keep down the height of the buildings opposite the ground belonging to the advocator." I think that sentence is directly applicable to the present case. If the servitude is good for any purpose—and it is conceded that it is a good servitude—it must be effectual to keep down the height of the buildings which are directly opposite the buildings belonging to the appellants and which the respondents propose to raise beyond the permitted height.

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Lord Kinnear.

But I think the force and extent of the doctrine of interest the Lord President was there explaining is brought out very clearly by another point in the case, because it was said that the dominant owner in that case had lost his right by allowing buildings to be erected at a different part of the street, and upon that question the Lord President says: "It must be shown (1) that Gould had a good title to object, and (2) that he had as good an interest to object to these buildings as he has in the . . . case" actually in question. "For," he says, "I do not understand anyone being bound by acquiescence to allow the erection of buildings which obstruct his light, merely because he has made no objection to buildings erected at a distance, which do him no harm. If no harm was done him by the buildings, it would be embarking in a very foolish litigation if he attempted to stop them. It therefore appears to me that the plea of abandonment cannot be sustained. Even if Gould had a right to object to the previous buildings, he had comparatively little interest, but he has an obvious interest now." This only shows that although a servitude may be expressed in terms for the general benefit of a certain estate, it may still be a question whether a particular house within the protected area is so situated as to take any advantage from the restriction.

Now, in the application of that judgment, I think that the buildings proposed to be erected run counter to the purpose for which the restriction was laid on the respondents' land, because what was intended to be secured to the appellants' property was that the space already open for air and light in front of their buildings should not be diminished or restricted by the erection of higher buildings on the opposite side of the street. I am therefore of opinion that the Dean of Guild's judgment must be recalled, and that we should remit to him to sustain the appellants' objections and to refuse the petition.

LORD JOHNSTON.—I think that this is a case of proper servitude, and that it is better to treat it as such, and not to allow the question at issue to be confused by reference to the law of real burdens, or of mutuality of restric-

tions, although I am far from saying that the case might not also be decided July 9, 1912. on these latter considerations had it been necessary. There is a clear servitude *altius non tollendi* created on the petitioners' property as servient tenement in favour of the remaining property of the Royal Bank, the petitioners' authors, and every part of it, into whosoever hands it might come, as dominant tenement. It is none the less a servitude that a counter servitude was imposed on the dominant tenement in favour of the servient. The objectors are in right of part of the Royal Bank's remaining property, and are therefore entitled to enforce the first-mentioned servitude against the petitioners. The Dean of Guild has, I think, misapprehended the reference by your Lordship in the chair * in a recent case ¹ to the case of *Gould v. M'Corquodale*,² and perhaps still more misapprehended that case itself. In that case the Lord President (Inglis) certainly says that he was "inclined to think that, in the case of a servitude *altius non tollendi*, if the owner of the dominant tenement had no interest to enforce it, the Court would not be disposed to sustain it." This is not in itself a very decided statement. But the Dean of Guild has not observed that it was conditioned by his Lordship thus, "if nimiously sought to be enforced *in æmulationem vicini*." And Lord President Inglis goes on to say, in words which exactly cover the present case,—“That question does not occur here, for the buildings objected to are *ex adverso* of the advocator's property, and therefore, if this servitude is good for any purpose, it must be effectual to keep down the height of the buildings opposite the ground belonging to the advocator.”

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But the Dean of Guild also nonsuits the objectors on the ground that they did not aver, and in fact refused to be drawn into averring, that the petitioners' proposed operations would, if carried out, injuriously affect their property. I think the objectors were right in the attitude they maintained. The words of Lord Watson in the case of the *Earl of Zetland v. Hislop*³ are as applicable to the case of co-disponees as to that of superior and vassal. The onus lies upon the disponent who is pleading a release from his obligation to allege and prove that his co-disponent's interest to enforce it has ceased to exist, and not on the latter to allege and prove his continuing interest.

For these reasons I agree with your Lordship that this appeal should be sustained.

LORD MACKENZIE.—The objectors here are proprietors of property immediately *ex adverso* of the existing Royal Exchange Buildings in Glasgow. They contend that there is in the title of the petitioners a servitude *altius non tollendi* which they, as owners of the dominant tenement, are entitled to plead. It was admitted that what is proposed to be done would be a contravention of the restrictions in the petitioners' title.

It appears to me that a servitude was well constituted by the terms of the disposition granted by the Royal Bank in favour of the petitioners' predecessors, and that it was conceived in favour of the property now owned by the objectors. We are informed in the pleadings in this case that the

* The Lord President who, though absent at the hearing, was present at advising.

¹ Braid Hills Hotel Co., Limited, v. Manuela, 1909 S. C., at p. 126.

² 8 Macph. 165.

³ (1882) 9 R. (H. L.) 40, at p. 47.

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whole provisions, declarations, servitudes, restrictions, and conditions contained in the contract of sale entered into in 1827 between the Royal Bank of Scotland and the petitioners' predecessors are repeated *ad longum* in this disposition. The contract of sale proceeds on the narrative that it was for the mutual accommodation of both parties in securing light, air, access, and amenity to their respective properties, first, that spaces of a certain width should be laid off on the north, south, and east sides of the property conveyed, which were to remain vacant and unbuilt upon in all time coming for the use, benefit, and advantage of the said respective properties—the parties being bound at mutual expense to convert the vacant spaces into a carriageway and pavement. Then follows a provision in regard to the height of the buildings, and, as I read the deed, this also was for the mutual accommodation of both parties in securing light, air, and amenity to their respective properties. In the contract of sale the restriction is (1) as regards the existing building, which it was provided should not be raised to a greater height than it was then unless for the sake of a centre cupola or ornament to be approved of by the first party; and (2) that the side walls and the west-end front of any buildings to be erected to the west of the said building should not exceed 40 feet in height, excepting a space in the centre thereof not exceeding 35 feet wide which might be raised to the height of the then bank, unless it should be deemed advisable to carry the said new erections 2 feet higher for the sake of architectural effect or ornament, and unless the same should be first approved by the first party. As the disposition was granted after buildings satisfactory to, and having the sanction of, all parties had been erected by the petitioners' predecessors, the servitude was made applicable to the buildings which had been erected. By the contract of sale it was provided by the same clause that "in like manner" the buildings fronting each of the north, south, and west sides of the plot or area of ground should form a handsome range of buildings not exceeding three storeys in height above the sunk storey unless where it might be deemed expedient and proper to carry the said building higher for ornament or architectural effect. It was declared by the disposition that the whole of the provisions, declarations, burdens, servitudes, restrictions, and conditions should be real liens and burdens affecting the subjects.

By these provisions, in my opinion, an effectual servitude was constituted in favour of the objectors' property. It was one of the known servitudes—*altius non tollendi*—and imposed a valid restriction on the petitioners' property. The objectors, as owners of their property, have thus a title to plead it. It does not appear to me to be necessary that they should have any assignation from the Royal Bank, who made the original contract with the Royal Exchange Company. In the contract of ground-annual, dated in 1835, under which the objectors' authors acquired right to the property, it was provided that these predecessors should be always entitled to the benefit of the privileges or burdens stipulated or imposed by the contract of sale above referred to. This clause does not appear to me to make the objectors' case better or worse. Their right is as owners of a dominant tenement, and is independent of assignation.

The petitioners, however, argue that the objectors do not aver any damage

or injury which will be done to their property by the operations proposed, July 9, 1912. and are therefore not entitled to plead the servitude. There is no allegation by the petitioners of any change of circumstances. If, therefore, the petitioners' argument is good now, it must have been equally good immediately after the disposition was granted in 1833. The petitioners say the onus is upon the objectors. In my opinion the petitioners' predecessors when they accepted the disposition in 1833 of the servient tenement conceded that the owners of the dominant tenement had an interest to enforce the restriction. It is for the petitioners to aver and prove facts and circumstances sufficient to show that that interest has now been lost. This they are unable to do. The facts speak for themselves. The petitioners' property is to the south, that of the objectors is immediately *ex adverso* to the north. The distance between is only 60 feet. In these circumstances it would be out of the question to say that a servitude *altius non tollendi* is not a benefit to the objectors' property. It is plain that they have an interest, and can therefore enforce the servitude against the petitioners.

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THE COURT sustained the appeal, and remitted to the Dean of Guild to sustain the appellants' objections and to refuse the petition.

FORRESTER & DAVIDSON, W.S.—H. B. & F. J. DEWAR, W.S.—Agents.

EULIFF SORENSEN, Appellant.—*J. A. Christie.*
JOHN GAFF & COMPANY, Respondents.—*Carmont.*

No. 161.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), First Schedule,
(3)—*Amount of weekly payment—"Benefit" received from employer—*
Payment of hospital charges.

July 10, 1912.
Sorensen v.
John Gaff &
Co.

The Workmen's Compensation Act 1906, enacts, First Schedule (3):—
"In fixing the amount of the weekly payment, regard shall be had to any payment, allowance, or benefit which the workman may receive from the employer during the period of his incapacity. . . ."

Held that payment by employers of an account rendered to them for the maintenance of an injured workman in hospital was a "benefit" received by the workman in the sense of this section, which fell to be taken into account in fixing the amount of his compensation.

IN an arbitration under the Workmen's Compensation Act, 1906, between Euliff Sorensen, seaman, and John Gaff & Company, ship-owners, Glasgow, the Sheriff-substitute of Lanarkshire at Glasgow (Lyell) pronounced certain findings in fact and in law, and at the request of the workman stated a case for appeal.

1ST DIVISION.
Sheriff of
Lanarkshire.

The case set forth:—(1) That the appellant, who was a seaman in the employment of the respondents on board the s.s. 'Shakespeare,' was injured by accident arising out of and in the course of his employment, while the said s.s. was at sea on 23rd December 1911. (2) That on the said 23rd December 1911, on the arrival of the said s.s. in Falmouth Harbour, the appellant entered the Falmouth Cottage Hospital, and was maintained and medically treated there until 16th February 1912. (3) That in respect of such maintenance and treatment the said hospital rendered to the respondents prior to the raising of the arbitration proceedings an account for £9, 5s., which the respondents

July 10, 1912. settled in full, subsequent to the raising of the arbitration proceedings, by a payment of £6, 10s. 7d. (4) That the weekly earnings of the appellant averaged at 34s. 6d. (5) That the respondents paid the appellant compensation at the rate of 17s. 3d., being fifty per cent of 34s. 6d., from the said 16th February 1912 up to 5th April 1912, at or about which latter date they aver that the appellant's incapacity came to an end.

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"The only question upon which the parties desired judgment meantime was as to whether the payment by the respondents of the appellant's maintenance and treatment in Falmouth Cottage Hospital from the date of the accident to his discharge on 16th February was a benefit which the appellant received from the respondents during his incapacity, to which regard must be had in fixing the amount of compensation.

"I found in fact and law (1) that the said payment of £6, 10s. 7d. for the appellant's maintenance and treatment in the said hospital was not payment of a debt due by the respondents to the appellant under the Merchant Shipping Acts or otherwise; (2) that the said payment was a benefit received by the appellant during the period of his incapacity, and in respect of a period of incapacity covered by the Workmen's Compensation Act, 1906, and I found in law (1) that in fixing the amount of the weekly payment regard must be had to the said payment of £6, 10s. 7d.; (2) that the respondents' liability to pay compensation to the appellant should be assessed at one penny per week from 26th December 1911 to 16th February 1912, and at 17s. 3d. per week from 16th February 1912 during the appellant's total incapacity, and with these findings I continued the cause."

The question of law for the opinion of the Court was:—"Whether the payment by the respondents of the appellant's maintenance and treatment in Falmouth Cottage Hospital from the date of the injury by accident to his discharge on 16th February 1912 was a benefit received by the appellant from the respondents during the period of his incapacity to which the arbitrator was bound to have regard in fixing the amount of the weekly payment, by virtue of the provisions of paragraph (3) of Schedule 1 of the Workmen's Compensation Act, 1906."

The case was heard before the First Division on 10th July 1912.

Argued for the appellant;—The payment in question was that of a debt due to the injured man and was not a benefit in the sense of paragraph (3) of the First Schedule. That section required that the payment or benefit should be received by the workman, not by his creditor. To admit the deduction of a payment made to a creditor would be to allow a claim to be set off against the weekly payment, in contravention of paragraph (19) of the same schedule.¹

Counsel for the respondents was not called upon to reply.

LORD PRESIDENT.—I think this is a plain case. By the third head of the First Schedule to the Workmen's Compensation Act, 1906, "in fixing the

¹ *The following authorities were referred to:—*Suleman v. Owners of the "Ben Lomond," (1909) 2 Butterworth, 499; Kempson v. Owners of "Moss Rose," (1910) 4 Butterworth, 101; M'Dermott v. Owners of "Tintoretto," (1910) 4 Butterworth, 123; Simmonds v. Stourbridge Glazed Brick and Fireclay Co., Limited, [1910] 2 K. B. 269.

amount of the weekly payment regard shall be had to any payment, allow-
ance, or benefit which the workman may receive from the employer during
the period of his incapacity.” Now in this case the arbitrator has found as
a matter of fact that the workman obtained a certain benefit, and that this
benefit should be taken into account in settling compensation. The only
point for us is whether on the facts as stated by the arbitrator there are no
facts that would entitle a reasonable man to say that this was a benefit. I
think, on the contrary, that all the facts point to the conclusion that this
was a benefit, and accordingly I think that there is no case at all for the
appellant.

LORD KINNEAR, LORD JOHNSTON, and LORD MACKENZIE concurred.

THE COURT answered the question of law in the affirmative.

ST CLAIR SWANSON & MANSON, W.S.—J. & J. ROSS, W.S.—Agents.

SIR RALPH ANSTRUTHER AND OTHERS (Sir Windham R. C. Anstruther's
Trustees), Appellants.—*Blackburn, K.C.—C. H. Brown.*
THE COMMISSIONERS OF INLAND REVENUE, Respondents.—
Sol.-Gen. Anderson—J. A. T. Robertson.

WILLIAM ROGER PATON, Appellant.—*Chree, K.C.—*
Hon. W. Watson.
THE COMMISSIONERS OF INLAND REVENUE, Respondents.—
Sol.-Gen. Anderson—J. A. T. Robertson.

No. 162.
July 10, 1912.
Anstruther's
Trustees v.
Inland
Revenue.

Paton v.
Inland
Revenue.

Revenue—Duties on land values—Provisions as to minerals—Meaning of
expression “minerals”—Felsite whinstone—Granite—Finance (1909-10)
Act, 1910 (10 Edw. VII. cap. 8), secs. 20, 22, 24.

Held that all substances obtained from the crust of the earth, other
than the surface soil, by mining, quarrying, or open working are
minerals in the sense of the Finance (1909-10) Act, 1910, with the
exception of those substances expressly excepted in the Act; and
accordingly that Felsite whinstone and granite, not being among the
excepted substances, were minerals, and subject to mineral rights duty.

I.—Anstruther's Trustees.

THE COMMISSIONERS OF INLAND REVENUE, acting under the Finance
(1909-10) Act, 1910,* made the following assessment of mineral rights

Valuation
Appeal Court.
Ld. Johnston.
Lord Salvesen.
Lord Cullen.

* The Finance Act (1909-10) Act, 1910 (10 Edw. VII. cap. 8), enacts:—

Sec. 20. “Mineral Rights Duty.—(1) There shall be charged, levied, and
paid for the financial year ending the thirty-first day of March Nineteen
hundred and ten, and every subsequent financial year, on the rental value
of all rights to work minerals and of all mineral wayleaves, a duty (in this
Act referred to as a mineral rights duty) at the rate in each case of one
shilling for every twenty shillings of that rental value. . . . (5) Mineral
rights duty shall not be charged in respect of common clay, common brick
clay, common brick earth, or sand, chalk, limestone, or gravel.”

Sec. 22. “Special Provisions as to Increment Value Duty and Reversion
Duty in the case of Minerals Worked or Leased.— . . . (8) Nothing
in this section shall apply to minerals which are exempt from mineral rights
duty under this Act.”

Sec. 24. “Definitions for purpose of Mineral Provisions.— . . .

July 10, 1912. duty on the trustees of Sir Windham R. C. Anstruther for the year ending 31st March 1911 :—

Anstruther's
Trustees v.
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Mineral Rights and Wayleaves chargeable.	Rental Value assessed by the Commissioners.	Mineral Rights Duty at one shilling in the pound on the Rental Value.		
1.	2.	3.		
Stone : Cairngryffe.	£ 753	£ 37	s. 13	d. 0

Sir W. R. C. Anstruther's trustees appealed under section 33 of the Act to a referee, on the ground that the stone in question (Felsite stone) was not a mineral.

The decision of the referee was in the following terms:—"The stone or rock called a 'Felsite' stone, taken from Cairngryffe Quarry, is, in terms of the Finance (1909-10) Act, 1910, a mineral.

DAVID RANKINE, Referee."

Sir W. R. C. Anstruther's trustees appealed, by stated case, under sections 33 and 42 of the Act, to the Judges of the Court of Session named for the purpose of hearing appeals under the Valuation of Lands (Scotland) Acts.

The facts of the case are contained in the following excerpt from a note by the referee which was included in the stated case:—

"The stone or rock as to which the appeal has been taken is leased by Sir Windham Robert Carmichael Anstruther, of Anstruther and Carmichael, Baronet, to the Upper Ward District Committee of the County Council of the county of Lanark. The subjects are described in the lease as All and Whole the whinstone quarry situated on the estate of Carmichael, in the parish of Pettinain and county of Lanark, near the top of the hill called Cairngryffe, and known as the Cairngryffe Quarry, together with the land necessary to form a double line of rails or hutch road from the aforesaid quarry to the loading bank to be formed on the west side of the Caledonian main line of railway. The tenants are also given the use of certain other lands and facilities necessary for the purpose of working, breaking, and carrying away the stone. . . .

"The stone or rock is a red-coloured hard Felsite rock, which is a form of whin, and it is of igneous origin. It is quarried or roughly broken by explosives, and is thereafter generally broken on the quarry floor by hand labour to a size suitable for being passed through a stone-breaking machine, a small portion of it being broken into two sizes of handmade road metal, from which the 'Grush' is extracted. The greater bulk of the roughly broken rock, amounting, I was informed, to 120 tons per day, is carried by tramway a distance of two miles or thereby to works placed near the public railway, where it is

Where any minerals are at any time being worked by means of any colliery, mine, quarry, or open working, all the minerals which belong to the same proprietor, if the minerals are being worked by the proprietor, or which the lessee has power to work if the minerals are being worked by a lessee, and which would in the ordinary course of events be worked by the same colliery, mine, quarry, or open working, shall be deemed to be minerals which are being worked at that date. . . ."

broken by machinery and screened into three sizes, the proportions July 10, 1912. produced, as I was informed, being:—

“Ten parts of large sized, or 2½-inch road metal, which is used on main roads. Anstruther's
Trustees v.
Inland
Revenue.

“Three parts of 1¼ to 1½-inch road metal, called seconds, which is used for side roads. Paton v.
Inland
Revenue.

“Two parts of ‘Grush,’ that being the small particles of the material passing through a 7/8th scree or riddle. The Grush is used for blinding or surfacing the metal on roads and for the surfacing of footpaths.

“Expressing the proportions in percentages they become roundly, 67 per cent of large sized or 2½-inch road metal; 20 per cent of seconds or 1½-inch road metal; and 13 per cent of Grush.

“In the course of argument by counsel for the appellant it was maintained that the inventory or list of excepted minerals or substances contained in section 20, subsection 5, of the Finance Act, was not intended to be final nor limited to the substances therein named, and that it is to be extended to substances *ejusdem generis* with those named, and further extended to those contained in a letter received by the agents for the appellant from Mr Gillespie, Surveyor of Taxes, Hamilton, which shows that the list of exempted minerals has been added to by the Revenue Authorities. The following is a copy of the copy letter which was produced:—

“Copy Letter, The Surveyor of Taxes, Hamilton, to
Messrs Russell & Dunlop, W.S.

“‘2nd August 1910.

“‘Dear Sirs,—I am in receipt of yours of yesterday. I assume that the “soft stone” you refer to has to be crushed or broken up in some way before it is fit for road-making. Please say if I am right in this. If my assumption is correct, I think the article must be considered as stone and not as gravel.

“‘I may mention for your information that the following mentioned substances are treated as not liable for mineral rights duty:—

Hearthstone. } (Derived from Upper Greensand.)
Firestone. }

Flint.

Portland Stone.

Carstone. (Derived from Lower Greensand.)

Sandstone.

Freestone.

Yours faithfully,

(Sgd.) T. GILLESPIE,
Surveyor.’

“Counsel for the Commissioners explained that the letter was not to be held as extending the list of exempted minerals, but is to be taken simply as a concession made by the Commissioners in an individual case. I would add that I have not been officially advised in respect of that letter, and all I have for my guidance in arriving at a decision are the Act and the statutory rules. . . .”

II.—Paton.

The Commissioners of Inland Revenue assessed William Roger Paton, of Grandhome, Woodside, Aberdeen, for mineral rights duty under the Finance (1909-10) Act, 1910, in respect of two granite quarries of which he was the owner. The referee to whom he

July 10, 1912. appealed having decided that granite was a mineral within the meaning of the Act, Paton appealed by stated case to the Judges of the Court of Session named for the purpose of hearing appeals under the Valuation of Lands (Scotland) Acts.

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The facts, as stated by the referee in the case, were as follows:—

"I found the subjects on which the assessment has been made consist of two quarries. These quarries are let under separate leases by the appellant, the one to George Hall and the other to John M'Adam & Sons. . . .

"On the occasion of my visit, I found that Messrs M'Adam & Sons were not quarrying any solid rock, and I understand they had not done so. They were turning over the rubbish laid aside in the former working of the quarry, which rubbish apparently consists partly of inferior rock and partly of a harder rock, and they were selecting the harder portions and passing them through a breaking machine, from which it passed through a screen, the broken stuff being thereby separated into:—

Dust.

$\frac{3}{8}$ th-inch chucks.

$\frac{1}{2}$ -inch chucks.

$\frac{3}{4}$ -inch chucks.

$1\frac{1}{2}$ -inch metal.

$2\frac{1}{2}$ -inch metal.

"The metal is again passed through the breaker unless there should be an order for it, but the production for which there is most demand is chucks, which are used partly for concrete work and partly for footwalks, the dust being used as a lime sand or for blinding roads.

"Mr Hall's operations are confined to quarrying the stone and cutting it up and dressing it for building purposes. I understand that some of the chips which are produced in the course of cutting up and dressing the stones are occasionally disposed of for use on roads. . . .

"In the quarry now in operation the post of granite is overlain by several feet of soil and subsoil, and I do not see wherein this granite can be said to be part of the soil. No doubt the granite extends over a large area in the locality in question, and it may possibly be that granite in the ordinary use of the term might be held to be the common rock of the district. But the granite in the district varies in quality, and hence it is that search by pitting or otherwise has to be made so as to discover where it is to be found of a quality fit for being profitably worked. There is evidence in the district of numbers of abandoned openings, thus showing that the good granite may be said to lie in pockets or areas of variable size. The quarry in question is of that class, the good rock being apparently of limited extent."

The two cases, Anstruther's Trustees and Paton, were heard together on 22nd June 1912.

Argued for the appellants in both the cases;—The substances in question were not minerals within the meaning of the Act and were not liable to duty. They were not minerals in the ordinary and popular acceptation of the term, and they were not minerals in the somewhat special sense which had been given to the word by the decisions of the Courts in questions arising in common law conveyances and under Railways, Canals, and Waterworks Clauses

Acts.¹ If, accordingly, they were minerals they must be so in a new July 10, 1912. sense of the term invented by the Finance Act. That the Act should have invented a second "legal" meaning for minerals was highly improbable, seeing that it would lead to the very anomalous result that a land-owner might have to pay mineral rights duty for substances which he could not claim as minerals under the Railways Clauses Acts. The presumption was that the Act had used "minerals" in the ordinary signification given to it in legal decisions, and there was no reason to assume that it had given the word a special meaning. It did not contain a definition of the word, and the explanation of subsection 5 of section 20, upon which the respondents so strongly founded, was to be found in the fact that doubts had recently been entertained about the precise position of the substances there exempted.² This was a taxing statute, and should be construed strictly and in the way least burdensome to the taxpayer.

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Argued for the respondents;—The substances were minerals within the meaning of the Act and liable to mineral rights duty. It was clear from the Act that the word "mineral" was used in its popular signification of any constituent of the earth's crust other than mere surface soil. Section 24 showed that minerals included substances got by quarrying and surface working as well as mining. The only reasonable explanation of subsection 5 of section 20 was that the term mineral included all mineral substances except the substances there enumerated, which would have been minerals also had they not been expressly excepted. It was to be noted too that in one case granite had been expressly held to be a mineral.³ The purpose of the statute was to tax landowners for all profits, other than agricultural profits, made out of the earth, and these included the profits assessed here.

At advising on 10th July 1912,—

I.—Anstruther's Trustees.

LORD JOHNSTON.—One of the new duties imposed by the Finance Act of 1910 is the mineral rights duty. The present case raises the question whether that duty attaches to the product of a quarry belonging to Sir W. R. Carmichael Anstruther's trustees, in which a particular species of whinstone called Felsite is worked for road metal, under a lease by the trustees to the road authority of the Upper Ward of Lanarkshire. I do not think that it is necessary to enter upon the details, whether relating to the species of rock, or to the mode in which it is worked, or to the terms of the lease to the road authority, which are set forth by Mr Rankine, the referee, in the case which he has stated. The simple question is whether this species

¹ North British Railway Co. v. Budhill Coal and Sandstone Co., 1910 S. C. (H. L.) 1; Caledonian Railway Co. v. Glenboig Fireclay Co., 1911 S. C. (H. L.) 72; Forth Bridge Railway Co. v. Incorporation of Guildry of Dunfermline, 1909 S. C. 493; Caledonian Railway Co. v. Symington, 1911 S. C. 552, 1912 S. C. (H. L.) 9; Magistrates of Glasgow v. Farie, (1888) 15 R. (H. L.) 94; Midland Railway Co. v. Checkley, (1867) L. R., 4 Eq. 19; Great Western Railway v. Carpalla United China Clay Co., Limited, [1909] 1 Ch. 218, [1910] A. C. 83.

² MacSwinney on Mines, Quarries, and Minerals, 4th ed. 565; Scott v. Midland Railway Co., [1901] 1 K. B. 317.

³ Attorney-General v. Welsh Granite Co., (1887) 35 W. R. 617.

July 10, 1912. of rock is a mineral in the sense of the statute, and whether, therefore, the mineral rights duty is exigible from Sir W. R. Carmichael Anstruther's trustees as the lessors.

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The Finance Act, 1910, section 20 (subsection 1), sets forth that there shall be charged, levied, and paid for each financial year ending 31st March "on the rental value of all rights to work minerals and of all mineral way-leaves, a duty (in this Act referred to as a mineral rights duty), at the rate in each case of one shilling for every twenty shillings of that rental value."

The same section (subsection 3) provides that every proprietor of any mineral shall, upon notice being given to him by the Commissioners requiring him to give particulars of the amount received by him in respect of the right to work minerals, make a return in the form required by the notice; and subsection 4, that mineral rights duty shall be assessed by the Commissioners on said return.

Had we to determine, without any further assistance from the statute, what is a mineral in the sense of the statute, the various considerations which have led the Court, in cases of voluntary transmissions of land reserving minerals and of compulsory purchases of land under statutory powers with statutory reservations of minerals, to determine what are and what are not minerals in the sense of the grant or of the statute would form a guide to the determination, and I think would lead to the undoubted conclusion that the Felsite rock in question was not a mineral in the sense of this statute, but was one of those ordinary substances composing the crust of the earth which was of the nature of the common rock of the district. But we are not left by the Finance Act, 1910, in that position. The same section (subsection 5) declares that "mineral rights duty shall not be charged in respect of common clay, common brick clay, common brick earth, or sand, chalk, limestone, or gravel." That is to say, these substances are by the statute excepted from the general description "minerals"; and the first suggestion, therefore, which the statute conveys is that, if it were considered necessary to except these substances from the general description of minerals, that general description must be intended to include everything else which can be wrought beneath the surface.

Passing to section 22, which provides rules for the charging of a different duty, viz., increment duty, in the case of minerals, subsection 8 provides that "nothing in this section shall apply to minerals which are exempt from mineral rights duty under this Act." This, again, indicates that in the sense of the statute all the component parts of the crust of the earth beneath the surface which can be worked, and are not within the exception above quoted, are to be deemed minerals. Further, there is an interpretation clause (section 24) having reference to the provisions of the statute imposing the mineral rights duty, &c., but it contains no definition of the term "mineral." It does, however, contain this important clause: "Where any minerals are at any time being worked by means of any colliery, mine, quarry, or open working, all the minerals which belong to the same proprietor, if the minerals are being worked by the proprietor, or which the lessee has power to work if the minerals are being worked by a lessee, and which would, in the ordinary course of events, be worked by the same colliery, mine, quarry, or open working, shall be deemed to be minerals

which are being worked at that date." This clause disposes of any possibility of distinction between those substances which can only be worked by mining in the ordinary sense of that term, and those which can be worked by quarrying or open working.

Having regard to the various provisions of the statute to which I have above referred, I can have no hesitation in holding that the term "minerals" in the sense of the statute does not bear the restricted meaning which it does in reservations of minerals, either in voluntary transactions regarding land or in compulsory purchases under railway, canal, and waterworks or similar Acts, and that in the sense of the statute, any substance, other than those excepted specially, which is obtained from the crust of the earth beneath the surface, by mining or quarrying or open working, and for which a consideration of the nature of rent or royalty is paid, is a mineral in the sense of the statute; and that upon the rights to work such substances the mineral rights duty imposed by the statute is payable under the statute.

The only difficulty that I experience is in understanding and appreciating the bearing of the letter which the referee quotes, addressed by the Surveyor of Taxes at Hamilton to the appellants' agents, in which the surveyor states, presumably under instructions, for the information of the latter, that the following mentioned substances "are treated as not liable for mineral rights duty," namely, certain of the greensand rocks, flint, Portland stone, sandstone, and freestone. And the appreciation of this statement is not made any easier by the explanation made on the part of the Commissioners that the letter is "not to be held as extending the list of exempted minerals, but is to be taken simply as a concession made by the Commissioners in an individual case." It is not to be wondered at that the appellants regarded this letter as a contemporaneous interpretation of the statute, by those who ought best to know its intention, which leads *a fortiori* to the conclusion that Felsite used for road metal ought not to be treated as a mineral under the statute. But I have searched the statute in vain for any authority conferred upon the Commissioners to treat as not minerals what the statute treats as minerals, or to make concessions in individual cases. I readily concede to the appellants that if the substances which, in the letter quoted, the Commissioners assume to treat as not minerals, are not minerals in the sense of the statute, *a fortiori* Felsite and the other road metals are not minerals. And, but for reasons which readily suggest themselves, I would have expected the Commissioners in common fairness to extend their discrimination to the road metals. But I do not find that I am authorised, any more than the Commissioners, either to exempt any particular substances from the general term "minerals" which are minerals in the sense of the statute, or to include any substances under the term "minerals" which are not minerals in the sense of the statute. And therefore, as I must hold for the reasons above given, that, whether ordinarily regarded as a mineral or not, Felsite must be deemed a mineral in the sense of this statute, I propose to your Lordships that we affirm the determination of the referee.

LORD SALVESEN.—I concur with your Lordship in the chair. I think there is really no doubt as to the true construction of the Act, and that,

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The main difficulty in the case is occasioned by the letter from the Surveyor of Taxes, to which your Lordship has referred, in which the appellants were informed that certain substances were to be treated as not liable for mineral rights duty. If this letter is to be regarded as an authoritative exposition of the Act, there appears to me to be no conceivable reason why stone which is only useful for road making should be treated as a mineral, while various forms of stone, of apparently far greater value, used for building are not to be treated as such. I associate myself with what your Lordship has said as to the apparent illegality of these exemptions on the construction of the Act for which the Inland Revenue has contended here, and which we hold to be correct. If such exemptions are to be granted, they should be made the subject of legislative enactment, and it would seem to be an entire novelty, in the levying of taxes imposed by an Act of Parliament, that the officials who have to administer it should take upon themselves the right of granting exemption to a large body of taxpayers, and so to sacrifice a considerable revenue which Parliament has directed to be collected. It is the interest of every taxpayer in the country to see that all persons who are liable to the tax which he pays are made to contribute on exactly the same footing. No Government departments have any power, unless expressly conferred by some statute to which we were not referred, to grant exemptions to one body of taxpayers and so to override the Act of Parliament which it is their duty to execute.

LORD CULLEN concurred.

II.—Paton.

LORD JOHNSTON.—In the case of William Roger Paton of Grandhome the appeal relates to a different class of stone from that dealt with in the last case, namely, granite. The same considerations apply to this case also, and judgment will follow accordingly.

LORD SALVESEN and LORD CULLEN concurred.

THE COURT found in each case that the decision of the referee was right, and dismissed the appeals.

RUSSELL & DUNLOP, W.S.—MARTIN, MILLIGAN, & MACDONALD, W.S.—
SIR PHILIP J. HAMILTON GRIERSON, Solicitor of Inland Revenue—Agents.

WILLIAM JAMES WOOD, Pursuer (Reclaimer).—*M^r Lennan, K.C.*— No. 163.

Kemp.

THE WESTERN CEMETERY COMPANY, LIMITED, Defenders (Respondents). July 10, 1912.

—*Murray, K.C.*—*D. Anderson.*

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Local Government—Rates and assessments—Exemptions—“Ground exclusively appropriated as burial ground”—Cemetery only partially occupied and earning profit—Rating Exemptions (Scotland) Act, 1874 (37 and 38 Vict. cap. 20), sec. 1. Cemetery Co., Limited.

The Rating Exemptions (Scotland) Act, 1874, sec. 1, exempts from assessments and rates “any ground exclusively appropriated as burial ground.”

Held (dub. Lord Johnston) that the whole of a portion of ground belonging to a cemetery company fenced off and enclosed for burial purposes, was “exclusively appropriated as burial ground,” and accordingly exempted, notwithstanding the facts (1) that the lairs into which it was divided were only in course of being sold and occupied; (2) that the company derived a profit from the sale of lairs.

ON 7th June 1910 William James Wood, collector of poor and school rates for the parish of Glasgow, brought an action against the Western Cemetery Company, Limited, for payment of £144, 11s. 3d., being the amount of assessments for poor, school, and other rates imposed on the defenders by the Parish Council of the parish of Glasgow for the year ending Whitsunday 1910, as owners and occupiers of the Western Cemetery, Maryhill, Glasgow. 1ST DIVISION.
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Skerrington.

The pursuer averred that the defenders acquired and carried on the cemetery with the object of making profit by selling to the public rights of sepulture; that they earned large profits by the undertaking, and that no restrictions were laid upon them by their titles as to the uses to which they might put the ground. He denied that the ground was “exclusively appropriated as a burial ground,” and as such exempted from rates and assessments under the Rating Exemptions (Scotland) Act, 1874, sec. 1.*

The defenders averred that the ground was exclusively appropriated as burial ground within the meaning of the section.

They pleaded;—(1) The pursuer’s averments being irrelevant and insufficient to support the conclusions of the summons, the action should be dismissed. (2) The defenders’ property, in respect of which the assessments now sought to be recovered were imposed, being exclusively appropriated as burial ground, and consequently exempt from assessment in terms of the Rating Exemptions (Scotland) Act, 1874, the defenders should be assoilzied, with expenses.

On 1st November 1910 the Lord Ordinary (Skerrington) sustained the first plea in law for the defenders, and dismissed the action.†

* The Rating Exemptions (Scotland) Act, 1874 (37 and 38 Vict. cap. 20), enacts:—Sec. 1. “No assessment or rate under any general or local Act of Parliament for any county, burgh, parochial or other local purpose whatsoever, shall be assessed or levied upon or in respect of . . . any ground exclusively appropriated as burial ground.”

† “OPINION.—The question in this case is whether a cemetery which belongs to a cemetery company and is used for the purpose of making profit by selling rights of sepulture therein is exempted from local taxation as being ‘exclusively appropriated as burial ground’ within the meaning of

July 10, 1912. The pursuer reclaimed.

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The case, having come up for hearing before the First Division, was continued to give parties an opportunity of lodging a joint minute of admission of facts.

The facts stated in the minute which was thereafter lodged were summarised by Lord Mackenzie as follows:—

“ The total extent of the land acquired by the defenders extended to 54·35 acres. They originally fenced off or enclosed as cemetery ground 14½ acres or thereby. The remainder of the total area, excepting a road, was then let by the defenders for agricultural purposes. From time to time the defenders have increased the extent of the ground fenced off for burial purposes, and there are now 27·71 acres so enclosed. The following subjects have been entered separately in the Valuation-roll, and assessments thereon duly paid—(1) the lands leased for agricultural purposes; (2) the cemetery superin-

the Act 37 and 38 Vict. cap. 20. I was informed that in practice such exemption has been allowed. The same statute exempts churches, &c., ‘exclusively appropriated to public religious worship.’ This latter exemption was considered by the Court in the case of *Trustees of College Street U.F. Church v. Parish Council of Edinburgh*, Jan. 31, 1901, 3 F. 414. There does not, however, appear to be any decision as to the exemption of cemeteries from taxation.

“ Counsel for the pursuer (a collector of rates) argued with great force that the exemption from taxation of a cemetery used as a source of profit to its owners was an anomaly and constituted an injustice to the other rate-payers, which Parliament could not have contemplated. He argued that the words of the statute were satisfied by holding that the exemption applied to public cemeteries such as parish churchyards or burial grounds established under the Burial Grounds Act of 1855, and (possibly) to cemeteries which are dedicated as such by private trust. In such cases there is no question of making a profit out of the burying ground; and, further, the dedication is complete because the public, or certain sections of the public, are entitled to insist upon the whole of the ground being used for burial purposes. In the case of a private cemetery like the one under consideration, the pursuer’s counsel did not dispute that the portion of the ground actually occupied by lairs is exclusively appropriated as burial ground not merely *de facto* but also *de jure*. The law forbids any wanton disturbance of a grave, and it might be invoked not merely by a lair-holder but also by a relative of the deceased. But he argued that the ground already given off for lairs is practically of no value to the Cemetery Company, and that the value of the cemetery as a profit-producing subject consists in the portion of the ground which has not yet been given off or ‘appropriated as burial ground.’ This argument does not, in my opinion, give sufficient weight to the fact that when the owner of a private cemetery has once allowed interments to take place he subjects himself to serious restrictions as to the use which he can lawfully make of the remainder of the ground.—See *Cunningham v. Edmiston*, June 23, 1871, 9 Macph. 869, *per* Lord Gifford (Ordinary), p. 875, and Lord Deas, p. 885. In the absence of any relevant averments to the contrary, I must assume that the only profitable use which the defenders, the Cemetery Company, could lawfully make of the unoccupied portion of the ground would be to use it as burial ground, a phrase which, in my opinion, is not confined to actual interments, but might include other uses appropriate to a burial ground, such as the erection of a mortuary chapel or a cenotaph.

“ In these circumstances, I am of opinion that the defenders’ cemetery is *de facto* exclusively appropriated as burial ground, and that it is immaterial to point out that the defenders may, if they please, cease to sell lairs

tendent's house and offices; (3) ground feued to the Scottish Burial July 10, 1912. Reform and Cremation Society, Limited; and (4) a mortuary chapel, within the fence enclosing ground set apart for burial purposes, used in connection with the portions thereof set aside for several of the Jewish synagogues. Wood v. Western Cemetery Co., Limited.

"The twelfth article of the minute of admissions is as follows:— 'That the whole area of 27·71 acres or thereby now fenced off or enclosed for cemetery purposes, and enclosed within the boundaries coloured purple on said plan, is laid out as lairs for burial, with the necessary carriage drives, walks, grass, and flower plots, and the said superintendent's house, &c.; that said 27·71 acres are divided into various sections containing lairs, the right of burial in which has been or is in course of being sold by the defenders on the terms and conditions and at the varying scales of prices set forth in the rules and regulations, of which No. 22 of process is a copy, and common lairs in which interments have been and are being made for a pecuniary consideration, as stated in said rules and regulations; that the whole subjects before referred to, viz., (1) those let for agricultural purposes; (2) those feued to the Cremation Society; (3) the Jewish mortuary chapel; and (4) the superintendent's house and offices, do not form any part of the subjects entered in the Valuation-roll as the Western Cemetery, about the assessability of which the present action has been raised.'"

The case was heard before the First Division (without the Lord President) on 3rd and 4th July 1912.

Argued for the reclaimer;—The ground was not "exclusively appropriated as burial ground" for the following reasons:—(1) The primary object of the defenders' Company was the earning of profits. This element of commercial enterprise was wholly inconsistent with "exclusive" appropriation as a burial ground.¹ Further, it was quite obvious that it could not have been the object of the Legislature, by the Act of 1874, to free a profit-making concern from the ordinary burdens. What it had in view was the old parochial burying ground or its statutory equivalent. That this must have been so was clear from the course of legislation prior to 1874 on the subject of exemp-

and so allow the unoccupied ground to remain unprofitable. The view above expressed as to cemeteries is consistent with the construction which I should be disposed to place upon the exemption of churches or premises exclusively appropriated to public religious worship. I do not think that it is a condition for obtaining the exemption that the church should be held under a title which forbids it to be used for any purpose except public worship. It is, I think, enough that it is *de facto* so used under circumstances which give rise to the inference that the user is of a more or less permanent character. The case of a cemetery is really *a fortiori* of the case of a church. As I have already explained, the vacant portion of the cemetery cannot (generally speaking), either *de facto* or *de jure* be put to a profitable use for secular purposes, whereas there are voluntary churches in Scotland which might be used for secular purposes without alteration of their structure or violation of the law.

"I accordingly dismiss the action, but it will be open hereafter to the pursuer to allege and prove, if he can, that there are portions of the so-called cemetery which are not in any reasonable sense appropriated as burial ground."

¹ Trustees of College Street United Free Church v. Parish Council of Edinburgh, (1901) 3 F. 414, Lord President Balfour, at p. 418.

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tions from assessment, and burial grounds.¹ (2) The ground could not be "exclusively appropriated" so long as it was, as now, only partially occupied. It was not enough that it had been fenced off and enclosed. It could not be "exclusively appropriated" until all the lairs were occupied or sold. At present it was only partially appropriated. (3) Exclusive appropriation in the sense of the Act of 1874 meant appropriation *de jure* and not merely *de facto*, and could only take place where there was a perpetual dedication to burial ground purposes either by common law or by Act of Parliament. In the present case there was nothing to prevent the Cemetery Company using the unoccupied ground for other purposes, and there was thus no dedication, unless perhaps such as might be implied in the contracts already entered into with lair-holders.² If there was any ambiguity in the words "exclusively appropriated" they should be interpreted so as to limit rather than to extend the statutory exemption from assessment.³

Argued for the respondents ;—The ground was "exclusively appropriated as burial ground" in the sense of the Act, if the words of the Act were reasonably interpreted. The best evidence of "appropriation" was use, and admission 12 of the minute showed that this area, the whole of which must be regarded as a *unum quid*, was actually used as a cemetery. Actual use, however, was not necessary to constitute appropriation.⁴ Dedication was sufficient, and dedication took place when, as here, the ground was fenced off and one or more lair-holders acquired a contractual right to insist on the ground being preserved in all time coming as a place of interment.⁵ The pursuer confused the purpose *for* which the Company had bought the ground, viz., profit, with the purpose *to* which the ground had been devoted, viz., a burial ground. It was with the latter only that the Act dealt. The Act was obviously passed to give effect to the actual practice of assessors in exempting this class of cemetery and to encourage the formation of cemetery companies.

At advising on 10th July 1912,—

LORD KINNEAR.—I think that this case has been rightly decided by the Lord Ordinary. His Lordship had not the advantage, which we have now, of having all the material facts before him conclusively determined by a joint minute of admissions, for, when the case first came before this Court we found that the parties were at variance upon some material points, and, accordingly, we gave them an opportunity—of which they have taken

¹ 3 and 4 Will. IV. cap. 30 ; 18 and 19 Vict. cap. 68, sec. 26 ; 28 and 29 Vict. cap. 62 ; *cf.* North Manchester Overseers v. Winstanley, [1907] 1 K. B. 27, [1908] 1 K. B. 835, [1910] A. C. 7 ; University of Edinburgh v. Greig, (1865) 3 Macph. 1151, 6 Macph. (H. L.) 97.

² See Paterson v. Beattie, (1845) 7 D. 561 ; Cunningham v. Edmiston, (1871) 9 Macph. 869 ; Craigton Cemetery Co. v. Assessor for Lower Ward of Lanarkshire, (1889) 16 R. 802.

³ Parish Council of Edinburgh v. Magistrates of Edinburgh, 1907 S. C. 1079, Lord M'Laren, at pp. 1087-88.

⁴ Burial Grounds (Scotland) Act, 1855 (18 and 19 Vict. cap. 68), sec. 11.

⁵ Cunningham and Others v. Edmiston and Others, 9 Macph. 869 ; Paterson v. Beattie, 7 D. 561.

advantage—of removing any difficulty in fact by adjusting admissions. July 10, 1912.

The result of the minute of admissions that is now before us appears to me to justify the inference drawn by the Lord Ordinary upon the imperfect materials before him, and I think that his Lordship has also come to a right conclusion in point of law.

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The question is whether a cemetery belonging to the defenders is exempt from assessment by virtue of the provisions of 37. and 38 Victoria, chapter 20. The provision in terms enacts that no assessment or rate “shall be assessed or levied . . . upon or in respect of any ground exclusively appropriated as burial ground.”

The state of facts upon which the defenders claim the benefit of this exemption are that they are a company incorporated mainly for the purpose of establishing and conducting a cemetery, that they have acquired ground for the purpose of a cemetery, and that it has been partially occupied. They have acquired also other ground which is not in the meantime laid out for burial purposes, but is put to other uses; and for that other ground they admit that they must be assessed, as they are, in the ordinary course. The property which is not appropriated to cemetery purposes is not entitled to any exemption. But then, as regards the ground which is really the subject in dispute, they say that they had originally fenced off and enclosed as cemetery ground a portion of the total area extending to fourteen acres and three-quarters, that from time to time they increased the extent of the ground so fenced off and enclosed for burial purposes, and that now the portion totally annexed and situated within the boundaries shown on the plans extends to 27·71 acres, and that is the ground presently fenced off and enclosed for burial purposes. Then they say—I mean both the parties say, for it is a joint admission—“that the whole area of 27·71 acres or thereby now fenced off or enclosed for cemetery purposes . . . is laid out as lairs for burial, with the necessary carriage drives, walks, grass, and flower plots, and the said superintendent’s house.” They say “that the 27·71 acres are divided into various sections containing lairs, the right of burial in which has been or is in course of being sold by the defenders on the terms and conditions and at the varying scales of prices set forth,” and that the other subjects which they have described, namely, “(1) Those let for agricultural purposes; (2) those fened to the Cremation Society; (3) the Jewish mortuary chapel; and (4) the superintendent’s house and offices, do not form any part of the subjects” about which the present question is raised. We are now concerned only with the 27 acres fenced off and enclosed for cemetery purposes. And then it is added that the whole “profit derived by the defenders from the business carried on by them, which, however, partly represents return of capital, has been sufficient to yield an average dividend of 4·7 per cent per annum to the preference shareholders, and of 5·03 to the ordinary shareholders.”

Now, it appears to me that, according to that description, the ground which has been fenced off and enclosed and dedicated to the purposes of a cemetery is exactly within the terms of the exemption clause. It is appropriated exclusively to the purposes of a burial ground. But then, the reclaimer maintained two arguments to the contrary, both of which must be considered. In the first place, he said that ground is not exclusively

July 10, 1912. appropriated to burial purposes so long as it is only partly occupied. It is not enough, according to his argument, that people designed certain ground for the purposes of a burial ground, but they must in fact make use of it for that purpose, and for that purpose exclusively. If the appropriation does not rest upon mere intention, but the ground has been actually set apart and dedicated to this one purpose, to the exclusion of any other, the Act is satisfied. I agree that, so long as people merely design to use land in a particular way, they do not come within the exemption, and I think the Company is under the necessity of proving that the ground is in fact set apart. But in ordinary language it is set apart for the purpose of a cemetery when it is fenced off and enclosed for this purpose, and when, so far as it is used at all, it is used for the burial of persons who have already acquired rights for themselves or their relatives by purchasing lairs in the ground.

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If this rested merely upon the fact of the ground having been fenced off and devoted to this purpose and to no other, I should have thought it enough. But then I think the legal effect of the contracts made by the Company must be taken into account, and I take it to be decided by the case of *Cunningham v. Edmiston*,¹ that, when a company has formed a cemetery of this kind and given rights of interment in particular lairs which have been actually used for that purpose, the effect of the contract is not only to entitle the lair-holders to insist that the particular lairs allocated to them shall be used exclusively for interment, but that there is also an implied obligation that the whole cemetery shall be used and applied for the purpose of interment and no other. It is set apart and expressly dedicated in the clearest manner to the purposes of a burial ground, and everybody who acquires a right of burial in that ground is entitled to insist that the cemetery so set apart shall be used only for the purposes of a cemetery. Therefore, I think it is no answer to say that the ground presently occupied by lairs is not the entire ground fenced off and set apart for the purposes of a cemetery. Upon the plain meaning of the words, "ground appropriated" to a particular purpose, as I understand language, means ground set apart for that purpose so as to admit of its being used for no other, notwithstanding that every part of it may not yet be completely occupied.

The second point the reclamer maintained was this : he said that although the cemetery is so set apart, it is not exclusively appropriated to the purpose of a burial ground because the proprietors earn a profit from the sale of lairs ; and the point, as I understand it, is that this enactment is not intended for the benefit of any cemetery owners who use their land for the purpose of profit. I cannot find any limitation of that kind in the words. They are perfectly clear, and cover all ground exclusively appropriated for the purpose. It is said that the word "exclusively" excludes among other things the idea of profit. That, however, is not a construction but a perversion of the language. No doubt the word "purpose" is liable to ambiguity. It may signify the special use to which a piece of land is applied, or the ulterior intention of the owner in so using it. But it can hardly have both meanings at once ; and in the present case the context

¹ 9 Macph. 869.

shows very clearly which of the two is intended. The subject of the enactment is the ground itself. It is the ground that is to be set apart for one exclusive purpose, and, if that condition is satisfied, it appears to me to be quite irrelevant to inquire whether the people who have so set it apart are to derive any emolument from it or not. It is said that this denies its proper force to the word "exclusively." But the operative exclusion which is postulated in the enactment must be due to the special use of the ground, and not to the motives of the land owner. If a particular piece of land is used for the purpose of a burial ground alone, that will exclude market gardening or building, and every other purpose for which it might have been suitable, just as completely and effectually when the owner hopes for a reasonable return for his expenditure, as if he had acted from pure benevolence or public spirit. According to the ordinary use of language, it may be said that a man's ground is exclusively appropriated to a particular purpose whether he is making money out of that appropriation or not. And I think that an excellent illustration of the ordinary use of this language is to be found in the opinions that were delivered in the case of *Cunningham v. Edmiston*,¹ to which I have already referred, because, in that case, there could be no question that the cemetery which was brought under the notice of the Court was conducted for profit, and the Court held that its proprietors were entitled to derive the profit from the interment fees which they exacted. But throughout the whole course of the opinions, you find the learned Judges, especially Lord Gifford who was Lord Ordinary, say over and over again that the point of the case to be kept in view is that the ground is exclusively dedicated for purposes of sepulture.

But then this argument was joined with another of a totally different kind; and, as I understood—I am not quite sure that I followed it,—the two were supposed to run, in some way, into one another and strengthen one another, because, it was said, the Act must be read with reference to the series of previous Acts by which Parliament had interfered for the regulation of public burial grounds. I cannot see what is the inference to be drawn from that fact. There are many other Acts about public burial grounds which do not confer this particular exemption. But, by the time this Act was passed, there were numerous cemeteries—in all the great towns in the kingdom there were cemeteries—carried on by cemetery companies who got more or less profit, more or less return for the capital they had spent on the ground, from interment fees; and, therefore, the existence of such cemeteries was a public fact, just as much within the view of Parliament as the existence of other burial grounds which were under the control of public authorities. The distinction between public parochial burial grounds, whether they are proper churchyards or not, and cemeteries which are carried on for a profit is perfectly clear and obvious; but there is one characteristic common to both, and that is that both are dedicated exclusively to purposes of sepulture; and that is the criterion which Parliament has selected for the definition of the ground which is to be exempt from rates and taxes.

On the whole matter, therefore, I come to the conclusion with the Lord

¹ 9 Macph. 869.

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July 10, 1912. Ordinary that this cemetery, being exclusively appropriated for the purposes of a burial ground, falls within the exemption clause.

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LORD JOHNSTON.—I have very great difficulty in acceding to the judgment which your Lordship proposes in this case, because I am not satisfied that it was the intention of the Legislature that exemption should be given in the case where the ground in question, though truly a burial ground—that is, ground appropriated for the purposes of burial—was primarily devoted to profit-making, and was only appropriated to burial to that primary end.

I think, differing from your Lordship, that considerable light is thrown upon the meaning of the statute, which we are called upon to interpret, by a consideration of previous legislation. But, in the first place, whatever may be the right to exemption, all burial grounds, other than the old churchyards, have a value and must enter the Valuation-roll. I need only refer to the case of the Portobello Cemetery¹ where a cemetery provided under the 1855 Act,—that is to say, a parochial burial ground, and one, therefore, from which no profit could be gained,—was entered in the Valuation-roll, leaving the Parochial Board to establish their right to exemption under the statute of 1874. Therefore, a burial ground has a value, and *a fortiori* has a value where it is a cemetery carried on for the purposes of profit.

I think, however, that one must approach the consideration of the statutes with some knowledge of the prior law with reference to the common law obligation to provide burial grounds for a parish. There are in Scotland some anomalous situations in which there are local burial grounds, which have not been provided by the heritors of the parish. I can instance the Calton Burial ground here which, as is seen from the Martyrs' Monument case,² was acquired by the Trades' Council of the Calton Burgh for purposes of burial many generations ago—I do not know when—and which was treated, as far as I can judge, as part of the common good of the Corporation of Trades. Similarly, there is the well-known cemetery in the centre of Dundee, which was a gift by Queen Mary to the burgh, and I have no doubt there are others.

But the ordinary parish burial ground in Scotland was the parish kirk-yard. After the Reformation, the common law placed upon the heritors of the parish the obligation to provide ground for burial purposes for the parish. The old Roman Catholic burial grounds round about the churches were naturally appropriated where these churches or their sites became the reformed parish churches; otherwise they had to be provided, and in any case to be extended when required, by the heritors. Perhaps one of the most illustrative instances of the situation is to be found in the case of *Walker v. The Presbytery of Arbroath*,³ which occurred so recently as 1876. But, by 1855, there had arrived a time when, for sanitary reasons, a great many burial grounds required to be closed or transferred to

¹ Edinburgh Parish Council v. Edinburgh Magistrates, *supra*, p. 793.

² Paterson v. Beattie, 7 D. 561.

³ (1876) 3 R. 498, (1876) 4 R. (H. L.) 1.

other places in order to provide larger accommodation. And, accordingly, July 10, 1912. in 1855, the Act, which is the current Parochial Burial Grounds Act in Scotland, was passed, which provided for the closing of certain burial grounds, and imposed upon the parochial boards, in place of the heritors, the duty of providing other burial grounds in place of those which were closed, and empowered them to acquire burial grounds where the needs of the community had outgrown the old parish kirkyard system. A great many burial grounds were so acquired, and according to the enactment of the 1855 Act, they could not be made the subject of profit. It is quite true that, under that Act, it was in the power of the parochial board to sell exclusive rights of sepulture. It was also in their power to impose dues in connection with burials, but it was equally provided by the statute that neither of these powers should be exercised for profit, that the utmost which the parochial board could do, in the way of raising funds by the sale of a limited portion for exclusive burial, and by the charge of burial dues, was *pro tanto* to meet the expenses of laying out and of maintaining the burial ground, and so reduce the rates. But it was in full contemplation that there would always be a liability for a remainder of such expenses laid upon the rates.

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Limited.

Ld. Johnston.

It is, therefore, made perfectly clear that the Act of 1855 did not contemplate any possibility of profit. I notice that the statute incorporates a portion of what is called the Cemeteries Clauses Act, 1847,—those sections which provide for the protection and preservation of cemeteries. I think it right to say here, and I think it is an observation of some bearing in relation to this matter in Scotland, that the Cemeteries Clauses Act of 1847 is not a Scots Act, it is only an English and Irish Act; it did not apply to Scotland, although certain sections of it were capable of being specially incorporated by reference in this general Act. That shows that, at anyrate in 1847, it was not common in Scotland for private enterprise to create public cemeteries, which could require the use of a Cemeteries Clauses Act, as must have been the case in England and Ireland. At the same time, I quite concede that it is a fact that there were in Scotland in 1855, particularly in such large towns as Edinburgh and Glasgow, some cemeteries of the class of joint stock company cemeteries—such as our own Dean Cemetery here, and, I have no doubt, others in Glasgow, and in possibly one or two of the bigger towns. But they were few in number.

That being the state of matters so far as the provision of burial grounds goes, the statutes which deal with exemption from rates follow in this sequence:—In 1833 there was passed an Act¹ which exempted from poor and church rates churches, chapels, and other places of religious worship. Now, from indications within that statute, it is clear that it did not apply to Scotland, but there is in it a point which I think worthy of notice, namely, it is very carefully laid down that, where there is any profit realised from any portion of such buildings as may be used for churches, chapels, meeting-houses, &c., the exemption shall not extend to such buildings. From the first point therefore where legislation touches this matter, you have it made very clear that there is to be no exemption where profit to

¹ 3 and 4 Will. IV. cap. 30.

July 10, 1912. any extent is derived. Now, not only does that statute not apply to Scotland, but it is, from our point of view, somewhat awkwardly worded, because it does not exempt the property, it exempts the person—"that no person or persons shall be liable to any such rates or cesses because of," &c.

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The next statute is one which, I understand, was passed because it was doubted—and is, as I think, clear—that the previous statute of 1833 did not apply to Scotland. This is the statute of 1865,¹ which, referring to the statute which I have noted, provides, in the same words, that "no person shall be rated . . . in respect of any church, &c.," and limits it to exemption from poor-rates. The limitation to poor-rates and the awkward way in which, following the English Act, the exemption was given to the person and not to the place was, I have no doubt, the cause of the Act of 1874; and that statute, after referring to the Act of 1865, provides that no assessment or rate under any general or local Act of Parliament—extending, therefore, the exemption from poor-rates to any assessment or rate—shall be assessed upon any church, chapel, meeting-house, or—extending it to include burial grounds—upon or in respect of any ground exclusively appropriated as burial ground.

Now, I cannot take that sequence of statutory enactment without noting two things, first, that the idea of the Legislature at the outset was to exempt that which was exclusively appropriated but from which no profit was to accrue, and, second, to extend the exemption to burial grounds just at a time when the operation of the Burial Grounds Act, 1855, may be assumed to have begun to have effect. And I think it is not at all unreasonable to conclude that the reason for this, the extension of the exemption in 1874, was that a new class of burial grounds had arisen in the course of the preceding nineteen years which were not in the same position as parish kirkyards. Moreover, there is no conceivable reason for exempting from rates a private venture for profit because its profit is to be attained by supplying for valuable consideration burial ground to those who desire to obtain the exclusive use of it.

In view of the above, if I am asked what is really the meaning of "exclusively appropriated as burial ground," I confess to a hesitation in coming to the conclusion that ground, which is put to the primary purpose of realising a profit, is, in the sense of this statute and in the view of the legislation to which I have referred, to be held as "exclusively" appropriated as burial ground. It seems to me that those words were really intended by the statute to apply—and to apply only—to those classes of burial grounds which were provided and were appropriated with a single eye to providing means of interment for the dead of the district.

But I cannot possibly avoid giving the utmost deference to the opinion which your Lordships, I know, entertain, that the words used in the statute are only capable of interpretation in the way in which your Lordship has interpreted them. Although I have expressed my views and doubts as to the intention of the Legislature, I cannot but admit that the words used by the Legislature would primarily and (if one did not go back to the history of the thing) naturally be read as your Lordship reads them. And, therefore,

¹ 28 and 29 Vict. cap. 62.

I do not venture to carry my doubts beyond the expression which I have given to them. I therefore assent to the judgment which your Lordship proposes, and in which, I understand, Lord Mackenzie concurs.

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LORD MACKENZIE.—The question in the case is whether the defenders are liable for poor, school, and other assessments for the year from Whitsunday 1909 to Whitsunday 1910. Assessment notices were duly sent to the defenders, who deny their liability to pay, and plead the terms of the Act 37 and 38 Vict. cap. 20, which provides:—Sec. 1. “No assessment or rate under any general or local Act of Parliament for any county, burgh, parochial or other local purpose whatsoever, shall be assessed or levied upon or in respect of any church, chapel, meeting-house, or premises in Scotland exclusively appropriated to public religious worship, or upon or in respect of any ground exclusively appropriated as burial ground.” The pursuer denies that the ground in respect of which the notices were served is exclusively appropriated as burial ground. There is no question that the defenders acquired and carry on the cemetery for the purpose of making profit. A minute of admissions has been put in from which the following facts appear:—[His Lordship gave the summary of the minute quoted *supra*, pp. 1174-5.]

The case is within a short compass, and depends on the construction of the words “exclusively appropriated” contained in the statute. About the meaning of the word “appropriated” there cannot be doubt. It means what is set apart for a particular purpose and use. The word “exclusively” adds little to its meaning. It signifies that the ground is set apart for the particular purpose and no other.

It was contended by the pursuer’s counsel that in order to get the benefit of the exemption the ground must be *de jure* appropriated—that is to say, as I understood the argument, that it must be possible to find a perpetual dedication either in the common law or in some other Act of Parliament. There is nothing in this argument. Even under the Act of 1855¹ there is no statutory dedication of ground as burial ground. It was next contended that there could not be exclusive appropriation unless and until a particular lair had been *de facto* used for the purpose of interment. The answer to this is twofold—that ground may be appropriated to a purpose before it is actually used; and, second, that in a reasonable sense the whole of the 27·71 acres is now being used as burial ground. The ground must be taken in its actual state as was done in the case of a church in the *College Street United Free Church, Edinburgh, v. The Parish Council of Edinburgh*,² and as was done in the case of the *Craigton Cemetery Company, Limited, v. The Assessor for Lower Ward of Lanarkshire*.³ The 1855 Act, section 11, shows that appropriation is wider than use. The twelfth article of the minute of admissions appears to me to conclude the matter against the pursuer. It is admitted that the whole of the 27·71 acres is fenced off and laid out as lairs in which the right of burial has been or is in course of being sold, and common lairs in which interments have been and are being made for payment. The right which each purchaser of a lair acquires over

¹ 18 and 19 Vict. cap. 68.

² 3 F. 414.

³ 16 R. 802.

July 11, 1912. The pursuer reclaimed, and the case was heard before the Second Division on 11th July 1912.

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Argued for the reclaimer;—The pursuer had obtained the concurrence of the Lord Advocate on cause shown,¹ and this was conclusive of his title and interest to sue the action. On the analogy of the position of the Attorney-General in England, the discretion of the Lord Advocate was absolute,² and would not be interfered with by the Court.³ Where a special official or a special Court was appointed by statute to act in particular circumstances, their decision was final.⁴ But apart from the fact that the Lord Advocate had decided in his favour, the pursuer had on the face of his pleadings a good case. He had relevantly averred a title and interest to sue, because the firm to which he belonged was directly interested in the subject-matter of the patent. The Lord Ordinary had erred in supposing it necessary for the pursuer to aver that he carried on business as an individual, and in holding that the present action should have been brought in the name of the firm.

Argued for the respondent;—The fact that the Lord Advocate had given his concurrence did not preclude the Court from considering whether the pursuer had a sufficient title and interest to sue, or whether he had a relevant case.⁵ The concurrence of the Lord Advocate signified no more than that the pursuer had a *probabilis causa litigandi*, and it was still open to the defender to take all the objections which were competent in an ordinary action. On the merits, the pursuer had stated no title or interest to sue. He described himself as a civil engineer, and did not aver that, as an individual, he carried on any business which was affected by the patent in question. The only interest he had averred was an interest in his firm, not in himself.

LORD JUSTICE-CLERK.—This is in all respects a very peculiar case. I do not think I have ever seen anything like it. The pursuer, Mr Melville, who is a civil engineer, desires to attack the patent of the defender, the patent being one relating to the kind of work that the pursuer does in his business. So far as we can assume, he is in the firm of Melville & Dundas, reinforced concrete contractors and engineers in Glasgow, and they do a

contracting business in reinforced concrete construction. He says nothing about his carrying on any individual business. If he means by 'the pursuer's business' in cond. 4 the business of his firm referred to in cond. 1, then I think it was for his firm to sue the action, and as I read the record I find it difficult to understand why the firm should not have been the pursuers. The matter might be made perfectly clear and definite by a very slight amendment. As the record stands, I cannot hold that the pursuer has set forth a relevant averment of title and interest.

"I do not see how the Lord Advocate's concurrence can supersede the duty of the Court to deal with the record as laid before it.

"I must sustain the second plea in law for the defender and dismiss the action."

¹ Patents and Designs Act, 1907 (7 Edw. VII. cap. 29), secs. 25 (3), 94 (3).

² Terrell on Patents (5th ed.), p. 254.

³ London County Council v. Attorney-General, [1902] A. C. 165.

⁴ Lawrence v. Comptroller-General of Patents, 1910 S. C. 683.

⁵ Gillespie v. Young, (1861) 23 D. 1357; Todd & Higginbotham v. O'Regan, (1859) 21 D. 1320.

large contract business in concrete construction. Now, that this gentleman, Mr Melville, is interested in matters relating to reinforced concrete construction there cannot be any doubt, taking his averments to be facts as we must do in considering the question of relevancy. July 11, 1912.
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But then it is said that he has no title to sue this action, because he has revealed the fact that he is a member of the firm of Melville & Dundas. I am unable to understand how it can be maintained that that fact defeats his title. To begin with, it is not said, nor is it averred, by the defender—which he could have done if it had been true—that “Melville & Dundas” is anything more than the name of an established firm. It is quite possible that the pursuer is the only partner in it, but why as a civil engineer interested professionally in reinforced concrete construction he should be excluded from suing the defender for the purpose of having a patent set aside because he belongs to a firm which does work of the kind to which the patent relates, I cannot understand. I think he may be held to have a perfectly substantial interest to set aside the patent; and he has gone to the Lord Advocate, and has got the concurrence of the Lord Advocate, which, it is quite certain, can now only be given on cause shown. I presume that means cause shown as regards having some probable cause to attack the patent, and as regards having right to raise an action, if it is an action that can be stated relevantly. Lord Justice-
Clerk.

I am not to go into the question of the absolute right of the Lord Advocate to deal with such a matter to the exclusion of the jurisdiction of this Court; but I am very clearly of opinion that if a party brought an action which, upon the face of his own condescendence, was irrelevant, it would not be an answer to say that the matter had been inquired into by the Lord Advocate, and therefore the Court must hold it relevant. I think we would be perfectly entitled, if a case was not relevant, to throw it out as irrelevant. All that the Lord Advocate has done after investigation, which we must assume he has made, is to grant his concurrence, and thereby put the pursuer in the position of being able to repel any objection raised on the ground that he has not settled with the Crown upon the matter. It is quite plain that the object of the concurrence of the Lord Advocate is to protect the Crown against actions being raised for the suppression of patents which the Crown has granted, if there are not reasonable or ostensible grounds for doing so.

I do not think I need to go into the matter any further. It is not a sufficient ground for holding that the pursuer, an engineer, has not got a title to sue a party who has a patent relating to the engineering business in which he practises his profession—whether alone or along with others—that in point of fact he carries it on at present under the firm name of Melville & Dundas, either alone or with others. I do not think it is even stateable that, if he is a member of the firm, the firm only can sue. He is in the exercise of his rights as a citizen, who, being an engineer, has an interest to prevent a patent standing which does or may interfere with him in his business, whether in partnership with others or as an individual. I cannot understand the idea that he is to be excluded from taking up that position because he happens to be a member of a firm. Without going deeper into the question of the duties of the Lord Advocate and the privilege of liti-

July 11, 1912. gants, I am of opinion that the interlocutor of the Lord Ordinary is wrong, and ought to be recalled.

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Cummings.

Lord Justice-
Clerk.

Mr Maitland referred to the case of *Gillespie v. Young*,¹ and to the observations made in it. What the Court decided there was that the Lord Advocate could not be held to have given his consent in terms of the Act. In terms of the Act, the giving of his consent requires that he should have investigated the case. All that was done in that case apparently was that the party went formally with his summons in his hand to the chief clerk of the Lord Advocate, who wrote upon the summons :—" Grants concurrence for Her Majesty's Advocate to the foregoing summons." That was following the form used in many cases in which the concurrence of the Lord Advocate is a mere formal matter in order to put things in shape, as, for instance, in petitions for breaches of interdict. But the observations of Lord Justice-Clerk Inglis in that case are very important as regards concurrence in such a case as this. His Lordship said :—" The defender says that is not such a concurrence as is contemplated by the Act of Parliament ; it is a mere formal concurrence ; it does not pretend to be anything else ; it is just the ordinary formal concurrence granted by somebody holding a general authority from the Lord Advocate, but it is not the concurrence which the Lord Advocate is directed to give or withhold upon consideration of the matter. Again, the pursuer rejoins to this, the only question into which the Court can inquire is whether the concurrence of the Lord Advocate has been given. Whether he has given it upon just cause shown or not is a question with which the Court have nothing to do. That is a matter touching the proper discharge by the Lord Advocate of his official duty, for which he is not responsible to this Court, but only to the Queen and to Parliament. It appears to me that there is a fallacy in this reply. It is quite true that if the concurrence of the Lord Advocate has been given, and if the fact of that concurrence being given is authentically proved to your Lordships, you have nothing to do with the conduct of the Lord Advocate in the administration of his department of the Government. That is quite true. You cannot inquire whether just cause was shown to him or what cause was shown to him, or whether he required any cause to be shown—because he might be so well acquainted with the subject as not to require any cause to be shown, or he might think he was so well acquainted with the subject and so completely master of the merits of this patent or its demerits that he did not require any cause to be shown to him. And he might be right or wrong. But with all that your Lordships have nothing to do. I think if the Lord Advocate's concurrence is given, and if there is authentic evidence of that concurrence being given before the Court, your Lordships can inquire no further."

That is exactly the position in which we are as regards the concurrence of the Lord Advocate ; we must assume that he made sufficient and satisfactory inquiry before he granted his concurrence. As I said before, if an irrelevant case were presented to us, the fact that the Lord Advocate concurred in it would not affect our decision, because we are bound to see that the proceedings which are brought before us in the form of a summons and

¹ 23 D. 1357.

condescendence are relevant, but as regards going behind the Lord Advocate July 11, 1912.
cate and inquiring what he has done, that is out of the question, for the Melville v.
reasons expressed by the Lord Justice-Clerk in the case quoted. Cummings.

Upon the whole matter, I am satisfied that no ground has been shown for sustaining the Lord Ordinary's judgment.

LORD DUNDAS.—I am quite of the same opinion. I confess I have some difficulty in understanding the way in which the Lord Ordinary has dealt with this case. He holds that the pursuer has not set forth an interest and title to sue, because, while he is designed as a civil engineer, "of the firm of Melville & Dundas," he says nothing about his carrying on any individual business. Apparently if the firm had sued, the Lord Ordinary would have been satisfied. Upon that, I can only say that I think that articles 1 and 4 of the condescendence set forth a quite sufficient statement of interest in the matter to satisfy the ordinary rules of pleading, especially as there is no averment made by the defender in any way to raise the point or to challenge a fuller statement as matter of pleading. The Lord Ordinary goes on to say: "I do not see how the Lord Advocate's concurrence can supersede the duty of the Court to deal with the record as laid before it." If his Lordship meant by that to affirm broadly that we have right in such cases to scrutinise the reasons for the Lord Advocate's concurrence, I should disagree with him. *Prima facie*, this action is in perfectly good order, because the concurrence is granted, and I do not doubt that we are to presume that the concurrence was "given upon just cause shown." Whether there might be a case in which, even although the Lord Advocate had granted concurrence, the defender could satisfy us that we ought to throw the action out for want of title, it is not necessary here to decide. I can only say that I think it would require some very special case which I do not at the moment figure. But I am quite clear that the present is not that case, and for the reasons which your Lordship has more fully stated I am for recalling the Lord Ordinary's interlocutor and remitting to his Lordship to allow a proof.

LORD SALVESEN.—I am of the same opinion. Like Lord Dundas, I desire to guard against laying down as an absolute rule that the mere fact of the concurrence of the Lord Advocate is conclusive on a question of title. I should require further argument before I was satisfied upon that point. No doubt one of the things which the Lord Advocate will consider is whether the person who desires to reduce a patent has any interest to do so, and if he thought he had none he would be very slow to grant his concurrence. At the same time, just as in a matter of relevancy the Court must decide whether the case is relevant, notwithstanding that the Lord Advocate has thought that a relevant case for reduction had been presented to him, so it may also be that we have a duty to consider the question of title. On that matter, however, I do not wish to express any considered opinion.

LORD GUTHRIE.—I concur.

THE COURT recalled the interlocutor of the Lord Ordinary, and remitted to him to allow a proof.

DAVIDSON & SYME, W.S.—MACANDREW, WRIGHT, & MURRAY, W.S.—Agents.

No. 165.

JOHN COLQUHOUN, Appellant.—*Murray, K.C.—Carmont.*

July 12, 1912.

JOSEPH WALTER WOOLFE, Respondent.—*J. R. Christie—Mercer.*Colquhoun v.
Woolfe.*Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), sec. 7 (2)—
Workman—Fisherman partly remunerated by share in earnings.*

The Workmen's Compensation Act, 1906, enacts, sec. 7, subsec. 2:—
 "This Act shall not apply to such members of the crew of a fishing vessel as are remunerated by shares in the profits or the gross earnings of the working of such vessel."

A fisherman was employed as a member of the crew of a steam trawler upon a contract of service with the master, representing the owner, under which he received wages at the rate of 30s. a week, and a commission of 2d. per £1 on the gross value of the fish landed under deduction of the cost of carriage. During the only week of his employment his commission amounted to 7s.

Held (diss. Lord Dundas) that he was not "remunerated" by a share in the profits or the gross earnings of the working of the vessel, and accordingly was not excluded by the subsection from claiming compensation under the Act.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), Second Sched. (17) (b)—Appeal—Stage at which appeal competent—Appeal against allowance of proof.

Observations (per Lord Kinneir) on the circumstances in which the Court will consider an appeal under the Workmen's Compensation Act before proof has been taken.

1ST DIVISION.
 Sheriff of the
 Lothians and
 Peebles.

IN an arbitration under the Workmen's Compensation Act, 1906, in the Sheriff Court of the Lothians at Edinburgh, Joseph Walter Woolfe claimed compensation from John Colquhoun, the registered owner of the steam trawler "Gloxinia," in respect of personal injury sustained by him in the course of his employment as a trawl fisherman. The Sheriff-substitute (Orr) allowed a proof, and at the request of Colquhoun stated a case for appeal.

The case set forth:—

"The facts admitted, and the averments of parties which raise the question of law hereinafter referred to, are as follows:—The appellant is a fish merchant, carrying on business in Glasgow, and is the registered owner of the steam trawler 'Gloxinia.' The respondent is a trawl fisherman, and on 15th January 1912, while employed as a member of the crew in the capacity of a fisherman on board said trawler, sustained injury by accident arising out of and in the course of his employment. The respondent made, *inter alia*, the following averment:—'The pursuer (respondent) is a trawl fisherman, and resides at No. 9 Henderson Street, Leith. He is a workman in the sense of the Workmen's Compensation Act, 1906. The defender (appellant) is a fish merchant, carrying on business in Glasgow. He is the registered owner of the steam trawler 'Gloxinia,' and was, in the sense of said Act, the employer of the pursuer at the work at which he was engaged when he sustained the aftermentioned injuries.' To this averment the appellant made the following answer:—'Denied that the pursuer is a workman and that the defender was his employer within the meaning of the Workmen's Compensation Act, 1906. *Quoad ultra* admitted.' The respondent further averred:—'The pursuer had been for a week prior to 15th January 1912 in the employment of the defender on board the said steam trawler under a contract

of service entered into between the master of the said trawler on July 12, 1912. Colquhoun v. Woolfe.
behalf of the defender and the pursuer, under which contract the pursuer was engaged to act as second fisherman on board said trawler, and was to be remunerated for his services as follows, viz., by payment of the sum of thirty shillings a week in cash, and 'by payment of a commission or percentage or poundage known as "fish money" of two-pence per pound sterling on the gross value of the fish landed each week from the said trawler under deduction of the cost of carriage of the fish. During the week the pursuer was employed by the defender the gross value of the fish landed under the deduction foresaid amounted to at least £42, and the pursuer's poundage thereon amounted to at least 7s.' The appellant's answer to this averment was as follows:—'Admitted that the pursuer's weekly wage amounted to 30s., and that he received in addition a share of 2d. in the £1 on the amount of the gross earnings of the said steam trawler "Gloxinia" after deduction of the cost of carriage of the catch of fish.' For the purpose of this case, the parties admitted that at the date of the accident the respondent's weekly earnings consisted of 30s. of wages, and 7s., being 2d. per £1 on the gross value of the fish landed from the 'Gloxinia' under deduction of the cost of carriage of the fish. The appellant stated the following pleas in law among others:—(1) The pursuer's averments being irrelevant, the action should be dismissed, with expenses; (2) The pursuer not being a workman within the meaning of the Workmen's Compensation Act, 1906, the present action should be dismissed, with expenses; and (3) *Separatim*, the pursuer, being a member of the crew of a fishing vessel remunerated by shares in the profits or the gross earnings of such vessel within section 7 (2) of the Act, is not entitled to compensation, and the present action should be dismissed, with expenses. At the request of parties I heard counsel on the said three pleas, and I thereafter, on 14th May 1912, issued the following interlocutor:—Edinburgh, 14th May 1912.—'The Sheriff-substitute having heard counsel for the parties and considered the cause, repels the first, second, and third pleas in law for the defender: Allows a proof, and appoints the cause to be heard, tried, and determined at a diet to be afterwards fixed.'"

The question of law for the opinion of the Court was:—"Whether on the facts as stated the respondent was remunerated by a share or shares in the profits or the gross earnings of the working of said fishing vessel, and is thereby excluded by section 7 (2) of the Workmen's Compensation Act, 1906, from claiming compensation under said Act."

The case was heard before the First Division (consisting of Lord Kinnear, Lord Dundas, and Lord Mackenzie) on 5th July 1912.

Argued for the appellant;—The respondent was remunerated by a share in the profits or gross earnings of the trawler. That was an express term of the contract, and was not affected by the fact that he was also entitled to 30s. a week of wages. The case was ruled by *Admiral Fishing Company v. Robinson*,¹ in which the contract between the parties was substantially the same as the contract here, the only difference being that here the fisherman got a weekly wage of 30s., whereas in that case there was a guarantee that the fisherman's share of profits should never be less than 30s. a week. Section 7, subsection (2), was intended to exclude from the benefits of the Act

¹ [1910] 1 K. B. 540.

No. 165.

JOHN COLQUHOUN, Appellant.—*Murray, K.C.—Carmont.*

July 12, 1912.

JOSEPH WALTER WOOLFE, Respondent.—*J. R. Christie—Mercer.*Colquhoun v.
Woolfe.*Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), sec. 7 (2)—**Workman—Fisherman partly remunerated by share in earnings.*

The Workmen's Compensation Act, 1906, enacts, sec. 7, subsec. 2:—

"This Act shall not apply to such members of the crew of a fishing vessel as are remunerated by shares in the profits or the gross earnings of the working of such vessel."

A fisherman was employed as a member of the crew of a steam trawler upon a contract of service with the master, representing the owner, under which he received wages at the rate of 30s. a week, and a commission of 2d. per £1 on the gross value of the fish landed under deduction of the cost of carriage. During the only week of his employment his commission amounted to 7s.

Held (diss. Lord Dundas) that he was not "remunerated" by a share in the profits or the gross earnings of the working of the vessel, and accordingly was not excluded by the subsection from claiming compensation under the Act.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), Second Sched. (17) (b)—Appeal—Stage at which appeal competent—Appeal against allowance of proof.

Observations (per Lord Kinnear) on the circumstances in which the Court will consider an appeal under the Workmen's Compensation Act before proof has been taken.

1st Division.
Sheriff of the
Lothians and
Peebles.

IN an arbitration under the Workmen's Compensation Act, 1906, in the Sheriff Court of the Lothians at Edinburgh, Joseph Walter Woolfe claimed compensation from John Colquhoun, the registered owner of the steam trawler "Gloxinia," in respect of personal injury sustained by him in the course of his employment as a trawl fisherman. The Sheriff-substitute (Orr) allowed a proof, and at the request of Colquhoun stated a case for appeal.

The case set forth:—

"The facts admitted, and the averments of parties which raise the question of law hereinafter referred to, are as follows:—The appellant is a fish merchant, carrying on business in Glasgow, and is the registered owner of the steam trawler 'Gloxinia.' The respondent is a trawl fisherman, and on 15th January 1912, while employed as a member of the crew in the capacity of a fisherman on board said trawler, sustained injury by accident arising out of and in the course of his employment. The respondent made, *inter alia*, the following averment:—'The pursuer (respondent) is a trawl fisherman, and resides at No. 9 Henderson Street, Leith. He is a workman in the sense of the Workmen's Compensation Act, 1906. The defender (appellant) is a fish merchant, carrying on business in Glasgow. He is the registered owner of the steam trawler 'Gloxinia,' and was, in the sense of said Act, the employer of the pursuer at the work at which he was engaged when he sustained the aftermentioned injuries.' To this averment the appellant made the following answer:—'Denied that the pursuer is a workman and that the defender was his employer within the meaning of the Workmen's Compensation Act, 1906. *Quoad ultra* admitted.' The respondent further averred:—'The pursuer had been for a week prior to 15th January 1912 in the employment of the defender on board the said steam trawler under a contract

of service entered into between the master of the said trawler on July 12, 1912. Colquhoun v. Woolfe.
 behalf of the defender and the pursuer, under which contract the pursuer was engaged to act as second fisherman on board said trawler, and was to be remunerated for his services as follows, viz., by payment of the sum of thirty shillings a week in cash, and 'by payment of a commission or percentage or poundage known as "fish money" of two-pence per pound sterling on the gross value of the fish landed each week from the said trawler under deduction of the cost of carriage of the fish. During the week the pursuer was employed by the defender the gross value of the fish landed under the deduction foresaid amounted to at least £42, and the pursuer's poundage thereon amounted to at least 7s.' The appellant's answer to this averment was as follows:—'Admitted that the pursuer's weekly wage amounted to 30s., and that he received in addition a share of 2d. in the £1 on the amount of the gross earnings of the said steam trawler "Gloxinia" after deduction of the cost of carriage of the catch of fish.' For the purpose of this case, the parties admitted that at the date of the accident the respondent's weekly earnings consisted of 30s. of wages, and 7s., being 2d. per £1 on the gross value of the fish landed from the 'Gloxinia' under deduction of the cost of carriage of the fish. The appellant stated the following pleas in law among others:—(1) The pursuer's averments being irrelevant, the action should be dismissed, with expenses; (2) The pursuer not being a workman within the meaning of the Workmen's Compensation Act, 1906, the present action should be dismissed, with expenses; and (3) *Separatim*, the pursuer, being a member of the crew of a fishing vessel remunerated by shares in the profits or the gross earnings of such vessel within section 7 (2) of the Act, is not entitled to compensation, and the present action should be dismissed, with expenses. At the request of parties I heard counsel on the said three pleas, and I thereafter, on 14th May 1912, issued the following interlocutor:—Edinburgh, 14th May 1912.—'The Sheriff-substitute having heard counsel for the parties and considered the cause, repels the first, second, and third pleas in law for the defender: Allows a proof, and appoints the cause to be heard, tried, and determined at a diet to be afterwards fixed.'"

The question of law for the opinion of the Court was:—"Whether on the facts as stated the respondent was remunerated by a share or shares in the profits or the gross earnings of the working of said fishing vessel, and is thereby excluded by section 7 (2) of the Workmen's Compensation Act, 1906, from claiming compensation under said Act."

The case was heard before the First Division (consisting of Lord Kinnear, Lord Dundas, and Lord Mackenzie) on 5th July 1912.

Argued for the appellant;—The respondent was remunerated by a share in the profits or gross earnings of the trawler. That was an express term of the contract, and was not affected by the fact that he was also entitled to 30s. a week of wages. The case was ruled by *Admiral Fishing Company v. Robinson*,¹ in which the contract between the parties was substantially the same as the contract here, the only difference being that here the fisherman got a weekly wage of 30s., whereas in that case there was a guarantee that the fisherman's share of profits should never be less than 30s. a week. Section 7, subsection (2), was intended to exclude from the benefits of the Act

¹ [1910] 1 K. B. 540.

July 12, 1912. persons for whose work the amount of remuneration was a matter of speculation.
Colquhoun v. Woolfe.

Argued for the respondent;—The object of the Act of 1906 as regarded seamen was to extend to such of them as were servants the benefits enjoyed by servants employed on land. The respondent here was a servant employed under a contract of service and remunerated, as servants are, by wages. The fact that he received a small share in the profit, a common form of incentive to effort, did not alter the fact that for all practical purposes he was paid by wages, and did not turn him into a person remunerated by shares in profits. It was clear that subsection (2) of section 7 used the word “remunerated” in the sense of “substantially or mainly remunerated,” and was meant to exclude partners and joint adventurers, and to relieve from liability those with whom an injured workman took a common risk as to profit.¹ It could not be said that the respondent was a partner, because he was paid 30s. a week even if the vessel on which he was employed did not go to sea²; nor could it be said that he was a joint adventurer with the appellant, because he was his servant. Section 7 (2), being an excluding subsection, fell to be strictly interpreted. The case of *Admiral Fishing Company*³ was distinguishable, for there the fisherman got no wages whatever.

At advising on 12th July 1912,—

LORD KINNEAR.—This is a stated case which is brought before us at a somewhat unusual stage in the proceedings, because there has been no inquiry. The Sheriff as arbitrator has allowed a proof, and the employer appeals against that decision. I should not wish it to be supposed that by entertaining an appeal at this stage we are giving any encouragement to appeals upon points of pleading before inquiry. The statute specially directs that the proceedings by way of arbitration are to be summary; and although the Sheriff's power to state a case for this Court is not restricted to any particular stage of the proceedings, it seems to me clear enough that the general intention of the statute is that the facts should first be ascertained, and that it is only when the determining facts have been fixed by the Sheriff that any question of law which he may have found it necessary to decide can be appealed to this Court. But I think that in the circumstances of this case the learned Sheriff has taken the most appropriate and convenient procedure, because the employer's objection to proof really goes to the foundation of the claim, and it is certainly for the advantage of both parties that the question should be determined before the expense of further procedure has been incurred.

The question is whether the workman applying for compensation is excluded from the benefit of the Act by the provisions of section 7, subsection (2). The seventh section is that which applies the Act to seamen,

¹ Gill v. Aberdeen Steam Trawling and Fishing Co., 1908 S. C. 328; Ellis v. Joseph Ellis & Co., [1905] 1 K. B. 324; Whelan v. Great Northern Steam Shipping Co., (1909) 78 L. J., K. B. 860, 25 T. L. R. 619.

² Clark v. G. R. & W. Jamieson, 1909 S. C. 132. Reference was also made to the Merchant Shipping Act, 1894 (57 and 58 Vict. cap. 60), sec. 742, and to *Ex parte Ferguson and Hutchinson*, (1871) L. R., 6 Q. B. 280.

³ [1910] 1 K. B. 540.

and the second subsection provides, "This Act shall not apply to such July 12, 1912.
members of the crew of a fishing vessel as are remunerated by shares in the profits or the gross earnings of the working of such vessel." That Colquhoun v. Woolfe.
clause of exclusion applies to a kind of arrangement which, from cases Lord Kinneir.
which have come before the Court, we know to be common among fishermen, by which a fisherman agrees to work not for wages but for a share of the profits or gross earnings. That may occur, perhaps generally it does occur, when the arrangement between the members of the crew and the owner of the boat is not that of master and servant, but of joint adventurers or partners in some form or another; but the case of *Clark v. Jamieson*¹ shows that it may also occur where the fisherman is employed upon a contract of service, and where there is no relation of copartnery between members of the crew *inter se* or between members of the crew and the owner of the boat if he himself is not one of the crew. But in either case the condition is that the fisherman is not paid by wages but is paid by a share of the profits or gross earnings. Now the question is whether the arrangement adopted by the parties to this case was an arrangement of that kind.

The facts are brought out quite clearly in the case stated by the Sheriff, and I understand that, except in so far as the statement consists of mere citation of the pleadings, it is based upon the admissions of parties. The Sheriff states that the appellant is a fish merchant and that he is the owner of the steam trawler "Gloxinia," and that the respondent is a trawl fisherman who, while employed as a member of the crew of that steam trawler, on 15th January 1912 sustained injury by accident arising out of and in the course of his employment. The remaining statement of fact which is material is taken from the respondent's averments, but it is quite competent to take these averments as facts for the purpose of deciding whether he has a good case. He avers that he is a workman in the sense of the Workmen's Compensation Act, and that the appellant is a fish merchant carrying on business in Glasgow. Then it is averred: "The pursuer had been for a week prior to 15th January 1912 in the employment of the defender on board the said steam trawler under a contract of service entered into between the master of the said trawler on behalf of the defender and the pursuer, under which contract the pursuer was engaged to act as second fisherman on board said trawler, and was to be remunerated for his services as follows, viz., by payment of the sum of thirty shillings a week in cash," and "by payment of a commission or percentage or poundage known as 'fish money' of twopence per pound sterling on the gross value of the fish landed each week from the said trawler under deduction of the cost of carriage of the fish." It is averred that during the week in which the pursuer was employed the gross value of the fish amounted to £42 and his poundage to at least 7s. The case, therefore, is that this man was employed upon a contract of service, and was paid a fixed wage of 30s. a week, and received in addition a payment, called fish money, of 2d. per pound on the value of the fish. We are not told, and it is not for the Court to conjecture, for what reason this additional sum was given. It is obvious enough, although I do not

¹ 1909 S. C. 132.

July 12, 1912. think it material to inquire whether the parties were in fact moved by any such consideration, that it might be an advantage to both to give the fisherman an interest in landing the fish in a saleable condition. The material point is that the fish money is, so far as it goes, a benefit to the fisherman over and above his wages ; and the question is whether receiving this further payment excludes him from the benefit of the Act by force of subsection (2) of section 7.

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I think it does not. The provision is not that the Act shall not apply to persons who receive any benefit from profits or earnings, but that it shall not apply to members of a crew who are remunerated by shares in profits or gross earnings. I think that what was intended by these words is that the man shall be really and substantially remunerated by shares of profits or earnings as distinguished from fixed wages. According to the ordinary use of language there is an implication of some degree of adequacy in the word "remunerate" and its cognates "remuneration" and "remunerative"; and if it were asked whether this man was remunerated by his commission on the gross earnings of the ship only, it would be a perfectly reasonable answer to say "No ; if that were all, he would have no remuneration at all ; that would be altogether unremunerative." His remuneration is by fixed wages, although in addition he gets 2d. per pound on the value of the fish.

The Act deals with two different classes of workmen ; one class of workmen who are remunerated by wages, and another who are remunerated by a share of profits. It was argued that we could not put that construction upon the statute without reading into subsection (2) of section 7 some such word as "mainly" remunerated, or "substantially" remunerated, and that is said to be an illegitimate process. I prefer to regard it as reading in nothing, but as construing words of ordinary language in a reasonable way in their application to the subject-matter ; but if there is any foundation for the criticism, I think it applies equally to the opposite construction which is maintained by the appellant. If the words are doubtful or obscure, it is not possible for either party to express what he considers the preferable reading without using some language that will make the true meaning a little more clear than the Act itself has made it. The respondent says it means, in a reasonable sense of the word, true or substantial remuneration for which the fisherman works. The appellant says it means any remuneration whatever, and if that is not so clear as to be put beyond dispute by the bare words of the clause, he is driven to the objectionable method of reading in some additional word to make it clearer, and after the word remunerated he reads in "to any extent whatever," or "in whole or in part." Of the two readings I prefer the respondent's, "mainly" or "substantially"; but the true answer is that the statute, reasonably construed with reference to the subject-matter, really contemplates two different classes of workmen—wage-earning workmen and profit-sharing workmen—and the subsection before us excludes the latter only from the benefit of the Act.

The appellant's counsel cited the decision of the Court of Appeal in the case of the *Admiral Fishing Co. v. Robinson*¹ as conclusive in his favour.

¹ [1910] 1 K. B. 540.

I do not so read the case. The facts were different from those with which July 12, 1912. we are concerned. The workman was employed on a steam fishing boat, Colquhoun v. and was paid, not by a fixed wage, but by a share in the profits, with a Woolfe. guarantee from the owners that his share of the profits should not be less Lord Kinnear. than 30s. a week. It was held by the County Court Judge that he was not excluded from the benefit of the Act by force of the clause we have to consider, because he was not paid by profits only, but by profits with a guarantee. In the Court of Appeal this was held to be wrong, because the workman was paid by a share of profits none the less by reason of his obtaining from others interested in the adventure a guarantee that his share should not be less than a certain sum. But the point for which the case was cited was to show that we are not to read into the enactment any qualifying phrase which is not expressed in terms; and it is true that the fault which was found with the judgment of the County Court Judge was that he had read the word "solely" into the section, so as to render it inapplicable to any member of the crew who in a certain event might receive more than the amount of his share. This was said to be a decision to the effect that if a workman receives any benefit from profits he is thereby brought within the scope of the excluding section, and he cannot be kept out of it except by the insertion of words which are not in the section.

I find nothing in what was said by the learned Judges to support any such inference. On the contrary, the judgment of Lord Justice Buckley, as I read it, brings out very clearly what I think is the true method of reasoning in the application of the section to a particular case. We must consider what is the true and substantial remuneration of the fisherman. Is it wages or a share of profits that he gets for his work? If it is a share of profits, the learned Judge says that to read into the Act the word "solely" would render it "impossible to work it, for a man is seldom if ever remunerated solely by a share. He gets his bunk on board ship, as a rule, he gets his food and other incidentals." If he is remunerated by a share he is a share-hand fisherman none the less because of those incidental advantages. But if, on the other hand, the man's true and substantial remuneration is not a share of profits but a fixed wage, the argument tells just as directly against the attempt to bring him into the class of share-hand fishermen. If a man is working for wages under a contract of service, he is a servant earning wages none the less because he is to get some incidental advantage out of the gross earnings of his employer. I concede that there might in certain circumstances be a question to which of the two classes a man belonged. But that would be a question of fact for the arbitrator.

I come, therefore, to the conclusion that this respondent is beyond all question a "workman" within the meaning of the leading enactment entitling him to compensation. I think that was hardly questioned; although there is a point taken to the contrary in the stated case, it is really beyond argument. A workman in the language of the statute "means any person who has entered into or works under a contract of service or apprenticeship with an employer." Now, that this man did so is perfectly clear from the learned Sheriff's statement of facts. Being within the general enactment I do not think he is within the exclusion

July 12, 1912. of section 7, subsection (2), and I think the learned Sheriff took a perfectly proper course when he proposed to allow him to prove his case.
Colquhoun v. Woolfe.

LORD MACKENZIE.—The question raised in this case is as to the proper construction to be put upon section 7 (2) of the Workmen's Compensation Act, 1906.

The Sheriff-substitute has held that the respondent is entitled to a proof of his averments. The appellant contends that the action should be dismissed, as the respondent's averments show that he falls within section 7 (2) of the Act, and is therefore not entitled to compensation. The important points in the respondent's averments are that for a week prior to the date of the accident he had been in the employment of the appellant under a contract of service to act as second fisherman on board the steam trawler "Gloxinia," of which the appellant is the registered owner; that he was to be remunerated for his services by payment of 30s. a week in cash, and by payment of a commission or percentage or poundage known as "fish money" of 2d. per £1 on the gross value of the fish landed each week from the trawler under deduction of the cost of carriage of the fish; that during the week prior to the date of the accident the pursuer's poundage amounted to 7s. Upon these facts, which are not in dispute, it appears to me that the case does not fall within the exclusion of section 7 (2) of the Act. The respondent cannot be regarded in a reasonable sense as remunerated by a share in the profits or gross earnings.

Prima facie section 7 (2) is intended to meet the case where the members of the crew are partners or joint adventurers. If, however, its operation were limited to such cases only, the necessity for its insertion in the Act would be difficult to see. Once partnership or joint adventure is established there is no room for the relation of employer and workman. This is brought out in the case of *Ellis v. Joseph Ellis & Company*.¹ A partner or joint adventurer would not be a workman, for section 13 enacts that to be a "workman" a person must have entered into or worked under a contract of service with an employer. The Act would not apply, and there would therefore be no necessity for a clause excluding from its provisions those who never were within them. There may, however, be cases in which, although working under a contract of service, the members of the crew of a fishing vessel agree to be remunerated by dividing the profits or gross earnings into shares, and yet the relationship is such that it cannot be said there is a partnership or joint adventure. *Clark v. Jamieson*² was a case which dealt not with a fishing but with a small cargo boat. It has, however, a bearing upon the present case, for it shows that a member of a crew who is remunerated by a share of the gross earnings of the vessel may be a workman within the meaning of the leading provisions of the Workmen's Compensation Act, 1906, and not a partner in a joint adventure. As Lord M'Laren pointed out there, it would be difficult to hold there was joint adventure where there was no contribution of capital, and no liability for losses. In such a case, if the boat were a fishing vessel, the members of the crew, though they fell under the leading provisions of the Act, would be excluded from its

¹ [1905] 1 K. B. 324.

² 1909 S. C. 132.

operation by section 7 (2). An illustration of this is contained in the case *Colquhoun v. Woolfe*, July 12, 1912. of the *Admiral Fishing Company v. Robinson*.¹ There all the crew were paid by shares in the adventure, and the claimant had a guarantee from the owners that his share should not be less than 30s. a week. It was held that notwithstanding the guarantee the claimant was remunerated by a share of the profits in the vessel, and therefore fell under the exclusion in section 7 (2). Lord Mac-

In the present case the main provision of the contract of service is that the employer shall pay a fixed money wage of substantial amount. The fact that a commission is to be paid over and above does not, in the circumstances of this case, make the subsection applicable. No doubt there might be a case in which there was a fixed allowance, *e.g.*, board and lodging, or a money payment of an equivalent amount, and a further provision of a share of profits, which latter was really the remuneration. In such a case the fixed allowance would not prevent the subsection from applying. Remuneration is recompense or reward for services rendered, and the share of profits in such a case would rightly be regarded as the *quid pro quo*. The man's keep or allowance in lieu thereof could not be regarded in that case as his remuneration. Assistance may be got from the negative term "unremunerative." That does not mean that nothing is got, but that what is got is not an adequate return for what is done.

The question in each case is, in my opinion, one of fact for the arbitrator. In the present case the claimant had been employed one week previous to the accident, and his poundage amounted to 7s. His wages were 30s. It cannot, in my opinion, fairly be said that the claimant was remunerated by a share of the profits. His remuneration was his wages, and the commission was of the nature of extra pay. We were referred to the case of *Whelan v. Great Northern Steam Fishing Company, Limited*,² where a man who was called a "share-hand" on board a steam trawler was held not entitled to compensation for an accident which happened to him while employed as a stower on board a cutter that took the boxes of fish to market. That case, however, does not assist us in arriving at a conclusion here. In the present case I think the commission was an incident in the contract of service, the leading provision of which was the performance of work for a fixed money wage. I am therefore of opinion on the facts of this case that the Sheriff-substitute was entitled to take the view he did, and that the question should be answered accordingly.

LORD DUNDAS.—[In his Lordship's absence his opinion was read by Lord Mackenzie]—The question here raised is a very short one; but it is important, and, I think, difficult to decide. Section 7 of the Workmen's Compensation Act, 1906, which for the first time included seamen within the class entitled to compensation, provides:—“(2) This Act shall not apply to such members of the crew of a fishing vessel as are remunerated by shares in the profits or the gross earnings of the working of such vessel.” We have to determine whether or not the respondent, Woolfe, is excluded, by the terms of the subsection just quoted, from the benefits of the Act.

¹ [1910] 1 K. B. 540.

² 78 L. J., K. B. 860, 25 T. L. R. 619.

July 12, 1912. The Sheriff-substitute holds that he is not; I have come, somewhat reluctantly, to the opposite conclusion. Woolfe was engaged as second fisherman on board a steam trawler belonging to the appellant, and was to be remunerated for his services by payment of 30s. a week in cash, and "by payment of a commission or percentage or poundage, known as 'fish-money,' of twopence per pound sterling on the gross value of the fish landed each week from the said trawler under deduction of the cost of carriage of the fish." I gather that he had been employed only for a week when he met with the accident in respect of which he now claims compensation. His "poundage" for that week amounted to about 7s.

It is clear that if Woolfe's sole money remuneration had been this weekly wage of 30s., his claim would have been within the Act; and, on the other hand, that if his commission or share of the gross value of the fish had been his sole money remuneration, his claim would have been excluded by the terms of section 7 (2). But in fact he had both; and that raises sharply the question we have to determine. I do not know, and it is probably unnecessary to speculate, what may have been the policy or object of the Legislature in introducing the subsection. It was suggested in the argument that the object was to exclude from the Act persons who were truly in the position of partners or co-adventurers. In that case the subsection would seem to have been unnecessary; for it was expressly decided under the Act of 1897 that a partner who works for wages in the partnership undertaking is not a "workman" within the meaning of the Act; because he would *ex hypothesi* be one of his own employers, and the Act has regard to a relation between two opposite parties, employer and employed—*Ellis v. Joseph Ellis & Company*.¹ Whatever the object of the subsection may have been, we must try to arrive at its proper construction and application with reference to the case before us. Now, if one reads the language of the subsection without addition or qualification, and asks whether or not the respondent was remunerated by a share in the profits or the gross earnings of the working of the vessel, the only possible answer seems to me to be an affirmative one. If a different conclusion is to be reached, one must, I think, read into the subsection some such word as either "solely," or "principally," "mainly," or the like. As against the first of these suggestions, we were referred to the case of *Admiral Fishing Company*.² The man's remuneration there was undoubtedly a specified share of profits, but with an added guarantee that the share should not in any case be less than 30s. a week. The Court of Appeal held that the claim was excluded. I think the judgment was right; and I further agree with the learned Judges who stated that in their opinion it was not legitimate to read into the subsection the word "solely." As Buckley, L.J., observed, "To construe the Act in that way renders it impossible to work it, for a man is seldom if ever remunerated solely by a share. He gets his bunk on board ship, as a rule, he gets his food and other incidentals." Nor, in my judgment, is it any more legitimate to read into the Act such a word as "mainly" or "principally." If that were done, the Court would have in each case to

¹ [1905] 1 K. B. 324.

² [1910] 1 K. B. 540.

determine whether the certain value of the weekly wage or the uncertain value of the share was in fact the more valuable right. This does not commend itself to my mind as a sound rule or principle for dealing with the matter. I do not think the Act invites us to enter upon such considerations; their ascertainment might in some cases be difficult, and the result frequently unconvincing. The problem does not, in my judgment, lend itself to solution by simply determining in each case which of the two elements is the more valuable, and whether one can be regarded as the dominating, and the other as a merely subsidiary, factor in the remuneration. Nothing that was said or decided in *Whelan*¹ seems to me to give any support or countenance to this method of dealing with the matter. If, then, one is to read the language of subsection (2) without any addition or qualification, one must, in my opinion, hold that the Legislature has excluded from the Act any member of a fishing crew whose remuneration includes a share (however small) in the profits or gross earnings of the vessel. I can see that, if this conclusion is correct, there may be room for hardship, and even abuse of the Act, if a man is induced to take employment for what may be a fair money wage, with the additional attraction of some small share in the value of the fish, which (while in itself of perhaps trifling advantage at the best) would deprive him, in case of accident, of his claim for compensation. But if the law be what I am constrained to think it is, fishermen would doubtless very soon become alive to risks of the nature I have indicated.

For the reasons stated, I should answer the question put to us in the affirmative; but as your Lordships hold a different opinion the answer will, of course, be otherwise. I am (as already indicated) not sorry that the judgment of the Court is to be in favour of the respondent, although I do not see my way to concur in it.

THE COURT answered the question of law in the negative, and dismissed the appeal.

BEVERIDGE, SUTHERLAND, & SMITH, W.S.—T. M. POLE, Solicitor—Agents.

WILLIAM BLACKIE HANLEY, Pursuer (Respondent).—*Constable, K.C.*—*Ingram.* No. 166.

THE LORD PROVOST, MAGISTRATES, AND COUNCIL OF THE CITY OF EDINBURGH, Defenders (Reclaimers).—*D.-F. Dickson*—*W. J. Robertson.* July 12, 1912.

Hanley v.
Magistrates
of Edinburgh.

Burgh—Drainage—Roads—Discharge of surface water—Flooding of agricultural land in burgh—Responsibility of drainage and road authority—Reparation—Negligence—Edinburgh Corporation Act, 1900 (63 and 64 Vict. cap. cxxxiii.), sec. 28.

The drainage and sewage from a portion of the city of Edinburgh flows into the Craigentinny Burn, which for part of its course forms the southern boundary of a market garden on the Craigentinny estate. When the district, which includes the Craigentinny estate, was annexed to the city of Edinburgh by the Edinburgh Corporation Act, 1900, it was provided by section 28 of the Act that the Corporation,

¹ 78 L. J., K. B. 860, 25 L. T. R. 619.

July 12, 1912.

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Hanley v.
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of Edinburgh.

who were the drainage authority, should not have power to diminish the supply of sewage water flowing through the burn and used for irrigating the estate, or to deepen or otherwise interfere with the burn so far as passing through the estate.

On two occasions in 1909, after a heavy rainfall, the burn overflowed its banks, and flooded the garden, and water also found its way into the garden through a gate or door opening on to a public road under which the burn flowed. Since 1900 there had been no increase in the quantity of sewage or surface water discharged into the burn but, in consequence of building and paving operations which had gradually rendered a greater portion of the surface of the drainage area impervious, the surface water found its way more quickly into the burn.

In an action of damages at the instance of the tenant of the market garden against the Corporation, the Court (*rev. judgment of Lord Ormidale*) *assolized* the defenders, *holding* (1) that, with regard to the increased flow of surface water from the higher to the lower levels of the area which they administered, the defenders had no more responsibility than an upper proprietor, who, by an improved system of drainage, discharged the surface water more rapidly from his lands on to those of a lower proprietor, and who was not liable for the flooding thereby caused; and (2) that, as in a question with a tenant on the Craigentenny estate averring damage to agricultural ground, the defenders (*a*), as the drainage authority, were not liable for the damage done by the burn overflowing its banks, since, by section 28 of the Act of 1900, they were prohibited from diminishing the supply of the sewage water or from interfering with the water-course in any way; nor (*b*), as the road authority, were they liable for the damage done by water entering from the road, since it had not been proved that any deficiency that might exist in the water channels of the road had resulted in sending more water on to the pursuer's lands than would otherwise have reached them.

2D DIVISION. ON 15th November 1909 William Blackie Hanley, market gardener, Ld. Ormidale. Restalrig Gardens, Restalrig, Edinburgh, brought an action against the Lord Provost and Magistrates of the City of Edinburgh, concluding for payment of £200.

The pursuer was tenant of the Restalrig market garden, which formed part of the estate of Craigentenny, at Restalrig, near Edinburgh. The garden was bounded on the south by the Craigentenny Burn, which from time immemorial had received the drainage and sewage from a portion of the city of Edinburgh. When the district, which included the Craigentenny estate, was annexed to the city of Edinburgh by the Edinburgh Corporation Act, 1900, it was provided by section 28 of the Act that the Corporation should not have power to diminish the supply of sewage water flowing through the burn and used for irrigating the estate, or to deepen or otherwise interfere with the burn so far as flowing through the estate.*

* The Edinburgh Corporation Act, 1900 (63 and 64 Vict. cap. cxxxiii.), enacts:—Sec. 28. "For the protection of the proprietors of the estate of Craigentenny and their successors (in this section called 'the proprietors'), the following provisions shall have effect (that is to say)—(1) Subject, as hereinafter in this section mentioned, it shall not be lawful for the Corporation, or any Local Authority, or person within the city . . . to injuriously affect or interfere with the irrigation of lands on the said estate, or to diminish or intercept or otherwise injuriously affect the supply of sewage or sewage water used for such irrigation, or to deepen, divert, cover over, or otherwise interfere with the stream known as Craigentenny Burn passing

The garden was bounded on the west by the Restalrig Road, from July 12, 1912. which access to the garden was obtained by means of a gate or door. The Craigentinny Burn, after passing through Lochend Meadows, flowed under the road from west to east through a culvert which extended beyond the road for about 55 feet along the southern boundary of the garden, after which the course of the stream was open. The portion of the culvert, 30 feet in length, under the road, was crossed by a water main, which had been put in by the Edinburgh and District Water Trustees under their statutory powers, which it was alleged diminished the capacity of the culvert.

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The defenders were the drainage authority charged with the construction and maintenance of drains and sewers within the city of Edinburgh.* They were also the road authority in charge of the Restalrig Road.

On 25th July and again on 13th October 1909, after a heavy rainfall, the pursuer's garden was flooded by water from the Craigentinny Burn, and he suffered damage, for the recovery of which he brought this action.

The pursuer averred:—(Cond. 3) "The defenders have for many years made from time to time a number of drains which discharge their effluents into said watercourse, and similarly they have above said road between Piershill and Restalrig, in virtue of powers vested in them as a corporation, authorised the connecting of a great number of other drains with the said watercourse or sewer. In consequence the volume of water and sewage carried by it has gradually become very considerable, and is always increasing. The defenders have not, however, altered or increased the capacity of the culvert foresaid at

through the said estate, or the carriers, feeders, or distributors therefrom, or with the effluents from the irrigation works, and the said Craigentinny Burn so far as passing through the said estate, and the carriers, feeders, and distributors connected with the irrigation of lands on the said estate, shall not vest in or belong to or be under the management and control of the Corporation. Provided always that if the Corporation shall hereafter deem it necessary in the public interest to interfere with or affect any of the rights, powers, or privileges hereinbefore secured, or to injuriously affect or interfere with the irrigation of lands on the said estate, or to diminish or intercept or otherwise injuriously affect the supply of sewage or sewage water used for such irrigation, or to deepen, divert, cover over, or otherwise interfere with the said Craigentinny Burn or the carriers, feeders, or distributors therefrom, or with the effluents from the irrigation works, the Corporation shall be at liberty to do so . . . upon obtaining an order granted by the Sheriff declaring that it is desirable in the public interest that the Corporation should have such powers. . . ."

* The Edinburgh Municipal and Police Act, 1879 (42 and 43 Vict. cap. cxxxii.), enacts:—Sec. 179 "The Magistrates and Council shall from time to time cause to be made and maintained under streets or courts, or elsewhere within the burgh, such sewers and drains as shall be necessary for the effectual draining of any portion of the burgh, and shall also cause to be made and maintained all such reservoirs, sluices, engines, and other works as shall be necessary for cleaning such sewers and drains, and, if needful, they may carry such sewers and drains through and across any enclosed or other lands and through any underground cellars and vaults, making full compensation for any damage done, which compensation shall be ascertained in the same manner as compensation for land to be taken under the provisions of the Lands Clauses Acts, and the Magistrates and Council shall have right of access for maintenance of all such sewers and drains."

July 12, 1912. **Hanley v. Magistrates of Edinburgh.** the Piershill and Restalrig Road, and the same has for a considerable time past been in the knowledge of the defenders quite insufficient to admit of the transmission of the contents of said burn whenever anything occurs, such as a fall of rain, to add materially to the contents of it. The Lochend Meadow immediately above the said Piershill and Restalrig Road is frequently flooded in consequence of the insufficiency of the said culvert to carry off the increased effluents of said burn or sewer, and this state of matters is well known to the defenders. The insufficiency of said culvert is entirely due to the artificial additions to the contents of said burn made by the drainage operations of the defenders as aforesaid." (Cond. 4) "On 25th July 1909 the said burn or sewer overflowed its banks in Lochend Meadows as before mentioned, owing to the insufficiency of said culvert. The water being dammed back by the embankment of the Piershill and Restalrig Road rose gradually on the ground to the west of said road until it reached a level considerably higher than that of the road. The water so pent up and accumulated percolated through the retaining wall of the road in great quantities. The road drains in said road are all connected into the said burn through the said culvert. In consequence of the pressure of water from the culvert or from the meadows immediately above the road, the said road drains overflowed and sent up a great quantity of sewage water on to said road through several syvors or gratings therein. The drains which enter the said burn from the Holyrood district immediately below said culvert also became choked through excess of drainage and regurgitated through the syvors or gratings on the Piershill side of the culvert, increasing said flooding. The said road was flooded in consequence for a considerable distance on each side of the entrance to the pursuer's garden above described to a depth of over two feet." (Cond. 5) "In consequence of the accumulation of water on the road, as set forth in the last article, said water forced itself through the door of the pursuer's garden, breaking it open, and during the 25th and 26th of July 1909 flowed in great quantities continuously off said road into his said garden. The said garden was in consequence flooded to the extent of over nine acres by the said water. . . ." (Cond. 6) "On 13th October 1909 the pursuer's garden was again flooded under the same circumstances and to practically the same extent. The said flooding, which was caused by the water being pressed up through said syvors or drains and walls and finding its way from the said road into the pursuer's garden, lasted for three days and also did great damage." (Cond. 7) "The pursuer produces a detailed statement of the damage sustained by him through both floodings. . . . The said damage by flooding is entirely due to the fault of the defenders in not increasing or having increased the size of the culvert above referred to to correspond with the drainage which they are diverting into it, and also in leading or allowing to be led into said burn more drainage water than on occasions it can take away without the carrying capacity thereof being increased to avoid flooding." [An averment that the flooding was also due to the faulty construction of the road drains and syvors was deleted, by leave of the Lord Ordinary, before proof was allowed.]

The pursuer pleaded;—The pursuer having sustained loss, injury, and damage through the fault of the defenders to the amount stated is entitled to damages as concluded for, with expenses.

The defenders pleaded;—(2) The pursuer's averments so far as July 12, 1912. material being unfounded in fact, the defenders should be assoilzied.

(3) The defenders having acted without negligence and within their statutory powers, should be assoilzied. (4) The defenders are entitled to absolvitor with expenses in respect that:—(a) Neither the culvert nor the channel and banks of the watercourse below said culvert belong to or are vested in the defenders; (b) Any obligation of protecting the lands from the effects of flooding arising through rainfall, normal or excessive, is upon the pursuer's landlord; (c) Defenders are debarred by statute from executing any effective protective works upon the culvert or channel or banks of said burn below said culvert. (5) The flooding complained of having happened through no fault of the defenders, they are entitled to be assoilzied.

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Proof was led on 22nd November 1910 and following days. The facts ultimately held to be established (which will be found more fully stated in the opinions of the Court), were as follows:—The flooding of the pursuer's garden was due, not to any increase in the quantity of sewage and house drainage passing into the Craigentenny Burn (the amount of which had not appreciably altered between 1900 and 1909), but to the fact that building and paving operations had gradually rendered a larger portion of the surface of the drainage area impervious to water, with the result that in time of heavy rainfall the surface water found its way more rapidly from the higher levels of the drainage area into the Craigentenny Burn. The pursuer's garden was flooded from two points, first, through the gate on the Restalrig Road, by water passing from the culvert through the road drains on to the road, and second, on the southern boundary of the garden, by water overflowing the banks of the burn. It was not proved that, so far as the flooding through the gate was concerned, the damage to the ground would have been diminished or averted, even if the portion of the culvert under the road had been enlarged, since that would have been of no avail unless the portion of the culvert to the east of the road had also been enlarged, and in any event it would only have allowed more water to pass, which would have increased the overflow of the banks lower down.

On 9th June 1911 the Lord Ordinary (Ormidale) pronounced an interlocutor decerning against the defenders for payment to the pursuer of the sum of £150.*

* "OPINION.—In this action the pursuer claims compensation from the defenders for injury done to his market garden by flooding on 25th July 1909, and again on 13th October 1909. It is not disputed that the pursuer's garden was flooded on both occasions. The first question to be decided is, what caused the flooding? I refer to the plan, No. 30 of process, as showing accurately the position and extent of the pursuer's garden, the course of the Craigentenny Burn, the Restalrig Road, and the subjects generally.

"The pursuer's case is that the water which entered his garden and flooded the low-lying part of it, came in through a gate from the Restalrig Road, because of the insufficiency of a culvert under that road to carry off the water which collected at the west end of it. The defenders' case is that while some water from the road may have passed through the gate—I do not think it was disputed that some water did so pass—the quantity was negligible and could not have followed the line alleged by the pursuer down to the lowest part of his garden; and that the flooding of that part was occasioned, both in July and October, by the burn overflowing its banks

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The defenders reclaimed, and the case was heard before the Second Division (without Lord Dundas) on 29th February, 1st, 6th, 7th, and 8th March, and 14th, 16th, 17th, 21st, 22nd, and 23rd May 1912.

Argued for the reclaimers;—(1) On the evidence it was clear that substantially the whole damage was done by the water which overflowed the banks of the stream on the southern boundary of the garden, and that the flooding was due to the increased area of impervious surface, which caused the rain water to drain more rapidly on to the lower levels. The defenders were not liable for this source of damage. The area drained by the burn was the natural area and had not been increased. The process of draining off surface water by rendering the ground impervious had been going on gradually and continuously since 1532, when the High Street was paved.¹ The Craigentenny Burn and its feeders had always been liable to violent floods. The drainage and building operations of the defenders had been

between the east end of the culvert under the Restalrig Road and the Craigentenny Avenue.

“This question of fact is rendered the more difficult of solution because, on the occasion of the October flood, it seems doubtful whether the gate was open. It was open on the occasion of the July flood. The extent of flooded ground is said to have been much the same on the later as on the earlier date, and the duration of the flooding was no longer on the later than on the earlier occasion. On both occasions there was an excessive fall of rain. On the evidence of the eye-witnesses, the pursuer, in my judgment, has proved his case. [His Lordship then discussed the evidence on which he arrived at this conclusion.] I hold, therefore, that it is proved that the pursuer's garden was flooded on the occasions in question by water which passed from the road through the pursuer's gate, and not by water overflowing the banks of the burn. The cause of the flooding of the road was the insufficiency of the culvert to carry off the water which collected at the west end of it. The result was that the road for two hours became a stream which, to a large extent, emptied itself into the pursuer's garden.

“It does not appear when the culvert was constructed. It is plainly a very old bit of work, and was in existence long before the defenders, as road authority, came to have an interest in it. I have no doubt that it originally, and until very recently, was sufficient to carry off all water coming down the burn from the west. At anyrate there is no evidence to the contrary. Its insufficiency on the occasions in question was due, I think, to two causes.

“First. The water main running across the top of the arch and projecting downwards from the crest into the arch 16½ to 18 inches, to some extent diminished the carrying capacity of the culvert. No. 29 of process seems to be a very accurate drawing of the culvert. The parties were not seriously in dispute as to the measurements and levels shown on that plan. This water main was inserted in the culvert in 1907 by the Water Trustees, but a minute of the defenders, dated 30th November 1906, bears that it was so inserted with their permission ‘provided the work is carried out at the sight of and to the satisfaction of the burgh engineer.’

“Second. The increase in the volume of water which has to pass through it on occasions of excessive rainfall renders the culvert inadequate. That there has been such an increase is, in my judgment, proved. I think that it has been brought about by the drainage operations of the defenders, the effect of which has been to pour a much larger volume of sewage and water into the burn from the 7-foot sewer of the defenders at the railway embankment than the burn was accustomed to receive at the time the

¹ Old and New Edinburgh (Cassell), vol. 1, p. 192.

carried out under statutory provisions,¹ which were imperative either July 12, 1912. in express terms, or because, though permissive in phraseology, they were enacted for the public benefit.² It followed that the defenders ^{Hanley v. Magistrates of Edinburgh.} were not responsible for any prejudice to private rights,³ unless they acted negligently,⁴ since what happened was the inevitable result of what Parliament had authorised them to do.⁵ This was not the case of an *opus manufactum*, or of a non-natural use of property.⁶ Flooding was a "common enemy" against which everyone was bound to protect himself.⁷ Pollution being out of the question, the defenders were in the position of an upper heritor who was entitled to drain his land of superfluous water without regard to the consequences to the lower heritor, and this rule applied to natural streams and rivers as the legitimate channels for the drainage consequent on habitation.⁸ Further the defenders had no duty to protect agricultural ground, such as the pursuer's, against flooding. If every proprietor of a field

culvert was constructed, and for long afterwards. The sewer in question took the place of the open burn in 1908. A large district of Edinburgh drains into it, and houses and population have greatly increased in that district during the last twenty or thirty years. No doubt the increase is not a thing of yesterday. It has been gradual, but it has continued down to the dates of the floods in question. In times of heavy rainfall there is a much more rapid collection of sewage and surface water than formerly, and the whole is discharged in concentrated volume far more rapidly, and at a higher velocity, from the sewer in question into the open course of the burn. The position of the defenders is that, having statutory power to construct drains, there is no limit to the amount of sewage and water which they are entitled to pass into the burn, so long as they collect it in the first instance in drains and sewers constructed under their statutory powers. They are entitled, they say, to disregard the consequences, however injurious, to riparian proprietors below the point where the sewer debouches into the drain. I am not prepared to affirm that proposition. I think they are bound to see to it that no damage results from the exercise of their general statutory powers to construct drains. There is no provision in any of their statutes which expressly, or by implication, empowers them to pour an

¹ Edinburgh Municipal and Police Act, 1879 (42 and 43 Vict. cap. cxxxii.), secs. 130, 152, 179, 181, 185, 187, and 197.

² Gray v. St Andrews and Cupar District Committees of Fifeshire County Council, 1911 S. C. 266.

³ Metropolitan Asylum District v. Hill, (1881) 6 App. Cas. 193; Rankine on Landownership, 4th ed., p. 392.

⁴ Edinburgh and District Water Trustees v. Sommerville & Son, Limited, (1906) 8 F. (H. L.) 25; Mair v. Aberdeen Harbour Commissioners, 1909 S. C. 721.

⁵ Dixon v. Metropolitan Board of Works, (1881) 7 Q. B. D. 418.

⁶ Fletcher v. Rylands, (1866) L. R., 1 Ex. 265, (1868) L. R., 3 E. & I. App. 330; Kerr v. Earl of Orkney, (1857) 20 D. 298; Anderson v. Oppenheimer, (1880) 5 Q. B. D. 602.

⁷ Nield v. London and North-Western Railway Co., (1874) L. R., 10 Ex. 4, per Bramwell, B., at p. 7.

⁸ Bell's Prin., secs. 968, 969, 1106; Ersk. Inst. ii. 1, 2; ii. 9, 2; Rankine on Landownership, 4th ed., pp. 514-515; Downie v. Earl of Moray, (1825) 4 S. 167; Campbell v. Bryson, (1864) 3 Macph. 254; Mason v. Shrewsbury and Hereford Railway Co., (1871) L. R., 6 Q. B. 578; Wilson v. Waddell, (1876) 2 App. Cas. 95; Fletcher v. Smith, (1877), 2 App. Cas. 781; Mayor, &c., of Bradford v. Pickles, [1895] A. C. 587; John Young & Co. v. Bankier Distillery Co., [1893] A. C. 691.

July 12, 1912. within the city was entitled to have it drained by the Corporation, that would impose an intolerable burden on the ratepayers. In any case, section 28 of the Act of 1900 absolutely prevented the defenders from interfering with the burn by deepening it or covering it over, and it was not suggested that anything else would have prevented the flooding. There was no notice on record of the case against the defenders as drainage authority, and this part of the pursuer's case should be disregarded.¹ (2) The only case which was made on record was against the defenders as road authority, in respect of their responsibility for the road drains in Restalrig Road and the portion of the culvert thereunder. No defect was alleged in the road drains, and the defenders had no responsibility for the culvert, their rights and duties with regard to the *solum* of the road being strictly limited.² But in any event, the pursuer's case was unsupported by evidence. The water main in the culvert, which was put in by the Water Trustees under their statutory powers, could not be altered by the defenders, and, in any event, it caused no obstruction. Even if the portion of the culvert under the road had been larger, the damage to the pursuer's garden would have been neither averted nor diminished.

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Argued for the respondent;—(1) On the evidence the Lord Ordinary had rightly decided that the damage was done by water passing

unlimited amount of sewage and water into the Craigentenny Burn. I do not require to decide whether they are liable, on this ground, to compensate the pursuer for the injury suffered by him through the flooding of his garden. I refer to the fact of their having increased the effluent from their sewer as showing how the culvert under the Restalrig Road has become insufficient.

"It appears to me that it is as road authority—it is admitted that they are the road authority—that they are to blame in that they have allowed the road to become the means of conveying the water of the burn into the pursuer's garden. How they are to avoid that result in the future may be a question. The mere enlargement of the culvert might lead to the overflowing of its banks by the burn to the east of the culvert. A different question would then arise. It is not proved that such a result would certainly follow.

"As to the defenders' right to interfere with the culvert, it appears to me that so far as it is under the road they have that right. They appear to have acted as if they had that right, for two drains from the north side have been led into it, and two other pipes which act as scour pipes have also been led into it. It is quite true that only a portion of the culvert is under the road, but that was the portion which led to the flooding. I think that, by their consenting to the Water Trustees laying the water main where they did, they became responsible for the obstruction thereby occasioned.

"I think that the pursuer has failed to prove that the road is the property of the defenders. Nor has he proved, in my opinion, that the defenders are responsible as owners or as road authority for the part of the Hospital Road overlying the portion of the culvert to the east of the Restalrig Road. In my judgment £150 will fairly cover the damage sustained by the pursuer, and I shall give decree for that amount, with expenses."

¹ Watson, Laidlaw, & Co., Limited, v. Pott, Cassels, & Williamson, 1909 S. C. 1445.

² Glasgow Coal Exchange Co., Limited, v. Glasgow City and District Railway Co., (1883) 12 R. 1283; Magistrates of Ayr v. Dobbie, (1898) 25 R. 1184. Wishart v. Wyllie, (1853) 1 Macq. 389, was also referred to.

through the gate on the Restalrig Road. But if it should be held July 12, 1912. that to any substantial extent flooding took place over the banks of the stream lower down, the defenders were responsible for this as the drainage authority for the city of Edinburgh. (a) The pursuer's garden lay within the area which they administered, and they were bound by statute to provide for the effectual draining of "any portion" of the burgh.¹ Section 28 of the Act of 1900 had no application, since it only referred to "sewage," and on the occasions in question only a small percentage of the flood water was sewage. Further, that section only prohibited the defenders from diminishing the flow, and gave them no authority to increase it. Moreover, under that section the defenders had power to make any alterations they thought necessary in the public interest on application to the Sheriff. The pursuer had the same rights as any other ratepayer in the burgh.² (b) Apart from the fact that the defenders were responsible for the effectual drainage of every portion of the burgh, including the market garden in question, they were liable on the separate ground that by their drainage operations they had caused the lands of a lower proprietor to be flooded. It was no answer to say that these operations had been carried out under statutory authority. Drainage powers given by Parliament did not authorise the committal of a nuisance in the exercise of the powers, and they had to be used with due regard to private rights.³ The decisions in *Metropolitan Asylum District v. Hill*⁴ and *Dixon v. Metropolitan Board of Works*⁵ were typical of a different class of case, where the statutory authority was bound to execute the work in a particular manner, and was naturally free from responsibility for the consequences. At common law a party was not entitled to collect the drainage water of the upper lands and discharge it on to the lands of the inferior heritor without consideration of his convenience⁶—which was just what had been done in the present case. Flooding might be a "common enemy," but the defenders had no right to protect their property by transferring the mischief from their own land to that of the pursuer.⁷ The doctrine of *in æmulationem vicini* was not obsolete.⁸ The rainfall on the occasions in question was not a *damnum fatale*; the defenders should have

¹ Edinburgh Municipal and Police Act, 1879, sec. 179.

² Edinburgh Corporation Act, 1900, sec. 16.

³ Attorney-General v. Hackney Local Board, (1875) L. R., 20 Eq. 626; Canadian Pacific Railway Co. v. Parke, [1899] A. C. 535; Geddis v. Proprietors of Bann Reservoir, (1878) 3 App. Cas. 430; Attorney-General v. Gaslight and Coke Co., (1877) 7 Ch. D. 217; The Queen v. Bradford Navigation Co., (1865) 6 B. & S. 631; Attorney-General v. Council of Borough of Birmingham, (1858) 4 K. & J. 528; Price's Patent Candle Co., Limited, v. London County Council, [1908] 2 Ch. 526; Glossop v. Heston and Isleworth Local Board, (1879) 12 Ch. D. 102, *per* Brett, L.J., at p. 121, Cotton, L.J., at p. 123; Evans v. Manchester, Sheffield, and Lincolnshire Railway Co., (1887) 36 Ch. D. 626; Public Health (Scotland) Act, 1897 (60 and 61 Vict. cap. 38), sec. 103.

⁴ 6 App. Cas. 193.

⁵ 7 Q. B. D. 418.

⁶ Campbell v. Bryson, (1864) 3 Macph. 254, *per* Lord Justice-Clerk Inglis, at p. 260; Dunn v. Hamilton, (1837) 15 S. 853; Ersk. Inst. ii. 9, 2.

⁷ Whalley v. Lancashire and Yorkshire Railway Co., (1884) 13 Q. B. D. 131.

⁸ Campbell v. Muir, 1908 S. C. 387.

July 12, 1912. foreseen it and taken measures accordingly.¹ The stream was to be regarded either as a sewer or a watercourse. If as a sewer, then it was the duty of the defenders to see that it was adequate for its purpose; if as a watercourse, then the defenders were to blame for putting more water into it than it was capable of transmitting. (2) The defenders were liable as road authority for the flooding through the gate on the Restalrig Road. The flooding was due to the inadequate size of the culvert under the road. The culvert was under the charge of the defenders, and they were bound to keep it efficient and to alter it if necessary.² Whatever effect section 28 of the Act of 1900 might have on the position of the defenders as the drainage authority, it did not affect their powers as the road authority. It was not denied that to some extent the capacity of the culvert was diminished by the main constructed by the Water Trustees. The defenders had power either to alter the water main themselves or make the Water Trustees do so, or to put in a relief drain,³ and they were to blame for neglecting to take any of these measures.

At advising on 12th July 1912,—

LORD GUTHRIE.—This case does not involve a large sum. The pursuer concludes for £200; the Lord Ordinary has awarded £150, and the defenders reclaim only on the question of liability. But the case raises difficult and important questions of fact and law. The questions of fact are difficult, because the evidence is conflicting, and because much of the evidence of the pursuer's witnesses is alleged by the defenders' experts to be scientifically impossible. The questions of law are of general importance for the defenders, and for all similar bodies.

It is common ground that, on the dates mentioned in the condescendence, namely, on 25th July and 13th October 1909, a substantial portion of the market garden on the Craigentenny estate, leased from year to year by the pursuer, was flooded by, and suffered material damage from, water coming, either more or less directly, from sewers and drains vested in the defenders as a drainage authority, or from the surface of an old turnpike road, Restalrig Road, vested in them as a road authority, or from both. The defenders are not alleged to have any responsibility in connection with the other road referred to in the evidence, the Old Hospital Road.

The record is vague as to the capacity or capacities in which the defenders are sought to be rendered liable in damages, but we were told at the debate that they are sued primarily as the road authority vested in the Restalrig Road, and secondarily as the drainage authority for the city of Edinburgh. In certain parts of his case, the pursuer seemed to be attacking the defenders in both capacities. The case does not raise any question of

¹ Potter v. Hamilton and Strathaven Railway Co., (1864) 3 Macph. 83; Harrison v. Great Northern Railway Co., (1864) 33 L. J., Ex. 266.

² Houstoun v. Barr, 1911 S. C. 134; Pirie & Sons v. Magistrates of Aberdeen, (1871) 9 Macph. 412; Duncan v. Suburban Committee of Midlothian County Council, July 10, 1900 (Lord Kincairney, Ordinary), Scottish County Council Cases, vol. vii., p. 39; Roads and Bridges Act, 1878 (41 and 42 Vict. cap. 51), secs. 2, 94, and 123, incorporating the General Turnpike Act, 1831 (1 and 2 Will. IV. cap. 43), sec. 85.

³ Edinburgh Municipal and Police Act, 1879, secs. 28, 141.

pollution, for it is admitted that the Craigentinny Burn has contained city July 12, 1912. sewage for much more than the prescriptive period. Nor although the rainfall in the July and October floods was very heavy, is there any ques- ^{Hanley v. Magistrates of Edinburgh.} tion of *damnum fatale*. Mr Walker Smith's description of the 25th July flood may be fairly applied to both floods: "While that rainfall was not Lord Guthrie. absolutely abnormal, it was still a very exceptional rainfall."

The pursuer maintains that all the damage was done by water, mostly rainfall water, coming from the Restalrig Road through the gate leading into his land, any water coming over the banks of the burn on to the pursuer's land being nothing more than a little leakage near the mouth of the culvert. The defenders' case is that, while a negligible quantity of water may have come through the gate, substantially the whole damage was done by the water, mostly rainfall water, which overflowed the banks of the Craigentinny Burn where, for a distance of about 350 yards, and with a width of about 11 feet and a depth of from 3 to 4 feet, it bounds the pursuer's land to the east of the Restalrig Road.

Taking the evidence as a whole, it seems to me that substantial damage was done both by water coming through the pursuer's gate, and by water overflowing the pursuer's banks. In view of the fact that no question was raised by the reclaimers as to the sum of damages awarded by the Lord Ordinary, it is unnecessary to determine to what extent the water, which injured the pursuer's land, came from the one source or the other. While accepting the evidence of the pursuer, his son Adam Hanley, his workmen Rutherford and Thomson, and the stationmaster Macdonald, corroborated by the Craigentinny architect, M'Laren, and the factor, Bryce, to the extent that a quantity of water came in at the gate sufficient to do substantial damage to the pursuer's land and produce, I think much of this evidence is greatly, and some of it is grossly, exaggerated. My impression is that much the largest quantity of water must have reached the pursuer's land over the banks of the burn to the east of the Restalrig Road.—[His Lordship then discussed the evidence leading to that conclusion.]

On record, the pursuer does not present any case against the defenders as drainage authority, in respect of their having allowed water on the occasions in question to overflow the banks of the burn west of the road into the Lochend Meadows (as it has periodically done from time immemorial), and thence on to his land, or in respect of their having allowed water to overflow the banks of the Craigentinny Burn bounding, or passing through, the ground let to him. On the contrary, he denies any overflow below the road, and the same attitude was maintained throughout the proof and in the debate. But in his junior counsel's speech in the Inner House, it was argued that, if any overflow took place at the east of the road, i.e., below it, to the extent of doing substantial damage, the defenders were liable therefor, as drainage authority. I do not think this view of the case is maintainable on record. But if it were, I should hold that the defenders were right. The open Craigentinny Burn to the west of the Restalrig Road, and to the east of the road as it bounds and runs through the pursuer's garden ground, is not one of the sewers and drains vested in the defenders under section 178 of the Edinburgh Municipal and Police Act of 1879, but it is a watercourse within the area of their administration used for the

July 12, 1912. conveyance of sewage, and, so far as situated to the west of the road, could be culverted by them.

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Lord Guthrie.

Up till 1900 the ground in question, and this part of the Craigentenny Burn, were in the county of Midlothian. Had that state of matters existed at the time of the July and October 1909 floods, it is clear that none of the defenders' operations, as drainage authority higher up the burn, could have founded a claim against them for flooding agricultural land by water overflowing the burn banks beyond the Restalrig Road. The whole water flowing in the Craigentenny Burn comes from the natural drainage area of that burn, about two square miles in extent, mostly in the Old Town, and a small part in the New Town, and there is no evidence that the defenders have led water, either pure or polluted, from other drainage areas into the districts contributing water to the burn. It is no doubt true that, through addition of buildings and streets and of population, and through consequent increase of impervious surfaces, the amount of water normally flowing in the burn has gradually increased during the last one hundred years, and, in floods, the proportion of increase in the water of the burn from acceleration is greater still. But no action could have lain for such gradual and natural increase, either normal or in times of flood, against ordinary upper proprietors, and no grounds were stated why, apart from express enactment, a claim for flooding of agricultural land should lie against a statutory drainage authority, which would not have lain against the individual proprietors within the area before the authority was constituted.

But in 1900 the district in question was annexed to Edinburgh by the Edinburgh Corporation Act of that year. Restalrig Road, previously one of the county roads, came under the administration of the defenders, as road authority, and express provision was made, by section 28, for the interests of the estate of Craigentenny. The result is that, so far as sewage water is concerned, the proprietor of Craigentenny must be held to have accepted the amount of water then in the burn as not excessive, because he, by that statute, disabled the defenders from diminishing it. If that date be taken, there is no evidence of any increase either of population or of building, and consequently of sewage water, either normal or in floods, in the burn since 1900. Indeed it appears from the census return 1900 to 1910 that there has been a substantial decrease in the population of the districts drained between these dates. This point of the effect of the Act of 1900 is not mentioned by the Lord Ordinary. It seems to me crucial, and is expressly given notice of by the defenders on record. Even, however, if a period of twenty-three years be taken, the increase has been slight. Of the whole drainage area not more than six per cent has been converted during that period by building operations from pervious to impervious; and the additional dry weather sewage from the buildings thus erected does not amount to more than about one-third of one per cent of the discharging capacity of the Restalrig Road culvert. The problem is one of rainfall not of sewage. The pursuer's case has been throughout conducted on two mistakes in fact, first, that the difficulties caused by flooding have been due to the increase or accelerated flow of dry weather sewage coming through drains vested in the defenders, whereas they have been due to rain water; and, second, that, as expressed in condescendence 7, the defenders "are diverting"

drainage into the burn, whereas they are merely giving effect to the rights which Parliament has conferred on the inhabitants of Edinburgh. July 12, 1912.

Further, the pursuer led no evidence as to the kind of works which the defenders had failed to execute so as to prevent flooding over his banks. Hanley v.
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of Edinburgh.

In the cross-examination of Mr Walker Smith and Sir Thomas Hunter it was suggested that part of the flood sewage water might be kept out of the Craigentenny Burn and put into a relief drain, beginning at the east end of the culvert. But any such operation would be in contravention of the provisions of section 28 of the 1900 Act. For the same reason the defenders could neither deepen nor widen the burn, nor interfere with its banks. Lord Guthrie.

I therefore think that if the pursuer has any record for a case against the defenders as drainage authority (which I doubt) no such case has been established. I ought to add that the pursuer's junior counsel stated a separate case against the defenders arising from the pursuer's position as a ratepayer within the drainage area. But this case, of which no notice is given on record, was not pressed by the pursuer's senior counsel. The case was ultimately argued on the footing that the pursuer has no other or higher rights than those of his landlord, the proprietor of Craigentenny.

The question remains whether the defenders are liable, as road authority, in damages to the pursuer for the damage done by the flood water flowing on to his lands from Restalrig Road through his gate, as I have held it did to a substantial extent. On record the pursuer does not allege against them any acts of commission involving fault. He does not suggest they should, or could, have refused to connect any of the sewers in question with the Craigentenny Burn, or that they should have prevented water overflowing the burn west of the Restalrig Road into the Lochend Meadows, or that they failed to construct proper drains, manholes, and syvors in the Restalrig Road, or that they improperly allowed the Edinburgh and District Water Trustees in 1907 to cross the top part of the culvert, about 20 feet from the west end and 65 feet from the east end, with a water-pipe, which narrowed the top space of that part of the culvert by 18 inches according to the pursuer, or 16½ inches according to the defenders, or that they improperly led into the culvert a 12-inch pipe and a 9-inch pipe draining the west and east sides of the Restalrig Road, the 12-inch pipe entering the culvert 24 feet 8 inches and the 9-inch pipe entering 26 feet 6 inches from the west end of the culvert. All these points except the first are now made by the pursuer, but most of them are not mentioned at all upon record, and none of them are founded on as inferring fault. The sole ground of fault alleged on record is "the fault of the defenders in not increasing or having increased the size of the culvert above referred to to correspond with the drainage which they are directing into it" (cond. 7), and the only reason for the alleged inadequacy of the culvert is thus stated in cond. 3:—"The insufficiency of said culvert is entirely due to the artificial additions to the contents of said burn made by the drainage operations of the defenders as aforesaid," thereby negating any of the other causes now put forward on the strength of certain passages in the proof. So far as blame is now attached to what happened in connection with the drains, manholes, and syvors in Restalrig Road, the

July 12, 1912. defenders had express notice that no point of this kind was to be made, because an averment as to their faulty construction contained in cond. 7
Hanley v. Magistrates of Edinburgh. was, on the pursuer's motion, deleted by interlocutor of 14th June 1910.
Lord Guthrie. It may be that the defenders were in fault for not having their drains fitted with valves to prevent regurgitation, such as are referred to in Mr Walker Smith's cross-examination, but no such case can be made by the pursuer on the record and proof.

If attention be confined to the sole ground of fault alleged on record, namely, the defenders' failure to enlarge the culvert (which, so far as it runs under the Restalrig Road, is treated, I am disposed to think rightly, as a part of the road under the defenders' management), I think the pursuer has failed to prove his case, as in a question with him, a Craigentenny tenant, alleging damage only to agricultural ground. In my view, the difficult questions which might have arisen with a resident in Restalrig village or elsewhere, alleging recurrent flooding of house property caused by insufficient road drainage, and not affected by the provisions of section 28 of the Annexation Act of 1900, do not arise here, whether the defenders be considered as a road authority or as a drainage authority. This distinction, which seems to me vital, does not seem to have been present to the Lord Ordinary's mind.

My reasons for thinking that the pursuer has failed on this part of his case have been indicated already. I am not moved by the defenders' alleged inability (apart from the Act of 1900) to operate on the culvert, as being below the roadway, or as being, to the extent of fully 50 feet, to the east of the road which alone is vested in them. They seem to possess power under section 179 of the Edinburgh Municipal and Police Act of 1879; but if they have not power, they can obtain it from Parliament. The defenders' true and, I think, sufficient answers are (1) that the pursuer founds his claim for enlargement of the culvert on the increase of sewage water due to the operations of the defenders or of the inhabitants, for whom they act as drainage authority; and the pursuer is not entitled to make any complaint of increase, for there has been none since 1900, when his landlord accepted the sewage water as not excessive, and by the Act of that year bound the defenders not to diminish it as it passes through the lands let to the pursuer; (2) that it is not proved that the flooding of the pursuer's ground on the occasions in question was due to the inadequate size of the culvert; and (3) that it is not proved that, even if the culvert had been enlarged as demanded by the pursuer, the damage to his ground would have been averted or materially diminished.

This view of the case may be sufficient for its decision in the defenders' favour. But if it be thought, in view of the full investigation on both sides into the alleged wrongous acts of the defenders above mentioned, and in view of the defenders' failure to object to the evidence so led, that these matters, although not referred to on record, or not referred to as inferring fault, ought to be considered and disposed of, I am of opinion that the pursuer has failed to establish fault on the defenders' part, for which they are liable in damages to him.

The pursuer says that he has proved that a substantial part of the damage done to his ground was caused by water coming through his gate, which

would not have come on to his land so as to cause him damage but for the July 12, 1912. following faults on the part of the defenders :—

First, their failure to prevent water coming through the manhole on the Restalrig Road to the south of the culvert, and thence along the road northwards and through the pursuer's gate. To this the defenders reply—in my opinion, effectively—first, that it is neither alleged nor proved that there is anything defective in the construction of the manhole, or in the drains connected with it; second, that it is not proved that any considerable amount of water overcame the northward levels and entered the pursuer's ground, instead of escaping, as most of it would naturally do, on the west into Lochend Meadows, and on the east into the Old Hospital Road; and third, that in any case, the alleged inadequacy and congested condition of the culvert can have had no connection with the spouting from the manhole, because it discharges below the culvert.

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Second, it is said that the defenders were to blame for the road water which spouted from the three syvors nearest the gate, and which entered the pursuer's land through his gate. Here again I think the defenders' answer is sufficient, first, that it is neither alleged nor proved that there is anything defective in the construction of the syvors, and second, that it is not proved that there was any fault in leading the connecting 12-inch and 9-inch drains, with which these syvors communicate, into the culvert, in substitution for the drain which entered the culvert before the water-pipe was placed in it in 1907, or that the position of these drains in the culvert, or the existence in the culvert of the adjoining water-pipe, in any way increased the tendency of the water to regurgitate during such heavy rain-falls as occurred on 25th July and 13th October 1909. The fact that water regurgitated in the same way from the manhole, which discharged below the culvert, indicates that the alleged inadequate size and congested condition of the culvert was not the cause of the water regurgitating on to Restalrig Road at the one place, any more than at the other.

Third, it is said to be proved that, but for the existence of the water-pipe, the floods complained of would not have occurred. This, although no notice of it is given on record, is the most plausible part of the pursuer's case. I do not think that the defenders can escape responsibility for the effect of this water main, in flooding the road and adjoining property, merely because it was actually inserted, not by them, but by the Edinburgh and District Water Trustees with their consent. They could have refused their consent; and it may be that, in view of the well-known difficulty in anticipating the effect of an obstacle on running water, they would have been wiser to have done so, and to have compelled the Water Trustees to run their water main across the stream clear of the culvert. But this is a very different thing from proving that the diminution of the culvert by the water main has caused substantial damage to the pursuer.—[His Lordship then considered the evidence on this point, coming to the conclusion that no damage due to diminution of the culvert was proved.]

In the view above stated, it is not necessary to consider the serious difficulties in the pursuer's way from the fact that the culvert, so far as vested in the defenders as road authority, only covers 30 feet out of the whole length of 85 feet, and from the fact that enlargement of the culvert

July 12, 1912. would apparently result in flooding over the banks of the burn to the east of the Restalrig Road.

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of Edinburgh.

Lord Guthrie.

My view therefore is that, on the assumption that the pursuer has proved substantial damage to his garden ground resulting from water coming from Restalrig Road through his gate, open, half open, or shut, he has failed to show that the defenders, either as road authority or as drainage authority, are liable in damages therefor. I come to this conclusion, whether the water entering his gate had run down Restalrig Road from north and south, or had come through the wall and the churchyard gate from the Lochend Meadows, or had come from the manhole to the south, or from the syvons alongside and near the gate.

LORD SALVESEN.—I have had an opportunity of reading the opinion of Lord Guthrie, and I concur in the conclusions of fact at which he has arrived on a review of the whole evidence. As, however, certain important questions of law were fully argued before us, I think it right to express the opinion which I have formed on some of these.

The Craigentenny Burn is a natural watercourse which from time immemorial has received the sewage of part of the city of Edinburgh. No question, therefore, arises of pollution, for a prescriptive right has been acquired by the inhabitants of that district to continue to put their sewage into the burn. There has been no increase in the area of the land which drains into the burn as there would have been if the drainage from the adjoining districts had been diverted into the burn. On the other hand, as the ground has become more and more covered with buildings and streets which are more or less impervious to surface water, there can be no doubt that in periods of heavy rainfall the surface water finds its way more quickly into the burn than it did when the land now built upon was in its natural state or used for purposes of agriculture. The same thing may be said of very many of the rivers and watercourses in Scotland. In the case of the larger rivers the laying of field drains in land of a wet or boggy character with the view of making it more productive has had a marked effect upon the rapidity with which spates or floods in such rivers rise and fall. It is, however, in my judgment quite settled law that a riparian owner is not entitled to interdict a heritor whose lands drain into the same river from laying drains in his fields which will have the effect of causing rain water to pass into the river more rapidly than if the land had remained unimproved. That drainage operations over a considerable area of land may have an injurious effect upon the salmon-fishing in a river, by causing the floods to rise and subside more quickly than they would otherwise have done, is matter of common knowledge; but the proprietor who drains his land is making a natural use of his property, and cannot be restrained from doing so because of the circumstance that his operations may have an injurious effect on the property of a lower heritor. In the same way the proprietor who lays out his land for building, and thereby renders the surface less pervious to water than it previously was is making a natural and legitimate use of his property, and cannot be restrained because of an apprehension more or less well founded that the watercourse into which his land naturally drains may thereby become more liable to overflow its banks

during periods of exceptional rainfall. While, therefore, it may be true July 12, 1912. that the Craigentinny Burn in consequence of the more rapid drainage from the surface of the land which naturally drains into it may now be more liable to overflow its banks than it was fifty or one hundred years ago, this is not, *per se*, a reason for imposing liability on the superior heritor for damage done by such flooding to the lands of the lower heritor.

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The pursuer's record does not, indeed, present a case of this kind ; but he founds his claim on an averment that the defenders have by their operations increased the quantity of water which finds its way into the Craigentinny Burn. This increase, he alleges, has made the culvert at the Restalrig Road which was formerly sufficient to pass off the water that came into it insufficient for that purpose. He says,—“The insufficiency of said culvert is entirely due to the artificial additions to the contents of said burn made by the drainage operations of the defenders as aforesaid.” I entirely agree with Lord Guthrie's conclusion in fact that this averment is completely disproved. The defenders have not appreciably added to the amount of water which finds its way into the burn ; but the improved drainage of the district which they administer has the effect of transmitting the surface water more rapidly into the burn than was the case when less of the land which naturally drains into it was occupied by houses and the drainage was less effective.

It may nevertheless be that the drainage authorities who are responsible for the proper drainage of the district may incur liability to the owner of property within the burgh area in consequence of a change of circumstances of this kind, if it is found that injury is periodically being done to his property. If, for instance, owing to the more perfect drainage of the upper parts of the town, the drains constructed in the lower parts have become insufficient to carry off the water as rapidly as it is transmitted to them, and flooding results, it may well be that a duty is laid on the drainage authority to take steps to have the size of the drains increased so as to cope with the more rapid flow ; although no actual increase of the annual quantity of water passed by the drains has taken place. Each ratepayer in the town is entitled to have his property efficiently drained ; and it can never be the right of the town authorities to sacrifice the interest of the owners of houses situated on a lower level for the benefit of the upper districts. If, therefore, the owner of a house abutting on a street or road within the city boundaries finds himself frequently flooded with sewage because of the drains constructed by the Local Authority becoming gorged in times of heavy rainfall, I cannot doubt that, apart from *damnum fatale*, he would have a claim against such authority for failing to discharge one of their primary functions. The peculiarity of the present case is that, so far as the estate of Craigentinny is concerned, the defenders are under a statutory disability to do anything to diminish the amount of sewage which they pass into the Craigentinny Burn. They are, besides, disabled by the same clause in the statute of 1900, from deepening, diverting, covering over, or otherwise interfering with the Craigentinny Burn so far as passing through the estate of that name. They cannot therefore take the steps which would be appropriate to prevent the adjoining lands from being overflowed with water at such times as the existing watercourse may be insufficient to

July 12, 1912. contain all the drainage that flows into it. I think, therefore, it is plain that if this flooding of the lands occupied by the pursuer (who can have no higher title than the owner of the Craigentenny estate, of whom he is the tenant) arose from the Craigentenny Burn overflowing its banks, the defenders would not be liable for the consequences of such flooding.

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Lord Salvesen.

The question, however, remains whether, assuming a substantial amount of the water which flooded the pursuer's lands came from Restalrig Road and flowed in through his gate, the defenders might not be liable as the road authority for the damage thereby caused. In order to succeed in this claim I think the pursuer must establish (1) that the culvert beneath the road, so far as within the jurisdiction of the defenders, was of less capacity than the watercourse above and below; or (2) that its capacity had been reduced by operations for which the defenders are responsible; and (3) that the water would not have reached his lands so as to flood them but for the insufficient capacity of the culvert.

As regards the first point, the culvert, as constructed, and until recently, was of the same capacity beneath the road as for the 55 feet to which it extends in the Craigentenny estate. It is plain, therefore, that the water which filled the culvert was not more likely in its original state to flow out on the road, which at the point nearly opposite the pursuer's gate appears to be at a little lower level than the top of the culvert, than it would be to overflow the banks lower down; and in any case, even if the culvert had been wider below the road, there would be exactly the same liability for the water to regurgitate through the drains on the road so long as the culvert on the Craigentenny estate remained of the same capacity. The most serious point against the defenders is that they permitted the Water Trustees to obstruct the culvert by putting in a large water-main underneath the road. I prefer the evidence of the defenders' experts as to the extent to which this water-main formed an obstruction to the flow of water; but even on their estimate it did obstruct the passage to the extent of 500 cubic feet per minute, assuming there was no head on the upper side of the culvert. This is not made a ground of complaint by the pursuer on his record; but as a great deal of evidence was led on the point, apparently without objection, I think we cannot disregard it. The fact remains that, whenever the culvert was running full, water would issue at the syvors at the lowest point of the road, which happens to be close to the pursuer's gate; and the more the culvert was obstructed the longer the level of the water would be maintained at the top of the culvert during the periods of greatest flow. The pursuer, however, cannot succeed unless he makes it reasonably clear that this obstruction of the culvert resulted in sending more water upon his lands than would otherwise have reached them; for it is of course immaterial from what precise place the water flowed if it would have overflowed the pursuer's lands to the same extent. On this point I think the pursuer's case fails. It is reasonably clear, having in view the relative capacity of the culvert itself and of the bed of the stream below, that when the culvert was running full there was bound to be an overflow over the banks; and the effect of the partial obstruction would merely be to intercept a portion of the water which would otherwise have flowed over the banks below. Indeed, I think the

obstruction, so far from injuring the pursuer, actually tended to diminish the quantity of water which overflowed his lands by damming it back on the Lochend meadows, and causing it to flow over other properties; whereas if the culvert had been wider the whole amount would have overflowed the banks of the burn on the Craigentenny side. These considerations, of course, do not apply to the owners of houses on the Restalrig Road whose properties would not have been flooded at all if there had been a free discharge for the water beneath the road and over the banks of the more or less artificial course of the burn on the Craigentenny estate.

I should like to add that while I cannot disregard the evidence of the pursuer's witnesses to the effect that a considerable body of water flowed from the road on to his lands, that evidence is plainly exaggerated, for the depth of water can at no time have exceeded a foot above the bottom of the gate; and if there had been any great rush of water I think it is certain that it would have left its traces on the farm road leading to the gate. If it were necessary to determine this point, I should hold without hesitation that by far the greatest volume of water found its way over the banks of the burn into the low-lying parts of the pursuer's market garden.

While I agree, therefore, with Lord Guthrie in holding that the defenders must be assoilzied from the conclusions of the present action, it is for them to consider whether they should not counteract the obstruction caused by the water-main by correspondingly widening the culvert beneath the road and so obviating what is *prima facie* a defect in their drainage system, namely, that whenever the culvert runs full it must necessarily discharge some of its contents on to the road by means of the syvors at the lowest part of that road. This could be easily avoided, so far as the road was concerned, by making the culvert underneath the road of such a width that the water would not so readily rise to the top of the culvert. No doubt it would still overflow the banks of the stream as it passes through the estate of Craigentenny, but the proprietors of that estate are quite able to look after their own interests, and can, if so minded, readily protect themselves by raising the banks of the burn on the side adjoining the pursuer's market garden.

LORD JUSTICE-CLERK.—I entirely concur in the opinions which your Lordships have delivered. This is a case in which there was very conflicting evidence indeed, but what study I have been able to give to it convinces me that the pursuer cannot succeed, and I am particularly unable to get over the fact that, even if the west tunnel which discharges above the culvert was full, it could not be passing more water than the culvert under the road could take; whereas the fact is, as I read the evidence, that the tunnel never was running full, which makes it certain that it was not any failure of the culvert to carry the volume of water coming from the west tunnel up the stream which caused any overflow on to the pursuer's ground—even if the water-pipe crossing the culvert constituted an obstruction to the water getting freely through the culvert, which I am satisfied was not so. Substantially the fact is that the culvert with the pipe across it quite freely passes through it all water coming from the tunnel to the west of the meadows which discharges into the burn above the road where the culvert

July 12, 1912. crosses it. It seems to me, therefore, that there can be no question of the defenders being in fault in these circumstances.

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THE COURT recalled the interlocutor of the Lord Ordinary, and assoilzied the defenders with expenses.

DANIEL TUDHOPE, Solicitor—Sir THOMAS HUNTER, W.S.—Agents.

No. 167. ARCHIBALD EDWARD BUTTER, First Party.—*Macphail, K.C.—Hon. W. Watson.*

July 12, 1912. FREDERICK CHARLES FOSTER, Second Party.—*Cooper, K.C.—Dallas.*

Butter v.
Foster.

Sale—Sale of heritage—Assignment of rents—Legal and conventional terms—Pastoral farm—Mansion-house and shootings—Titles to Land Consolidation (Scotland) Act, 1868 (31 and 32 Vict. cap. 101), sec. 8, Sched. B, No. 1.

By the Titles to Land Consolidation (Scotland) Act, 1868, sec. 8, it is enacted that a clause of assignment of rents in the statutory form "shall, unless specially qualified, be held to import an assignment to the rents to become due for the possession following the term of entry, according to the legal and not the conventional terms, unless in the case of forehand rents, in which case it shall be held to import an assignment to the rents payable at the conventional terms subsequent to the date of entry."

A landed estate, consisting of a mansion-house and shootings and farms, was sold with entry at Martinmas 1910, and the disposition contained an assignment of rents in the statutory form. A hill or sheep farm on the estate had been let in 1895 on a lease which was still current. The lease provided for entry at Whitsunday 1895 as to the houses, yards, hill pasture, and natural grass, and also provided for payment of the rent at two terms in the year, beginning the first term's payment at Whitsunday 1896. The mansion-house and shootings had been let for the year 1910, the rent being payable one-half on 1st January 1910 and the other half on 1st July 1910.

Questions having arisen between the purchaser and the seller as to the apportionment between them of the rents—

Held (1) with regard to the farm—that the rent conventionally payable at Martinmas 1911 was legally due at Martinmas 1910 for the crop up to that date, and so fell to the seller.

Mackenzie's Trustees v. Somerville, (1900) 2 F. 1278, *followed*.

Wigan v. Cripps, 1908 S. C. 394, *doubted*.

Held (2) with regard to the mansion-house and shootings—that the rent must be regarded as running *de die in diem*, and, accordingly, that the seller must pay to the purchaser the portion of the half-year's rent, received on 1st July 1910, that effeired to the period from 11th November to 31st December 1910.

Contract—Construction—Prior communings—Sale of heritage—Disposition—Prior articles of sale.

Articles of sale for the sale of a heritable estate contained certain conditions as to the rights of the purchaser and the seller respectively in the rents. A sale was effected in terms of the articles, and was followed by a disposition which contained an assignment of rents in the statutory form.

Held that the rights of parties in the rents were regulated by the terms of the disposition to the exclusion of the conditions contained in the articles of sale.

Lee v. Alexander, (1883) 10 R. (H. L.) 91, and *Orr v. Mitchell*, (1893) 20 R. (H. L.) 27, *followed*.

Jamieson v. Welsh, (1900) 3 F. 176, *distinguished*.

ON 17th October 1911 a special case was brought for the opinion and judgment of the Court upon certain questions as to the parties entitled to the rents of the estate of Faskally to which Archibald Edward Butter, late of Faskally, was the *first party*, and Frederick Charles Foster, now of Faskally, was the *second party*.

July 12, 1912.
Butter v.
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1st DIVISION.

The case stated as follows:—"1. On 15th July 1910 the first party sold by private bargain to the second party the estate of Faskally, in the parish of Moulin, Perthshire, under articles and conditions of sale, to which an agreement for the purchase was appended and signed by the second party. . . .

"2. The third article of the said articles and conditions of sale provides, *inter alia*,—"The purchaser or respective purchasers shall have right to the rents for the possession following the term of Martinmas 1910, which it is hereby declared shall be the term of entry to the estates."

"3. The sixth article of the said articles and conditions of sale provides, *inter alia*, as follows:—"Upon payment or settlement of the price, with interest if incurred, the exposor shall execute and deliver a formal and valid disposition or conveyance of the lands in favour of the purchaser . . . which disposition . . . shall contain a clause of entry as at the term of Martinmas 1910, and all other usual and necessary clauses in deeds of conveyance of land in Scotland, and, particularly, a clause binding the exposor in absolute warrandice, but excepting from such warrandice the current leases or missives of lease or other rights of possession of the present tenants or occupiers of the lands and others."

"6. By disposition, dated 9th and recorded 11th November 1910, the first party conveyed to the second party the said estate of Faskally, with entry at Martinmas 1910. . . .

"7. The said disposition contains an assignation by the first party of the rents of the said estate in the following terms:—"And I assign the rents."

"8. The said assignation of rents is in the form prescribed in Schedule B of the Titles to Land Consolidation (Scotland) Act, 1868, and by section 8 of that Act it is enacted that 'The clause of assignation of rents in these forms shall, unless specially qualified, be held to import an assignation to the rents to become due for the possession following the term of entry, according to the legal and not the conventional terms, unless in the case of forehand rents, in which case it shall be held to import an assignation to the rents payable at the conventional terms subsequent to the date of entry.'

"9. On delivery of the said disposition the second party entered into possession of the estate of Faskally, and questions have arisen as to the rents to which the first and second parties are respectively entitled under the circumstances set forth in this case.

"10. The rents in question are certain rents payable in terms of leases granted by the first party of (1) the farm of Old Faskally, and (2) Faskally House and shootings.

"11. By lease, dated 13th May and 16th June 1896, the first party let to certain tenants the farm of Old Faskally for a period of fifteen years from and after Whitsunday 1895 as to the houses, yards, hill pasture, and natural grass, and at the separation of crop of 1895 from the ground as to the arable land; and the said lease, by minute endorsed thereon, dated 31st October and 2nd November 1903, was extended for a further period of five years from and after the expiry

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stated in the lease, and that as if the expiry therein had been Whitsunday 1915. . . . In terms of the said lease the tenants bound themselves to pay to the first party the sum of £250 sterling (which rent was reduced to £225 in terms of the said minute) 'of yearly rent payable at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment thereof at Whitsunday 1896 and the next term's payment thereof at Martinmas thereafter, and that for the grass crop 1895, and corn crop 1896, and so forth, half-yearly and termly during all the years of this lease.' The parties are agreed that the farm of Old Faskally, which extends to over 3700 acres, of which 67 acres are arable and the remainder grazing, is a grazing farm.

"12. By lease, dated 31st October and 4th November 1903, . . . the first party let to the tenant therein designed (first) 'All and Whole the furnished mansion-house of Faskally, with the offices, stabling, coach-house, and coachman's house thereto pertaining, and the garden, lawn, and policies; and also All and Whole the exclusive privilege of shooting and sporting over' certain parts of the estate of Faskally; and also the fishings of Faskally as therein described from the opening of the season till the close in each year. In terms of the said lease the tenant bound herself to pay to the first party 'the sum of £1325 sterling yearly in name of rent, and that in equal portions on the first day of January and the first day of July in each year, beginning the first payment of the said rent, being £662, 10s., on the first day of January 1905, and the next payment of a similar sum on the first day of July 1905, and so forth half-yearly thereafter on the first day of January and first day of July during the currency of this lease.' The said lease was granted for the term of ten years from 1st January 1905, with power to either party to terminate it at 1st January 1910. By agreement this option to terminate the lease was extended, and subsequently the tenant gave notice to the first party of her intention to terminate the lease on 1st January 1911. On 1st July 1910 the last half-yearly instalment of the rent payable in terms of the said lease was paid to the first party by the tenant.

"13. The salmon-fishing contained in the lease closed on 31st October 1910. The wages of the keepers, gardeners, and house-keeper, and the expenses of firing the mansion-house up to 31st December 1910, payable by the proprietor in terms of the said lease, were paid by the first party. The second party has agreed to relieve the first party of the proportion of these expenses effeiring to the period from Martinmas 1910 to 1st January 1911 in the event of the contentions of the second party with regard to the rent of Faskally House and shootings being sustained in this case.

"14. (1) As regards the rents of the farm of Old Faskally, the first party contends that the rents received or to be received from the tenant of the farm at Whitsunday and Martinmas 1911, in terms of the lease, are the rents legally payable at Whitsunday and Martinmas 1910, payment of these rents having been conventionally postponed for a year in terms of the said lease; and that he is entitled to receive payment of these two half-yearly instalments of rent because they are not rents due, according to the legal terms, for the possession following the second party's term of entry under the foresaid disposition in his favour, namely Martinmas 1910. (2) As regards the rent of Faskally House and shootings, the first party contends that he is entitled to retain the whole rent paid by

the tenant on 1st July 1910, for the period of six months up to July 12, 1912. 31st December 1910, when the tenant gave up possession, and that the said rent is not apportionable between the first and second parties. The first party contends that, as the said rent was paid forehand in terms of the said lease, and in accordance with the usual practice in such cases, and was actually received by the first party before the date of the sale to the second party, it is not covered by the assignation of rents contained in the said disposition in favour of the second party, which assignation in the case of forehand rents conveys to the second party only rents payable at conventional terms subsequent to Martinmas 1910. The first party further contends as regards the rents both of the farm of Old Faskally and of Faskally House and shootings that the rights of the parties to the said rents must be determined in accordance with the terms of the said disposition in favour of the second party, and that if there is any difference in effect between the clause of assignation of rents in that disposition and the provision as to rent in the third article of the foresaid articles and conditions of sale (which the first party does not admit), the said articles and conditions must be held to have been superseded by the disposition.

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“15. (1) As regards the rents of the farm of Old Faskally, the second party admits that the first party is entitled to receive the half-year's rent payable at Whitsunday 1911, but he disputes the first party's right to receive payment of the half-year's rent payable at Martinmas 1911, and contends that the half-year's rent to be received from the tenant of the farm at Martinmas 1911 in terms of the lease, is the rent legally payable at Martinmas 1910, payment of that rent having been conventionally postponed in terms of said lease; that said half-year's rent is for the possession for the period from Martinmas 1910 to Whitsunday 1911; that said half-year's rent vested in the first party on 11th November 1910, and being moveable property, was not carried by the assignation of rents clause in the disposition; and that the second party is, under the contract of sale, entitled to the said half-year's rent legally payable at Martinmas 1910. (2) As regards the rent of Faskally House and shootings, the second party contends that in terms of the contract between the first party and the second party, and the provisions of the Apportionment Act, 1870 (33 and 34 Vict. cap. 35), said rent falls to be apportioned between the first party and the second party, and the latter is entitled to the proportion thereof effeiring to the period from 11th November 1910 to 31st December 1910.

“16. The parties are agreed on the foregoing statement of facts, and they have adjusted the amount which will be payable by the first party to the second party in the event of the second question of law in this case being answered in the affirmative.”

The questions of law were:—“(1) Is the first or is the second party entitled to the half-year's rent of Old Faskally Farm payable in terms of the lease thereof at Martinmas 1911? (2) Is the second party entitled to receive payment from the first party of a proportion applicable to the period from 11th November 1910 to 31st December 1910 of the half-year's rent of Faskally House and shootings received by the first party on 1st July 1910?”

The case was heard before the First Division on 30th and 31st May 1912.

Argued for the first party;—(1) The rents of a pastoral farm were

July 12, 1912. paid for crop and not for possession, and the rent in question, though by convention not exigible till Martinmas 1911, was legally payable for the crop up to Martinmas 1910, *i.e.*, for the crop prior to the second party's entry. Accordingly, it was not carried to him by the assignation of rents in the disposition.¹ The case of *Wigan v. Cripps*,² which differed from the previous case of *Mackenzie's Trustees*,³ was wrongly decided, and the decision in *Mackenzie's Trustees*³ should be followed. (2) The disposition superseded the articles and conditions of sale, and was the sole measure of the parties' rights; because in questions between a seller and purchaser of heritage the execution of a formal conveyance superseded all previous contracts,⁴ though it might be otherwise as regarded moveables.⁵ (3) The rent of the house and shootings was a forehand rent payable on 1st January and 1st July. Therefore, there being no rent payable subsequently to the second party's entry, none was carried to him by the assignation of rents.⁶ The shootings and fishings did not need to be considered separately; they were mere adjuncts to the tenancy of the dwelling-house.

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Argued for the second party;—(1) The rent of the farm, legally payable at Martinmas 1910, was payable for possession following that term, and had therefore been carried to the second party by the assignation of rents.⁷ It could not be suggested that payment of that rent did not confer upon the tenant a right to exclude intruders from his farm during the period from Martinmas 1910 to Whitsunday 1911, but the argument for the first party would deny the existence of any such right. The first party's argument involved the unjustifiable addition of the words "after the date of entry" to the words "to become due" in section 8 of the 1868 Act. The case of *Wigan v. Cripps*² was rightly decided, and governed the present case. There was no authority for the view that in a pastoral farm rent was paid for the existing crop and not for possession. The crop was continually growing and continually being consumed during possession. (2) The rents in question, being for possession following the term of Martinmas 1910 and legally payable at that term, ought to be regarded as moveables which had vested in the first party as at that date. Accordingly, the provisions of the articles of sale applied and carried these rents to the second party, for a disposition did not supersede a prior agreement *quoad* moveables.⁸ (3) The rent paid for the house and shootings for the period 1st July to 31st December 1910 accrued *de die in diem*, and accordingly for the period after the second party's entry it accrued to him. Therefore the first party having received the rent for that period in advance was bound to account for it to the second party.

¹ Lord Glasgow's Trustees v. Clark, (1889) 16 R. 545; Maxwell's Trustees v. Scott, (1873) 1 R. 122; Mackenzie's Trustees v. Somerville, (1900) 2 F. 1278; Bell's Lectures on Conveyancing, i. 639.

² 1908 S. C. 394

³ 2 F. 1278.

⁴ Lee v. Alexander, (1883) 10 R. (H. L.) 91; Orr v. Mitchell, (1893) 20 R. (H. L.) 27.

⁵ Jamieson v. Welsh, (1900) 3 F. 176.

⁶ Titles to Land Consolidation Act, 1868, sec. 8; Bell's Prin. 1204; Lord Glasgow's Trustees v. Clark, 16 R. 545.

⁷ Titles to Land Consolidation Act, 1868, sec. 8.

⁸ Jamieson v. Welsh, 3 F. 176, Lord Kinnear, at pp. 181-2.

At advising on 12th July 1912,—

July 12, 1912.

LORD JOHNSTON.—By disposition of 11th November 1910 Mr Butter of Faskally sold to Mr F. C. Foster the estate of Faskally with entry at Martinmas 1910, and the disposition, which was in short statutory form, proceeded: "And I assign the rents, feu-duties and casualties, and I bind myself to free and relieve the said Frederick Charles Foster and his fore-saids of all feu-duties, casualties and public burdens." This short statutory form of assignation of rents is declared by the Titles to Land Act, 1868, section 8, to "be held to import an assignation to the rents to become due for the possession following the term of entry, according to the legal . . . terms," &c.

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The farm of Old Faskally was let at the date of the sale for a term of years. The tenant's entry to the farm had been at "Whitsunday 1895 as to the houses, yards, hill pasture, and natural grass, and at the separation of crop 1895 from the ground as to the arable land." The rent was "payable at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment thereof at Whitsunday 1896, and the next term's payment thereof at Martinmas thereafter, and that for grass crop 1895 and corn crop 1896, and so forth, half-yearly and termly thereafter during all the years of this lease." The farm of Old Faskally is admittedly a hill or sheep farm, the arable land being purely an adjunct. Hence there is no doubt that the legal terms for payment of the rent of the first crop and year were Whitsunday and Martinmas 1895; and that, the conventional terms being Whitsunday and Martinmas 1896, the rent was payable twelve months backhand.

The purchaser having collected the rents due at Whitsunday and Martinmas 1911, admitted his obligation to account to the seller for that payable at Whitsunday, but claimed right to retain that payable at Martinmas 1911; and this case has been brought to determine, *inter alia*, his right so to do. The point at issue—for the conventional terms of payment may be disregarded—really is whether the half-year's rent legally payable at Martinmas 1910 is for the last half of crop and year 1910, or for the possession from Martinmas 1910 to Whitsunday 1911.

To solve this question it is, I think, necessary to determine the reason or principle upon which in grass farms, where possession is by custom given at Whitsunday, the rent is "legally," that is, by custom, payable at the term of entry and at Martinmas thereafter, and is, therefore, if possession only is regarded, apparently payable forehand. The first difficulty in concluding that it is payable for the possession is that forehand rent is alien to the general conception of agricultural leasing and is only resorted to as an indirect means of obtaining partial security for rent. I conceive that none of the customary or legal provisions regarding entry and payment of rent can be reduced to a principle or system absolutely logical in all its incidents and results, and yet, at the same time, that there is an intelligible and fairly logical idea running through the whole, when a broad view of the situation is taken, and incidental inconsistencies are disregarded. That idea is, I think, that rent is payable not for occupation in point of time, but for beneficial occupation, and that the

July 12, 1912. beneficial occupation is regarded from the point of view of the predominant character of the farm, discarding its minor accessories.
 Butter v. Foster.

Ld. Johnston.

Hence when the farm is predominantly arable, the rent is by custom or legally payable for the crop, or for the crop and year, as it is usually stated; the crop and year is naturally counted from Martinmas, when the land is ready to be prepared for sowing, to the Martinmas after the crop is cleared, and the rent is accordingly legally payable at Whitsunday after sowing, and at Martinmas after reaping in equal portions. The rent is thus payable for the beneficial use or cropping, and the terms of payment are adapted to that beneficial use or cropping. Further, the corn crop is the criterion, and it is not allowed to affect the arrangement that possession of houses and grass is customarily given at the Whitsunday before the first crop and year begins, or that the comparatively modern introduction of green crop requires, unless by arrangement, retention of some portion of the land after the last crop and year is technically closed.

In the case of a farm predominantly grazing the crop is mainly a summer one, but being of natural grass it has begun to grow with the commencement of spring, and it is, so to speak, ready to be reaped or enjoyed, roughly speaking, from the Whitsunday of entry to the Martinmas following. Hence it is no great stretch to conceive of the crop and year of a pasture farm being from the Martinmas prior to entry to the Martinmas after entry, thus accounting for the rent being payable for the first half of the crop and year at the Whitsunday of entry, and the last half at the Martinmas six months after entry, and so on during the currency of the lease, notwithstanding the apparent inconsistency of the former tenant remaining in physical possession for the first half of the first crop and year of the lease, and the new tenant remaining in physical possession for six months after the last crop and year is closed. The reason of this apparent inconsistency in possession is doubtless the practical inconvenience of either transferring to the new tenant or removing to other ground, a thing rarely if ever done, a sheep stock at Martinmas term.

I think that the conclusion at which I have arrived is in accordance with the judgment of this Division in the *Portmore* case¹; which I think presents the sound view of the law on the subject, though I am aware that it is counter to that of the Second Division in the *Glendaruel* case,² to which I am unable to subscribe.

There is an additional question with reference to the rent of the house and shootings. From the information that we have I think it is clear that the residential element in Faskally is the predominant one, and, therefore (as there is a slump rent payable for the house and shootings), that, in any division of the rent, the shootings as a separate subject, and the period of time during which they are enjoyed, must be entirely disregarded. The rent in this case is something like £1300, payable the first half on the first day of the year, and the second half in the middle of the year; but as there are no legal terms in connection with the letting of such premises, I think that the rules of apportionment referring to farms do not apply, and that

¹ Mackenzie's Trustees v. Somerville, 2 F. 1278.

² Wigan v. Cripps, 1908 S. C. 394.

the rent must be regarded as running *de die in diem*. Consequently, the July 12, 1912. small portion of it from Martinmas to 31st December will have to be paid ^{Butter v.} by the seller, who has received it, to the purchaser, who entered at Mar-Foster. tinmas.

LORD PRESIDENT.—I agree. I think the main question is really settled by the *Portmore* case.¹ Upon the question of the shootings as a separate subject I agree with what Lord Johnston has said.

LORD KINNEAR.—I also agree. I only add that having reconsidered the question with the attention which is certainly called for by the criticism of Lord Low, I still adhere to the opinion of Lord Adam, with which I concurred in the *Portmore* case.¹

LORD MACKENZIE.—There is a preliminary question here as to whether the articles of sale may be referred to, but I think, on the cases of *Lee v. Alexander*² and of *Orr v. Mitchell*,³ there can only be one answer on that point. The case of *Jamieson v. Welsh*,⁴ which was founded upon, was plainly a different case, because there the terms of the disposition did not exhaust the contract between the parties. Accordingly, I think there is no question that it is upon the disposition that the rights of the parties must depend. That being so, I agree that the first question should be answered in the manner proposed, and I do so because of the decision in *Portmore*.¹ I agree that the second question should be answered in the manner proposed, for the reasons explained by your Lordships.

The LORD PRESIDENT and LORD KINNEAR concurred with LORD MACKENZIE on the preliminary point referred to by his Lordship.

THE COURT found, in answer to the first question, that the rent referred to was payable to the first party, and answered the second question in the affirmative.

TODS, MURRAY, & JAMIESON, W.S.—FORBES DALLAS & Co., W.S.—Agents.

ROBERT HOWIE, Pursuer (Respondent).—*G. Watt, K.C.—Duffes.*

No. 168.

THE AILSA SHIPBUILDING COMPANY, LIMITED, Defenders
(Reclaimers).—*Horne, K.C.—J. H. Henderson.*

July 12, 1912.

Reparation—Negligence—Safety of the public—Explosion of naphtha vapour in private yard—Failure to specify cause of the explosion.

Howie v. Ailsa Shipbuilding Co., Limited.

A boy, seven years of age, was killed by the explosion of a barrel containing naphtha vapour, which was standing on a lorry in a shipbuilding yard. In an action of damages at the instance of the boy's father against the owners of the yard, the pursuer averred that the boy had been allowed by the defenders to enter and remain in the yard, and that the barrel, owing to its containing naphtha vapour, was in a "highly explosive and dangerous condition." He did not, however, make any averments as to what had caused the vapour to ignite.

The Court (*rev. judgment of Lord Cullen*) *dismissed* the action as being in the circumstances irrelevant, in respect that the pursuer had failed to specify in what way the defenders were responsible for the proximate cause of the accident, namely, the ignition of the vapour.

¹ Mackenzie's Trustees v. Somerville, 2 F. 1278.

² 10 R. (H. L.) 91.

³ 20 R. (H. L.) 27.

⁴ 3 F. 176.

July 12, 1912. ON 26th February 1912 Robert Howie, mason, Troon, brought an action against the Ailsa Shipbuilding Company, Limited, Troon, concluding for payment of £300, as solatium for the death of his son, William Howie.

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2D DIVISION.
Lord Cullen.

The pursuer averred:—(Cond. 2) “On or about 22nd November 1911 the pursuer’s son, William Howie, aged seven years, went to the defenders’ premises in the company of an employee of the Glasgow and South-Western Railway Company, named Andrew Cousar. Cousar had occasion to go to defenders’ yard to remove goods on the defenders’ instructions, and he took pursuer’s son into the said yard and left him upon the lorry in order that he might go to defenders’ office adjoining the yard to transact business. The defenders’ statements in answer are denied. Explained and averred that defenders’ servants allowed pursuer’s son to enter the yard and remain there with the said lorry.” (Cond. 3) “On the instructions of the defenders, or one of their employees for whom they are responsible, three barrels, alleged to be empty, were placed upon the said lorry for removal. The said barrels, however, contained a considerable quantity of naphtha, and were in a highly explosive and dangerous condition, with the result that an explosion occurred, and one of the barrels burst and struck the pursuer’s son and killed him.” (Cond. 4) “The said accident was caused by the fault of the defenders or of their servants for whom they are responsible, in respect that they caused the said barrels to be placed upon the lorry in the dangerous condition described. Naphtha is well known to be an extremely dangerous explosive, and barrels which have contained it, after being emptied, should be kept in a safe place for a period of at least eight days to allow the naphtha fumes to disappear. This is the ordinary precaution adopted for the safety of the public, but no such precaution was taken by the defenders as regards the three barrels in question. Had the defenders or their servants even inspected the said barrels, they would have seen that they contained naphtha fumes in considerable density. The defenders or their servants were further in fault in respect that the said barrels were dispatched with a hole in each of about 2½ inches diameter. The said holes should have been filled with plugs to prevent air from mixing with any fumes that might remain in the barrels. The absence of this necessary precaution greatly increased the risk of explosion.”

In answer the defenders averred that the explosion was caused by the fault of the pursuer’s son, who was playing with lighted matches.

The defenders pleaded, *inter alia*;—(1) The pursuer’s averments being irrelevant and wanting in specification, the action should be dismissed.

On 7th June 1912 the Lord Ordinary (Cullen) allowed an issue.

The defenders reclaimed, and the case was heard before the Second Division on 12th July 1912.

Argued for the reclaimers;—(1) The pursuer had not averred any negligence on the part of the defenders. In particular, he gave no account of how the explosion occurred. The cases on which he relied, where liability was held to exist though it could not be shown exactly how the accident happened, were distinguishable, for in those cases there was proof of negligence prior to and apart from the actual occurrence of the accident. In the present case there was no averment of any act, either of omission or of commission which could

infer fault on the part of the defenders. (2) In the circumstances July 12, 1912. averred by the pursuer, the defenders had no responsibility for what happened to the boy. He was on the defenders' premises without their invitation and for his own pleasure. In such circumstances he took all the risks of the place.¹ It was specially important that this was not a place of public resort. If boys had been in the habit of coming about their premises it might have been that a higher degree of responsibility would have attached to the defenders,² though even this was not certain.³ But in any case the pursuer's son was just a chance comer, and the defenders were not under any duty to protect him.

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Argued for the respondent ;—(1) The initial act of negligence on the part of the defenders consisted in their bringing the barrels full of explosive vapour and placing them on the lorry near the pursuer's son.⁴ It was for the defenders to show that this negligence was not the cause of the accident, and it was unnecessary for the pursuer to establish precisely how the explosion took place.⁵ A person dealing with a dangerous article, such as a substance liable to explode, was not entitled so to deal with it that a natural result was injury to others. (2) The defenders were not relieved from liability, because the accident took place on their premises. The pursuer's son was in the yard with their knowledge and permission, and was not a trespasser, and he was entitled to be protected against their negligence.⁶

LORD DUNDAS.—This is an action of damages brought by a man whose pupil son has been unfortunately killed by an accident. The defenders are a limited company carrying on business as shipbuilders and engineers in Troon. It seems that on a certain day in November 1911 this little boy was taken to the defenders' yard by a man named Andrew Cousar, who was an employee of the Glasgow and South-Western Railway Company. Cousar went to the yard to remove goods on the defenders' instructions, and he took the boy with him—I suppose as a pleasuring for the little lad. He left him upon the lorry in order that he might go to the defenders' office adjoining the yard to transact business. Then we have article 3 of the condescence. It is here, I think, that the pursuer's record is radically irrelevant.

¹ *Indermaur v. Dames*, (1866) L. R., 1 C. P. 274, *aff.* (1867) L. R., 2 C. P. 311, *per* Kelly, C.B., at p. 312; *Smith v. London and Saint Katherine Docks Co.*, (1868), L. R., 3 C. P. 326, *per* Bovill, C.J., at p. 332; *Devlin v. Jeffray's Trustees*, (1902) 5 F. 130, *per* Lord Kinnear, at p. 135; *Holland v. Lanarkshire Middle Ward District Committee*, 1909 S. C. 1142.

² *Findlay v. Angus*, (1887) 14 R. 312.

³ *Ivay v. Hedges*, (1882) 9 Q. B. D. 80.

⁴ *Clerk and Lindsell on Torts*, 5th ed., pp. 109, 452.

⁵ *Britannic Merthyr Coal Co., Limited, v. David*, [1910] A. C. 74; *M'Arthur v. Dominion Cartridge Co.*, [1905] A. C. 72; *M'Grath v. Glasgow Coal Co., Limited*, 1909 S. C. 1250; *Dominion Natural Gas Co., Limited, v. Collins*, [1909] A. C. 640; *Williams v. Great Western Railway Co.*, (1874) L. R., 9 Ex. 157.

⁶ *Cooke v. Midland Great Western Railway of Ireland*, [1909] A. C. 229, *per* Lord Atkinson, at p. 238; *Lowery v. Walker*, [1911] A. C. 10; *Galloway v. King*, (1872), 10 Macph. 788; *Messer v. Cranston & Co.*, (1897) 25 R. 7.

July 12, 1912. He says that on the instructions of the defenders, or one of their employees for whom they are responsible, three barrels, alleged to be empty, were placed upon the said lorry for removal. So far so good. "The said barrels, however, contained a considerable quantity of naphtha, and were in a highly explosive and dangerous condition, with the result that an explosion occurred, and one of the barrels burst and struck the pursuer's son and killed him." The part of this sentence beginning "with the result" seems to me to be an entire *non sequitur* to what goes before it.

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Lord Dundas

It stands to reason, and is matter of common knowledge, that barrels of naphtha standing upon a lorry could not in themselves be a source of danger, unless somehow or other a light were applied to them. But how that light came to be applied, or by whom, there is no averment whatever to show. I think in a case of this sort it is incumbent upon the pursuer to set forth, at all events, some feasible statement of how the accident occurred, and this the pursuer has, in my judgment, entirely failed to do. He makes no attempt to explain or account for the ignition, which was the proximate cause of the accident, or to connect it in any way with the defenders. His averments do not even exclude (except by a bare denial) the account offered by the defenders' answer, which seems a probable enough one. On these short but, to my mind, conclusive grounds, I am for throwing this action out as irrelevant.

I do not desire, for my own part, to enter into, or to express any definite opinion upon, the other matter which was argued, viz., that this unfortunate little boy had no right to be where he was—on a lorry in this private yard—and that the case may be irrelevant on that ground also. I can see that the pursuer might have great difficulty in convincing the Court of the relevancy of his action upon this aspect of it. But the ground upon which I prefer to rest my opinion is quite sufficient, if it is well founded.

I am sorry that the Lord Ordinary did not give us the benefit of his views in the shape of an opinion; because I am not able to conjecture for myself why he should have allowed an issue upon this record.

LORD SALVESSEN.—I am of the same opinion and on the same grounds. I think it is not enough for the pursuer to aver that the explosion occurred with the result that the pursuer's son was killed. He must show in some way that the proximate cause of the explosion, to wit, the ignition of the explosive mixture contained in the naphtha barrel, was due to some cause for which, or to some person for whom, the defenders are responsible.

It may be that he has excluded the defenders' theory of the accident by denying that the boy used any matches or himself ignited the explosive mixture; but he has not excluded other possibilities, such as, for instance, that a mischievous lad, knowing that such barrels contained an explosive mixture, deliberately ignited the barrel. I cannot conceive that if such a thing were done on private premises belonging to the defenders they would be responsible for what would really be an act of malicious mischief. But a cause of this kind is not excluded by the pursuer's record; indeed, there is no theory presented as to how the explosion occurred. For all that appears one might have imagined that the framer of the record thought that a mixture of naphtha fumes and air would explode spontaneously. Now,

of course, we all know that that is not so, and that a light must be applied July 12, 1912. to such a mixture before it can produce damage.

On that short and simple ground I am for recalling the Lord Ordinary's interlocutor, although I am not at all sure that I would not have done so on the mere ground that this boy was not legitimately in the premises where, on the assumption of the pursuer, dangerous articles were stored. They had no reason to anticipate that the boy would be in their premises at all, nor had they any duty in regard to the boy who chanced to come there without their consent, and certainly without their invitation, express or implied.

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Lord Salvesen.

LORD GUTHRIE.—I agree that the case fails, as your Lordships have put it, through the absence of connection, in the way of averment, between the defenders' alleged fault and the accident. The nature of the material is important. The words used in condescendence 4 are "an extremely dangerous explosive"; but these words cannot be used in a technical sense. This was not in a technical sense an explosive, because it was not an explosive within the meaning of the Explosives Act, 1875.¹ If it had been, then the mere possession of explosive material of more than a certain amount would of itself have been sufficient to make the defenders responsible if an explosion occurred, even without any averment of direct negligence to infer fault. But the material is not of that nature, and it is not denied, although the record does not admit it, that without the application of light it is perfectly safe.

I do not know that there was any necessity for the pursuer averring either exactly how the accident occurred or who applied the light. It might have been sufficient if he had averred that the place where barrels with a certain residuum of naphtha in them were placed was a place where the defenders were bound to anticipate that lights would be, or might probably be, encountered. But in fact the accident took place in broad daylight, and there is no suggestion that there was any reason whatever to anticipate that any light would be met with in this particular place.

On the other question of the legal category under which the boy fell at the time, it does seem to me that the pursuer, on his own averment, discloses what would be a sufficient ground for holding the action irrelevant; because he states that the place where the accident happened was in the defenders' yard, that is an enclosed place. He might in the way of averment have made his case relevant if he had said that this place was a place where the public, and in particular children, were allowed habitually to resort; but all he says is that the defenders' servants allowed the pursuer's son to enter the yard and remain there on the lorry. He does not even say that they saw him come in on the lorry; he merely says that he was not stopped from coming into the yard. That raises the question whether it can be said that he was legitimately there. Mr Watt said he might be illegitimately there, but still, if he were reasonably there without any moral fault on his part, he was not a trespasser. I am not aware that a person can be in any place except either legitimately or

¹ 38 and 39 Vict. cap. 17.

July 12, 1912. illegitimately ; and if he is illegitimately there, it is difficult to see that he is not in the position of a person who goes there at his own risk. But it is enough, as your Lordships have said, to decide the case on the first question.

Howie v. Ailsa Shipbuilding Co., Limited.

LORD JUSTICE-CLERK.—I am of the same opinion. As regards the latter question I agree with what has been said by Lord Guthrie. The case will be dismissed, and with expenses.

THE COURT recalled the interlocutor of the Lord Ordinary, sustained the first plea in law for the defenders, and dismissed the action.

MACKAY & YOUNG, W.S.—MORTON, SMART, MACDONALD, & PROSSER, W.S.—Agents.

No. 169. **MATTHEW CARSTAIRS NOBLE AND OTHERS** (Robert Noble's Testamentary Trustees), Petitioners.—*Blackburn, K.C.—J. H. Henderson.*

July 10, 1912.

Noble's Trustees.

Trust—Administration—Powers of trustees—Power to expend trust funds on, and grant long lease of, urban tenement—Application to nobile officium of Court.

The trustees under a testamentary settlement (the purposes of which involved separate interests of liferenters and fiars) presented a petition to the *nobile officium* of the Court for authority to expend a portion of the capital of the trust-estate in altering and repairing an urban tenement included in the estate, and for power thereafter to lease the tenement for twenty-one years, which, in their opinion, would be to the advantage of all the beneficiaries in the estate.

The Court *dismissed* the petition, *holding* (1) that if the trustees did not already possess the desired powers under the terms of the deed, it was incompetent for the Court to grant them in the exercise of its *nobile officium* ; and (2) that if the trustees did possess the powers, the exercise thereof was a matter of administration for their own determination, with regard to which the Court could give no advice.

Berwick, (1874) 2 R. 90, followed.

1ST DIVISION. ON 7th December 1911 Matthew Carstairs Noble and others, the testamentary trustees of Robert Noble, who died in 1902, presented a petition to the *nobile officium* of the Court for powers in connection with the administration of the trust-estate.

The testator by his settlement had conveyed his estate to the petitioners to be held in trust by them for certain members of his family in liferent, and for others in fee. At the date of the petition the liferenters were still alive.

The trust-estate, which amounted to about £8750, included a tenement in Jedburgh, valued at about £1400, which had been purchased in 1895 by the testator, and formed part of his estate at his death. When he acquired the property it was let on a lease for twenty years from 1892, nominally to the postmistress at Jedburgh, but in reality to the Postmaster-General. Before the expiry of this lease the Postmaster-General intimated to the petitioners that he was prepared to renew the lease, at an increased rent, for twenty-one years, provided the petitioners executed certain alterations on the buildings, which were estimated to cost £1000.

Mr Noble's settlement provided :—" My trustees and executors shall be entitled to the fullest powers and exemptions usually con-

ferred in similar cases according to the most liberal interpretation; July 10, 1912. and particularly I authorise and empower them . . . to lend out the whole or any part of the trust funds and estate on heritable security . . . or to invest the same . . . in the purchase of heritable property, feu-duties, ground annuals, or other heritages, and from time to time to alter and renew the securities as may be necessary or as may seem to them expedient: To hold the investments, whether heritable or moveable, in which the trust funds and estate may be invested at the time of my decease so long as it may seem to them expedient.”

The trustees were given no express power to grant long leases or to expend any part of the capital of the trust-estate in altering or making additions to any heritable property held by them.

In these circumstances the trustees presented this petition to the *nobile officium* of the Court, craving the Court “to grant warrant to and authorise the petitioners (1) to uplift from . . . the capital of the said trust-estate . . . a sum of £1000, or such other sum as to your Lordships shall seem proper, and to apply and expend said sum of £1000, or such other sum as your Lordships may authorise the petitioners to uplift, in defraying the cost of the alterations and additions above referred to; and (2) to grant a lease of the altered and extended premises to the Postmaster-General for the period and for the rent and on the conditions above stated.”

On 16th January 1912 the Court remitted to Mr G. F. Dalziel, W.S., to inquire into the facts and circumstances set forth in the petition and to report.

The reporter suggested the following questions for the consideration of the Court:—(1) Whether the trustees’ power of administration, and in particular their power to retain the investments made by the testator, did not enable them to grant the lease and to make the necessary expenditure, if, in the exercise of their discretion, they considered such a course advisable, and whether, in this view, the petition was not unnecessary?¹ (2) Whether, in any view, it was competent to appeal to the *nobile officium* of the Court for the purpose of obtaining powers which were not conferred by the trust-deed?²

On the merits of the application the report stated:—“In the whole circumstances it appears to the reporter that the petitioners’ proposals are not inconsistent with the purposes of the trust, and it seems to him that the proposals cannot be said, without qualification, to be either expedient or inexpedient for the execution of the trust. The proposals may probably be considered expedient in the sense that they will tend to secure, in the meantime, the continuance of the income of the trust at its present level, but, in the view of the reporter, it is not so clear that the proposals are expedient from the point of view of the capital of the trust-estate, as it is impossible to forecast what price the property, as altered, might fetch if and when a sale becomes necessary. Whatever results the petitioners’ proposals might lead to, they would not appear to affect the execution of the trust purposes, but would merely affect the amount which the beneficiaries concerned may receive.”

¹ The reporter referred to *Armstrong v. Wilson’s Trustees*, (1904) 7 F. 353.

² The reporter referred to *Berwick*, (1874) 2 R. 90; *Kinloch*, (1859) 22 D. 174; *Wardlaw’s Trustees*, (1902) 10 S. L. T. 349; *Lindsay’s Trustees*, 1911 S. C. 584.

July 10, 1912. The case was heard before the First Division (without the Lord President) on 6th July 1912, when the cases cited by the reporter were referred to.

Noble's
Trustees.

At advising on 10th July 1912,—

LORD KINNEAR.—This is a petition presented by trustees for power to uplift a certain sum of money of the capital of the trust-estate and apply it in a particular way, and also for power to grant a lease. It is important to observe that it is not a petition under the Trusts Acts, or under or in virtue of any statutory power, but an appeal to the *nobile officium* of the Court.

Now, it appears to me upon consideration of the petitioners' statement and Mr Dalziel's report that the questions which the trustees have to decide, and which they very naturally consider somewhat difficult, are questions of administration and nothing else. The trustees say that part of the trust-estate consists of heritable property in Jedburgh—a certain tenement of houses and yards which appertain to the various tenants, one of whom is the postmistress, which really means the Postmaster-General. Then they say that the current lease has expired at Whitsunday 1912, and the question which they have to consider is whether they will agree to certain terms for granting a new lease to the Postmaster-General. The difficulties are two: in the first place, in order to obtain a satisfactory tenant they must spend a sum of, I think, £1000 upon alterations and additions to the premises, and, in the second place, the lease which the Postmaster-General will accept must be a lease for twenty-one years. The trustees ask the Court for power to enable them to carry out this transaction by authorising the expenditure of capital and authorising the lease.

I am unable to see that the Court can authorise these things to be done by virtue of the *nobile officium*. The questions are merely questions of administration. The difficulty in which the trustees are placed is obvious enough, because if they spend a considerable sum of capital in order to obtain a tenant, it may or may not be probable that at the end of the lease the capital value of the subjects will remain as it is now, at the date of the expenditure being incurred. But that is just one of the questions which occur in ordinary administration of a trust-estate, because the real difficulty arises from the conflicting interests of beneficiaries. The trustees must make as much of the property as they can in the meantime for the benefit of the liferenters; and they must keep the capital intact as far as they can for the ultimate benefit of the fiars. It is a question of management. But then they say they have no power because they cannot advance this money without the authority of the Court. I am disposed to say for myself, although I am afraid that it is going a little beyond what I think is the strict business of the Court in matters of this kind, that I do not see any serious difficulty about their power to grant the lease, if it is reasonably prudent and expedient to do so. They find the premises in question as part of the trust-estate, they are empowered to hold the heritable property in that condition during the trust, and the only profitable use that they can make of it for the benefit of the estate is obviously to let it. Further, I am not aware of any limitation upon the power to let, if there be any power to maintain and let a heritable property at all, which should prevent

the trustees from letting the subjects in question for twenty-one years if July 10, 1912. they could not get a tenant for a shorter lease. Nor am I impressed very ^{Noble's} much with the difficulty of spending money in order to put the subjects ^{Trustees} into lettable condition, because the power to lease, if it is to be effective, ^{Lord Kinnear} carries with it, so far as necessary, the power to spend money on the subjects so as to put them into a condition in which they will be accepted by a tenant. The mere question of amount may raise a question of discretion and perhaps a question of difficulty, but it is a question of administration to be determined by the conditions of the deed with reference to the circumstances of the estate, and it is a question for the trustees and not for the Court.

In these circumstances it appears to me that the proper course for the Court to take is that which is, I think, authoritatively fixed by the judgment of this Division in the case of *Berwick*,¹ where the Lord President, in a petition for authority by testamentary trustees to accept a renunciation of a lease, says this:—"Neither is this a case under the Trusts Acts. The powers of trustees are defined by the trust-deed, and the Court will give no higher power. The trustees are not entitled to come to the Court for advice. If they have not the power given them by the deed, it is not competent for us to give it them. I think, therefore, that the petition should be dismissed as incompetent." He says that if they had the powers, they did not require to come to the Court to obtain any further authority; and I rather think that when the Lord President said they were not to come to the Court for advice, he meant that the Court was not to give advice even as to the extent and effect of the power. Lord Deas says, in concurring with the Lord President:—"I see no reason whatever to doubt that the petitioners take a judicious view of what is for the interests of the trust-estate. But it is for them to exercise their own discretion in the matter. If they do so rightly they will be safe. But it is a pure question of management in which we cannot aid them, and I think we must refuse the petition as incompetent."

The reporter, in a very full and satisfactory report, called our attention to a subsequent case in which a somewhat different course was followed—the case of *Stenhouse and Another (Wardlaw's Trustees)*,² which I have carefully considered: and I agree with the reporter that it is not quite in accordance with the view stated in the case which I have cited. But one must observe upon it that it was a proceeding in the Outer House, and with the greatest respect for the learned Judge who was presiding there, and who was always extremely cautious in the exercise of powers, I cannot set his action in that case against the authority of the First Division in the case of *Berwick*,¹ which does not seem to have been brought under his notice.

I am therefore of opinion that this petition must be dismissed.

LORD JOHNSTON.—The petitioners here ask for power to do two things, first, to apply £1000 of the trust-estate in meliorating a certain heritable subject which is part of that estate, and secondly, to grant a lease for twenty-

¹ 2 R. 90.

² (1902) 10 S. L. T. 349.

July 10, 1912. one years of the said piece of heritable property. I concur with your Lordship in the view which you have expressed with regard to this petition being one under which the Court cannot grant powers. So far as the leasing goes, the application is perfectly unnecessary. Where trustees are appointed by a testator, they are called on to administer and manage his estate on business lines as he would have done himself, with this one limitation that, whereas he might have put his estate to hazard, if he had chosen, in the way of investment, they must not do so. But where it is not a question of investment, but a question of managing estate *in forma specifica*, they have not only a right but a duty to manage that estate on reasonable business principles. Now, heritable property may be of different classes, and the administration of two different pieces of heritable property may happen to be quite different. For instance, a testator may leave a dwelling-house which he has occupied himself, and it may be right that some of his descendants should have the opportunity of occupying it. One would think that trustees would hesitate to place such an item of heritage beyond their control by giving as long a lease of it as would be appropriate had their duty been to put it to another purpose. But where the property is a mere investment for the purpose of profit, it is the duty of the trustees to administer that item of the trust-estate to the best advantage; and if they think that a twenty-one years' lease of it is to the advantage of the estate, they certainly have power to grant it. It is a matter entirely for their discretion, and therefore they cannot come here to ask us for powers, because that would be simply to ask the Court to put its *imprimatur* upon an exercise of the trustees' discretion, where they have the power already.

It is the same with the amelioration of the subject for the purpose of letting it. Suppose we were dealing with an agricultural farm, the trustees could not possibly come to us to ask for authority to make the buildings fit for a new lease, or to meet the requirements of an eligible tenant. They would have to exercise their own discretion, as I think they must do here. If, in their discretion, they think it is in the interests of the estate to let to the Postmaster-General, and in order to obtain him as a tenant to expend money upon the melioration and extension of the property, there again it is entirely a question for their discretion, and they cannot come here to ask us to back them up by saying that their discretion has been exercised wisely. That is a thing that we cannot possibly do. I therefore concur with your Lordship.

LORD MACKENZIE.—I am of the same opinion. The matters that are dealt with in this petition and in the report by Mr Dalziel are matters of trust administration, and as such cannot be dealt with by the Court in an appeal to the *nobile officium* of the Court. It is for the trustees to administer in the manner which they think best in the circumstances.

I should only like to add, with reference to what has been said, that when the expression "the advantage of the estate" is used, the trustees have to consider that there are interests in the estate which may at certain points conflict because, whenever there are liferenters and fiars, what is for the benefit of the liferenter may not be for the benefit of the fiar, and *vice*

veraz. But that is a matter for the trustees, and they must, in the whole July 10, 1912. circumstances of the case, act in the best interests of all, holding an even ^{Noble's} balance between the liferenters and the fiars. I feel justified in this case ^{Trustees.} in saying that I do not see that there is any reason to doubt that the trus- ^{Lord Mac-} tees have power to grant a lease for twenty-one years if, in the whole cir- ^{kenzie.} cumstances of the case, that is the best trust administration; and if it is necessary in order to secure the best offer (and here it is an offer made by the Post Office) that capital expenditure should be made, then they are just in the same position as trustees who are managing agricultural property when a farm lease runs out, who may be face to face with questions whether buildings are to be renewed, land to be drained, and so on, and how much money will have to be expended in order to get the present tenant to remain, or to get a better offer. All that is pure matter of administration. Accordingly, as I have said, these are matters for the trustees to determine, with regard to which the Court cannot give advice.

THE COURT dismissed the petition.

KELLY, PATERSON, & Co., S.S.O., Agents.

JOHN S. BOYLE (Owner of the Steam-Trawler "Glenogil"), Pursuer No. 170.
 (Reclaimant).—*Constable, K.C.—Burn Murdoch.*
 FRED. OLSEN (Owner of the S.S. "Balduin"), Defender (Respondent). July 10, 1912.
 —*Horne, K.C.—Lippe.* Boyle v.
Olsen.

THE LINDSEY STEAM FISHING COMPANY, LIMITED (Owners of the Lindsey
Steam Fishing
Co., Limited,
v. Actiesel-
skabet
Bonheur.
 Steam-Trawler "Lacerta"), Pursuers.—*A. R. Brown.*
 ACTIESELSKABET BONHEUR (Owners of the S.S. "Balduin"),
 Defenders.—*Horne, K.C.—Lippe.*

Process—Conjunction of actions—Proof—Competing actions against same defender—Competency of conjoining actions—Right of competing pursuers to cross-examine each other's witnesses—Ship—Salvage.

Two shipowners brought separate actions against the same defender in respect of salvage services rendered to the defender's vessel. The claims of the two pursuers were mutually hostile. The Lord Ordinary having conjoined the actions—

Held that the Lord Ordinary was right in conjoining the actions, but his interlocutor *varied* by the addition of a declaration that (following the English practice) counsel for the one pursuer should have the right to cross-examine the witnesses for the other.

Process—Tender—Conjoined actions at the instance of different pursuers—Duty of defender to apportion sum tendered amongst pursuers—Ship—Salvage.

Where separate actions for salvage services at the instance of two pursuers having conflicting interests had been brought against the same defender and had been conjoined, *opinion per curiam* that, if the defender desired to put in a tender in the conjoined actions, he should (following the English practice) be obliged to apportion the sum tendered between the pursuers.

July 10, 1912. ON 27th January 1912 John S. Boyle, owner of the steam-trawler "Glenogil" of Glasgow, brought an action in the Sheriff Court at Aberdeen against Fred. Olsen, owner of the s.s. "Balduin" of Christiania, in which he claimed the sum of £5000 in respect of salvage services rendered by the "Glenogil" to the "Balduin."

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Lindsey Steam Fishing Co., Limited, v. Actieselskabet Bonheur.

—

1st Division. Lord Dewar.

ON 5th March 1912 the Lindsey Steam Fishing Company, Limited, owners of the steam-trawler "Lacerta" of Grimsby, brought an action in the Court of Session against Actieselskabet Bonheur, Christiania, described also as owners of the "Balduin," in which the sum of £500 was claimed in respect of salvage services rendered on the same occasion by the "Lacerta" to the "Balduin."

The circumstances in which these claims arose were as follows:— On 28th November 1911 the "Balduin," which was disabled by the loss of her propeller, accepted offers of assistance from the "Glenogil" at a point in the North Sea about 160 miles east-by-north from Aberdeen. The "Glenogil" took the "Balduin" in tow that afternoon and proceeded to tow her towards Aberdeen. On the afternoon of 30th November, at a time when the "Glenogil" was making but little headway with her tow, the "Glenogil" asked the "Lacerta," which was by this time standing by, to assist her. The "Lacerta" then passed a hawser to the "Balduin," and the two vessels together towed the "Balduin" to Aberdeen Harbour, which was reached at about eight o'clock that evening.

The owner of the "Glenogil" averred in his action that the "Lacerta" had no claim for salvage, but only a claim for towage undertaken at the request of the master of the "Glenogil." He averred that he himself was liable to the "Lacerta" for this claim for towage, and that the sum due in respect thereof had been included in the £5000 for which he concluded. The owners of the "Lacerta," on the other hand, averred in their action that they had an independent claim for salvage.

On 9th March 1912 the Lord Ordinary (Dewar) ordered the "Glenogil's" action to be remitted to the Court of Session *ob contingentiam*, and on 21st May he pronounced an interlocutor conjoining the two actions, and granted leave to reclaim.

The owner of the "Glenogil" reclaimed, and the case was heard before the First Division on 19th June 1912.

It was intimated to the Court that, since the date of the Lord Ordinary's interlocutor, the defenders had made a tender to the pursuers jointly of £1000 in settlement of their claims against the "Balduin."

Argued for the reclaimer;—Conjunction was a matter within the discretion of the Court, and its object was to promote the purposes of convenience and economy.¹ But conjunction should only be ordered where there was identity of parties or of subject-matter, and should not be ordered where any perplexity or embarrassment to the parties would result.² In the present case the interests of the two pursuers were not only not identical, but were conflicting, the owner of the "Glenogil" denying the claim of the owners of the "Lacerta" for remuneration for services other than those of towage. The result of conjunction in these circumstances would be to the prejudice of the pursuers,

¹ "Strathgarry," [1895] P. 264, *per* Bruce, J., at p. 266.

² Duke of Buccleuch v. Cowan, (1866) 4 Macph. 475, *per* Lord Justice-Clerk Inglis, at p. 480, *aff.* (1876) 4 R. (H. L.) 14.

as neither would have the right to cross-examine the witnesses of the July 10, 1912. other. The recent case of *Wilson v. Rapp*¹ in the Outer House, where salvage actions at the instance of different pursuers had been conjoined, was not an authority binding on the Court, and was distinguishable from the present case in respect that the pursuers in that case were at one as to the nature and value of the services rendered. The Lord Ordinary admitted in that case that conjunction in such circumstances was without precedent. The embarrassment to which the pursuers would be put by conjunction of the present actions appeared more clearly in connection with the question of the tender which had been made. The real reason why conjunction had been asked for was, as in *Wilson's* case,¹ in order that a single tender might be made in respect of the claims in both actions, as was done in "*Jacob Landstrom*."² The Lord Ordinary reserved his opinion in *Wilson's* case¹ as to whether such a tender would, in Scotland, be sufficient in law. If the answer to this question were in the affirmative the inequity of conjunction became apparent. Each pursuer would be put to the task of answering two speculative questions before he could accept or refuse the tender, viz., what were the nature and value of the services rendered by the two claimants respectively? This situation would be especially embarrassing to the owners of the "*Lacerta*," who had, at this stage, no material from which to arrive at the value of the "*Glenogil's*" services except her owner's statement on record. But in point of fact a joint tender was not competent according to the law of Scotland; it was necessary that a specific sum should be tendered to the pursuer in each action. At all events a joint tender was incompetent in Scotland where conjunction had not taken place,³ but it was competent in England even in the absence of consolidation.⁴ The English practice could be no guide in this matter, as the legal results of tender and of conjunction or consolidation differed in the two countries.⁵ According to the English practice the refusal of a tender had not the acknowledged *ipso jure* effect on expenses that such refusal had in Scotland.⁶ Further, the English Courts in the case of a joint tender ordered apportionment between the various plaintiffs. If a joint tender were to be allowed in this case it should, in equity, only be allowed subject to the conditions of the English practice. The respondents' argument upon the terms of the Merchant Shipping Act, 1894,⁷ could not be applied to the circumstances of the present case. The amount due in satisfaction of salvage claims did not depend exclusively on the value of the vessel salvaged; the time occupied in salving, and the labour and risk of the salving crew or crews had also to be considered,⁸ and the parties were at issue as regards the latter considerations. There might be cases in which the aggregate amount due

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¹ 1911 S. C. 1360.

² "*Jacob Landstrom*," (1878) 4 P. D. 191.

³ Cf. opinion of Lord Salvesen in *Wilson v. Rapp*, 1911 S. C. 1360.

⁴ Roscoe, Admiralty Practice, 328-9, 370; "*Jacob Landstrom*," 4 P. D. 191; "*Strathgarry*," [1895] P. 264.

⁵ *Cowan & Sons v. Duke of Buccleuch*, 4 R. (H. L.) 14, per Lord Blackburn, at p. 26.

⁶ The "*Lee*," 1889, 6 Aspin. Maritime Cases, 395.

⁷ 57 and 58 Vict. cap. 60.

⁸ Owners of the "*Vulcan*" v. Owners of the "*Berlin*," (1882) 9 R. 1057; "*Clifton*," (1834) 3 Haggard, Admiralty, 117.

July 10, 1912. could be determined *ab ante* and tendered to the salvors, leaving only the question of apportionment to be settled in the process. But it was necessary that the aggregate amount due should be ascertained before the situation contemplated in the sections founded on by the respondents could arise. In the present case this situation could only arise when the claims of the respective pursuers had been adjudicated upon.

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Counsel for the owners of the "Lacerta" intimated that they concurred in the argument for the reclaimer.

Argued for the respondents;—The Lord Ordinary had rightly conjoined the actions, as the interests of convenience and economy were best served by this course.¹ It was necessary in the circumstances of this case that the whole matters in dispute should be disposed of in one action, as all the considerations must be before the Court before it could adjudicate upon either claim. The provisions of the Merchant Shipping Act with regard to salvage actions all pointed to the ascertainment of a sum due and its subsequent apportionment between the various claimants.² The situation contemplated by section 547 (3) of the Act was precisely that in which these actions would be placed by conjunction. Under that section the defenders might have raised an action and called both pursuers as parties thereto, in which case they would have been forced to suffer the alleged prejudice which they anticipated here.³ On this point the respondents respectfully adopted as their argument the opinion of Lord Salvesen in *Wilson v. Rapp*.⁴ It was the common practice in England to consolidate actions on the ground of expediency, even where the plaintiffs had conflicting interests. The question of tender was a separate question and did not arise at this stage. It was not brought before the Court in this reclaiming note and could therefore not properly be considered. If the tender which had been made was not a competent tender in the circumstances of the case the pursuers need not regard it. The question whether it availed the defenders would fall to be determined at the end of the day.

At advising on 10th July 1912,—

LORD PRESIDENT.—In this reclaiming note we were referred to various authorities on English practice. It is quite evident that counsel are not fully aware of what this practice is. It is one of those matters which is not easily found in the books. I have taken the opportunity of conferring on this subject with one of the learned Judges in the Admiralty Division, and I have learned that when actions are so conjoined,—or rather consolidated, as it is expressed in England,—there is always an opportunity for the counsel of the one set of plaintiffs to cross-examine the witnesses of the other.

Now I think it is my experience here that if an interlocutor simply conjoins two actions and says nothing more, there is no right given to

¹ "Strathgarry," [1895] P. 264.

² Merchant Shipping Act, 1894 (57 and 58 Vict. cap. 60), secs. 547-556; Kennedy on Civil Salvage, 2nd ed., pp. 168 *et seq.*

³ Counsel referred to "The Gantock Rock," (1900) 2 F. 1060, as a case in which conjunction took place of consent and where two pursuers cross-examined each other's witnesses.

⁴ 1911 S. C. 1360.

counsel for one pursuer to cross-examine the witnesses of the other. I July 10, 1912, think that this cross-examination should be allowed. I do not see anything in our practice against it, but I think the matter should be dealt with in the interlocutor. Accordingly, I think the Lord Ordinary's interlocutor ought to be affirmed, but with the addition that counsel for the one pursuer should have the right to cross-examine the witnesses of the other.

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That is all that it is absolutely necessary to decide with regard to this reclaiming note, but as the matter of tender is obviously very much at the root of the question now at issue, and as we have heard argument upon this point, it is as well that I should give the result of my inquiries on this subject also. I was informed by the learned Judge that whenever he thought the justice of the case required it—and I gathered from him that it was what may be called the ordinary rule rather than the extraordinary—if a defender in such circumstances put in a tender he was then obliged by the Judge to apportion the tender amongst the other parties. That really is equivalent to putting in two separate tenders. I mention this because I think it is the course that ought to be followed in this case.

LORD KINNEAR, LORD JOHNSTON, and LORD MACKENZIE concurred.

THE COURT varied the interlocutor reclaimed against by adding thereto the words "under the direction that counsel of the one pursuer shall have right to cross-examine the witnesses of the other," and with this addition adhered to the said interlocutor.

ALEX. MORISON & Co., W.S.—MACKENZIE & KERMAK, W.S.—BOYD, JAMESON, & YOUNG, W.S.—Agents.

JOHN KIRK SYMON, Pursuer (Respondent).—*D.-F. Dickson—Wilton.* No. 171.

WEMYSS COAL COMPANY, LIMITED, Defenders (Appellants).—

Horne, K.C.—Hon. W. Watson.

July 12, 1912.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), sec. 1 (1)— Symon v.
Accident arising out of and in the course of the employment—Message clerk Wemyss Coal
injured while boarding a tramway car in motion. Co., Limited.

A boy, employed as a message clerk, was sent on an errand and given money to pay for his tramway fare. While attempting unnecessarily to board a tramway car in motion—which, as he knew, was forbidden—he fell, and was injured.

Held that the accident did not arise out of the boy's employment.

IN an arbitration under the Workmen's Compensation Act, 1906, between John Kirk Symon, Buckhaven, and the Wemyss Coal Company, Limited, the Sheriff-substitute of Fife and Kinross at Cupar (Armour Hannay) awarded compensation, and, at the request of the employers, stated a case for appeal.

2D DIVISION.
Sheriff of Fife
and Kinross.

The case set forth:—“(1) The claimant on 29th October 1910, being the date of the accident after mentioned, was fourteen years of age, and had been employed as message clerk in the appellants' service at their Muiredge office for about five months prior thereto.

“(2) On said date he was sent a message from the appellants' Muiredge office to the appellants' head office at East Wemyss, which

July 12, 1912. is situated westwards from Muiredge, and was given money to pay his tramcar fare both ways.

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"(3) The tramway line runs alongside the public road and is properly fenced off from it, but access is obtained to the tramway line by gates or openings in the fence to the west of the railway crossing. A line of railway belonging to the North British Railway Company but worked by the appellants intersects the public road and tramway line at right angles. There is a tramcar stopping-place about eighty feet or thereby from the appellants' Muiredge office immediately to the west of the point where the railway crosses the tramway line, as shown on the plan No. 20 of process. At the stopping-place there is a gate in the fence giving access from the public road to the tramway premises for tramway passengers, and at that point there is a notice on a tramway standard, 'Cars stop here.' Cars do not always stop for passengers, sometimes they only slow down. The claimant came to the car stopping-place, but, the car being late, he walked eastwards a few yards to look for the car coming, though there was no necessity for his doing so. Cars do not stop at the place where the claimant attempted to get on, but on the car coming to the railway level-crossing where it had slowed down, as required by the Board of Trade regulations, he attempted to board the car, as he had frequently done before, about two yards to the east of the railway line and just opposite appellants' office.

"(4) In boarding the car he slipped and fell, breaking his left thigh and injuring his right leg so severely that it had to be amputated below the knee. His injuries were serious and permanent.

"(5) The car had a trailer or baggage car behind it which introduced an element of danger, and it caught the claimant and dragged him several yards westwards over the railway crossing, but as its pace was only about five miles an hour neither the tramway conductor nor the claimant considered there was any danger in what the claimant did. At the pace the car was going the conductor would not have stopped the claimant jumping on even if he had seen him, which he did not.

"(6) The claimant admits he knew there was a notice in the car against jumping off or on while the car was in motion, but no attempt has ever been made to enforce this notice by a prosecution or otherwise, and the conductors only interfere if they think there is danger from the car going fast. In attempting to get on the car the claimant was acting not for his own purposes but on the business of his employer. Although the appellants were aware that their employees generally were accustomed to get on and off cars while in motion, they never prohibited or questioned the practice, and they never warned the claimant against it. At the rate the car was travelling at the time of the accident the operation was reasonably free from danger and was not reckless.

"(7) If the claimant had been waiting alone at the stopping-place, as would have been the case on this particular occasion, the car would probably only have slowed down to let him jump on.

"(8) At the spot where the claimant attempted to board the car the ground was quite level, and it has for long been a common practice for miners on leaving their work, and others in the appellants' employment (including the claimant), to board the cars while in motion, and this practice has never been objected to by the appellants or the tramway company or their servants. One of the appellants'

servants was stationed at said level-crossing at the time of the accident, and had been stationed there for many months prior to the accident. Neither he nor any other person ever suggested that the claimant and appellants' other workmen were not entitled to board the cars at said point. Symon v.
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"(9) The *solum* of the ground where the accident happened belongs to the North British Railway Company, but the tramway company have a wayleave right over it.

"(10) There is a railway trespass notice close to the spot where the claimant was injured, and similar notices erected by the appellants and the tramway company. The claimant, however, had not read these notices, and was unaware that he was trespassing. No prosecution or other means had been taken to warn trespassers.

"(11) It was part of the claimant's duty to travel over said level-crossing and up to the railway line every day to collect waybills belonging to the appellants. The line is a private railway line belonging to the North British Railway Company and worked by the appellants."

On the above facts the Sheriff-substitute found that the claimant sustained personal injury by accident arising out of and in the course of his employment with the defenders and appellants, and that he was entitled to compensation.

The question of law for the opinion of the Court was:—"Was I right in holding that claimant's accident arose out of and in the course of his employment with the defenders and appellants?"

The case was heard before the Second Division (without Lord Dundas) on 19th June 1912.

Argued for the appellants;—The accident did not arise out of the boy's employment. The test was whether the danger was incidental to the employment, as in the case of *Millar*,¹ or was an added risk which the workman had taken on his own account.² In the present case the accident occurred through the boy jumping on to the car while it was in motion. This was a dangerous act, which he knew was forbidden, and which he did not require to perform in carrying out his employers' orders. It was immaterial that the employers knew of this practice and took no steps to prevent it. The accident did not take place on their premises, and they were not responsible for seeing that the rules of the tramway company were observed.

Argued for the respondent;—So far as any general rule could be laid down, the true test of whether an accident arose out of the employment was whether at the time of the accident the workman was about his master's business.³ This was clearly brought out by contrasting the cases of *Conway*⁴ and *Traynor*.⁵ In the former case compensation was awarded because, although the applicant

¹ *Millar v. Refuge Assurance Co., Limited*, *supra*, p. 37.

² *Rodger v. Paisley School Board*, *supra*, p. 584, *per* Lord President Dunedin, at p. 587; *Murray v. Denholm & Co.*, 1911 S. C. 1087, *per* Lord Salvesen, at p. 1102; *Revie v. Cumming*, 1911 S. C. 1032; *Richard Evans & Co., Limited, v. Astley*, [1911] A. C. 674, *per* Lord Chancellor Loreburn, at p. 678; *Traynor v. Robert Addie & Sons*, (1910) 48 S. L. R. 820.

³ *Smith v. Lancashire and Yorkshire Railway*, [1899] 1 Q. B. 141; *Moore v. Manchester Liners, Limited*, [1910] A. C. 498.

⁴ *Conway v. Pumpherston Oil Co., Limited*, 1911 S. C. 660.

⁵ *Traynor v. Robert Addie & Sons*, 48 S. L. R. 820.

July 12, 1912. had gone to a forbidden place, it was for a purpose connected with his employment; in the latter case compensation was refused in almost identical circumstances because there was no evidence to show why the applicant had broken the rule. If the workman were acting in the interest of his employer, then he was not necessarily deprived of his right to compensation because he was in breach of a rule.¹ Disobedience to an order might amount to misconduct,² but, as the boy was seriously and permanently disabled, that was no defence for the employers in this case. Applying the test, it was clear that the arbitrator had come to a right decision, for there was no doubt that the boy was on his master's business when the accident occurred. It was immaterial that the accident did not occur on the employers' premises, because under the Act of 1906 there was no limitation of *locus* as there was under the earlier Act.³ Apart from any general rule, the award was right on the merits. Boarding the car while it was in motion was not an added risk; it was not really a risk at all. This was a point of fact on which the arbitrator had found in favour of the workman. In any event, there was evidence to support the arbitrator's award, and it could not be said that he had misdirected himself on a point of law. In such a case the Court would not interfere with his decision.⁴

At advising on 12th July 1912,—

LORD JUSTICE-CLERK.—The pursuer in this case was at the time of the accident which has led to the present proceedings, a boy of fourteen years of age, and was sent from the works of the appellants with a message to a place at some distance, his employers providing him with money to pay tramway fares for his going and returning. He met with his injury by falling in attempting to mount a tramcar in the circumstances which I shall now state in detail. There was a fixed stopping-place, where in ordinary course he would have boarded the car. On arriving at the stopping-place he found that the car had not reached it, and he left the stopping-place, and went forward towards the coming car for some little distance. When the car came opposite to him, and when it was moving at about five miles an hour, he endeavoured to mount on to the car, and fell and received his injury. No one invited him to go forward to meet the running car, and no one invited him to get on to it while it was still in motion. There was a notice in the car forbidding this, and the boy, who had used the tramway before, was aware of this notice.

The question in these circumstances is whether the master is bound to pay compensation in respect that the accident occurred during the course of employment and arose out of the employment. The Sheriff-substitute has answered in the affirmative. I am unable to agree with him. He

¹ *Whitehead v. Reader*, [1901] 2 K. B. 48; *Praties v. Broxburn Oil Co., Limited*, 1907 S. C. 581; *Wallace v. Glenboig Union Fireclay Co., Limited*, 1907 S. C. 967; *Johnson v. Marshall, Sons, & Co., Limited*, [1906] A. C. 409; *Bist v. London and South-Western Railway Co.*, (1907) 23 T. L. R. 471. Lord Salvesen referred to *Martin v. Fullerton & Co.*, 1908 S. C. 1030.

² *George v. Glasgow Coal Co., Limited*, 1908 S. C. 846, *aff.* 1909 S. C. (H. L.) 1.

³ Workmen's Compensation Act, 1897 (60 and 61 Vict. cap. 37), sec. 7.

⁴ *Mackinnon v. Miller*, 1909 S. C. 373.

seems to hold that a boy such as the respondent does not run much risk in July 12, 1912. mounting a car going at five miles an hour, and to deduce from that idea the conclusion that, if an accident happens when the risk is taken, it happens as an incident of the employment. I cannot assent to that.

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When vehicles running on rails are to take up or put down passengers, it is the rule that they must stop to do so, and in this case the rule was specially brought to notice. The rule is established because there is danger when mounting or alighting is attempted when the vehicle is in motion. So much is the danger realised that on railways it is a punishable offence to enter or leave a train while in motion. It is, of course, often done, with the result that from time to time accidents do occur. But nothing can be more clear than that if such an act is dangerous, and for that reason forbidden, the person who breaks the rule which is known to him, does so at his own risk. It may be different if a servant of the railway or tramway company invites a person to step on to a car or carriage when in motion. Then the company by its servant is setting aside its own rule, and must answer for the consequences.

Lord Justice-
Clerk.

I cannot therefore see how it can be held that the doing of an act forbidden, and known to be forbidden, can be held to make a master liable for an accident to his message boy, on the footing that the accident arose out of his employment. He is doing knowingly what he has no need to do, and no right to do, in order to fulfil his duty. It is not in any way like an accident such as making a false step upon a stair, or falling where steps are not in good order. Such a case as the insurance canvasser does not seem to resemble the present case in the least. Having to go on to a stair with worn steps may, in the words of Lord Salvesen in *Murray's case*,¹ be "incidental to the character of the business." In that case nothing is done which is prohibited, and what is done, namely going on the stair, is a necessary action in the fulfilment of the duties of the employment. What happens is a pure accident in the course of doing what it was right to do. Here what happens is no doubt an accident, but it is an accident the action leading to which was not reasonably incidental to the employment. The boy had no cause to do what he did—he was doing what his employment in no way required him to do. The Sheriff-substitute seems to think it is a ground for reaching the conclusion at which he arrived that it was proved that other people mounted cars at this place when they were in motion, and that this has not been objected to by the tramway company's servants nor by the appellants. As regards the tramway company, the appellants cannot be affected by the company's failure to see that their own rules were observed, and I cannot hold that the appellants were called upon to watch their servants outside their own premises, and to attend to the working of tramways. The Sheriff-substitute holds that in "attempting to get on the car, the pursuer was not acting for his own purposes, but on the business of his employer." I cannot agree with that finding, which the Sheriff-substitute puts in his finding of facts but which is really a finding in law. When the respondent left the stopping-place, and walked up the line to board the moving car, and when trying to do so,

¹ 1911 S. C. 1087, at p. 1103.

July 12, 1912. he was not acting on the business of his employer. The business of his employer in no way called upon him so to act. His doing so in no way facilitated or promoted his employer's business. It could not do so.

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Clerk.

Further, when the Sheriff-substitute puts in his findings in fact a statement that if the boy had waited at the proper stopping-place the car might not have stopped, he is plainly not stating a fact proved, but stating what he imagines was likely. It was the duty of the conductor to stop if a passenger was waiting, and it is quite irrelevant to state guesses as to whether he would have done his duty.

I do not think it necessary to go over the cases quoted to us for the respondent. They were nearly all cases where the work was being done on the master's premises, and where the acts in course of being done were of the nature of fulfilment of work for the master. The sufferers were not going outside their duty, though they might be careless in doing what they did. But there is one case which, I think, has a strong bearing upon the present, viz., the case of *Revie*.¹ In that case a man, whose duty it was to stay by and attend to a brake on the back of a lorry, left the place where he should have been and went forward to sit with the driver in front. When a time came when the driver told him to put on his brake, he proceeded to get down in order to go back and apply the brake. In getting off the front of the lorry he fell and was run over. It was held that he had put himself in circumstances not incidental to the duty he was to perform, and so that what had happened did not arise out of his employment. The Lord President in that case, using the phrase which he found in the case of *Brice v. Lloyd*,² expressed himself to the effect that the test is whether the risk of the accident is one which may be reasonably looked upon as incidental to the employment. I can see no distinction between going to a wrong place and there trying to jump on to a car not intended to stop at that place, and going to a wrong place on a lorry and jumping off. In the one case as in the other the person injured was not doing what was incidental to his duty to his master—he was not doing anything for his master. His position was for the time being away from what duty prescribed. The brakesman chose to go to the front of the lorry, the boy here chose to go forward away from the stopping-place. The one jumping off and the other jumping on were each wilfully taking an outside risk not incidental to the reasonable requirements of duty.

I therefore am of opinion that the question put in this stated case should be answered in the negative.

LORD SALVESSEN.—The facts in this case are extremely simple. The respondent, who is fourteen years of age, was employed as a message clerk by the appellants, and had been in their service for about five months prior to the accident. On 29th October 1910 he was sent with a message from the appellants' Muiredge office to East Wemyss, and was given money to pay his car fare both ways. He went to a stopping-place of the tramcar but, as it did not arrive for some little time, he walked a short distance in the direction from which it was coming, there being no occasion for his doing so. When the car passed him he attempted to board it while it was pro-

¹ 1911 S. C. 1032.

² [1909] 2 K. B. 804.

ceeding at five miles an hour, and in so doing he fell and sustained a serious permanent injury. He was not invited by the conductor to join the car while in motion, and he knew that there was a notice in the car against his doing so. No question of serious or wilful misconduct arises in the case, because that cannot be pleaded where an accident to which the Workmen's Compensation Act applies results in the permanent disablement of the workman. The sole question in the case is whether the accident arose out of and in the course of the respondent's employment.

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Lord Salvesen.

The Sheriff-substitute has evidently given great weight to two considerations which I think are entirely irrelevant in considering the only question which we have to decide. The first is that there is not much danger in an active lad of fourteen jumping on to a car which is proceeding at five miles an hour. That there is some danger is obvious from the fact that the accident happened; and as wilful and serious misconduct is not in the case, it seems to me to be a matter of no moment whether the car was going at five miles an hour or at twice or three times that speed. I daresay that an active lad can, without serious risk, board a car which is going no faster than he can run, although of course the risk increases with the increase of speed. If it be held to be incidental to the employment of a messenger who is directed to use a public conveyance that he should run the risk of joining it in motion, it appears to be quite immaterial in a case of this kind what is the speed at which the conveyance is moving. The second circumstance is that the employers knew that their employees were accustomed to get on and off the cars while in motion, and never questioned the practice or warned the men against it. I cannot see that the employer's duty in a matter of this kind goes beyond his own premises. If he permits a dangerous practice there, even although it is prohibited by his own rules, he may bar himself from pleading that the knowledge of the rule put his workmen in the wrong whenever they violated it. But I apprehend that it is no part of his duty to warn his workmen not to infringe the rules of a tramway company or railway company over which he has no control, more especially when the workman is quite aware of the existence of the rule. I think it is common knowledge, with which a boy of fourteen may quite well be credited, that if he joins a moving car he does so at his own risk.

There is a third circumstance on which the Sheriff-substitute also lays some stress, namely, that even if the boy had been at the stopping-place the car might not have stopped for a single active passenger. That is, of course, a mere speculation; and at anyrate it is certain that it was the duty of the conductor, if the boy had signalled to him, to stop the car. If he had failed to do so, and had invited the boy to join the car when in motion, the tramway company would have incurred liability for the accident which resulted, just as a passenger has been found entitled to get damages from a railway company for being run over while crossing the line instead of using a foot bridge, when he had been invited by a railway servant to cross the line.

We were favoured with an elaborate citation of authorities more or less in point, of which the cases of *Whitehead*,¹ *Martin*,² *Conway*,³

¹ [1901] 2 K. B. 48.

² 1908 S. C. 1030.

³ 1911 S. C. 660.

July 12, 1912. *Revie*,¹ *Evans*,² and *Johnson*,³ were the most important. The circumstances in most of these cases were entirely different from those that we have here. Symon v. Wemyss Coal Co., Limited. Lord Salvesen. In all of them, except *Revie's*,¹ the accident occurred on the master's premises while the injured workman was doing his proper work, although, it may be, in a negligent manner, but that is just the kind of case to provide for which the Workmen's Compensation Act was passed. The only exception is the case of *Revie*,¹ where the accident occurred on a road, and the circumstances there more nearly resembled those which are found in the present case, and indeed appear to me to be *a fortiori*, for the workman when he met with his accident was actually obeying an order with which he was bound to comply. In other respects it is very similar, because the risk of jumping off a moving conveyance is similar to that of jumping on to it. I humbly think that that case was well decided, and at all events it is binding upon us. If so, the question of law falls to be answered in the negative, and I propose that we should so answer it.

LORD GUTHRIE.—I concur. It is sufficient in this case to found, as your Lordships have done, on the specialty that the boy got on, not only while the car was moving, but at a place which was not a stopping-place. It is not necessary to decide what would have been the result had the accident happened at a stopping-place, or if not happening at a stopping-place, the accident had resulted from the boy slipping while getting on a car which was at rest. But I am not satisfied that there are any facts before us which would assimilate the case to that of *Millar v. Refuge Assurance Company*.⁴ The boy was a clerk with many duties, one of which was to go messages. The case is not comparable with that of boy messengers, such as there are in London, whose sole duty is to go messages and who are compelled to be regularly and constantly in public vehicles.

THE COURT answered the question of law in the negative.

D. R. TULLO, S.S.C.—W. & J. BURNES, W.S.—Agents

No. 172.

July 12, 1912.

Hill v. Inland Revenue.

R. WYLIE HILL, Appellant.—*Horne K.C.*—*Lippe*.
THE COMMISSIONERS OF INLAND REVENUE, Respondents.—
Sol.-Gen. Anderson—*J. A. T. Robertson*.

Revenue—Super-tax—Deductions—Farming losses—Losses not claimed as deductions from Income-Tax—Deductions not claimed within six months—Finance (1909-10) Act, 1910 (10 Edw. VII. cap. 8), sec. 66 (2)—Customs and Inland Revenue Act, 1890 (53 and 54 Vict. cap. 8), sec. 23 (1).

The Finance (1909-10) Act, 1910, enacts, sec. 66 (2):—"For the purposes of the super-tax, the total income of any individual from all sources shall be taken to be the total income of that individual from all sources for the previous year, estimated in the same manner as the total income from all sources is estimated for the purposes of exemptions or abatements under the Income-Tax Acts."

The Customs and Inland Revenue Act, 1890, sec. 23, provides that for loss sustained in the occupation of land for purposes of husbandry

¹ 1911 S. C. 1032.

² [1911] A. C. 674.

³ [1906] A. C. 409.

⁴ *Supra*, p. 37.

an adjustment of liability for income-tax may be obtained upon giving notice within six months after the year of assessment.

Held that a taxpayer, in making a return of his income of the previous year for the purposes of the super-tax, was entitled to claim as deductions losses sustained in husbandry, although these losses had not been claimed as deductions from his income-tax, and although his claim was not made within six months after the year of assessment.

Hill v. Inland Revenue.

THIS was an appeal by stated case under the Finance (1909-10) Act, 1910, at the instance of R. Wylie Hill, Balthayock, Perth, against a decision of the Income-Tax Commissioners disallowing certain deductions, in respect of farming losses, from the appellant's total income returned for the purpose of super-tax for the year ending 5th April 1910. The total income which fell to be returned for that purpose in terms of the Act was the income for the year 6th April 1908 to 5th April 1909.

1st Division.
Exchequer Cause.

The case set forth the following facts:—

“1. At a meeting of the Commissioners for the Special Purposes of the Income-Tax Acts, held in Edinburgh on the 18th July 1911, Mr R. Wylie Hill (hereinafter called ‘the appellant’), residing at Balthayock, near Perth, N.B., appealed against an assessment to the super-tax in the sum of £5140 for the year ended 5th April 1910, under the provisions of section 66 of the Finance (1909-10) Act, 1910.*

“2. On the 2nd November 1910 the appellant made a return for the year ending 5th April 1910, for the purposes of super-tax, in the sum of £7289, 10s., arrived at as follows:—

“The annual value of properties owned and also in some cases occupied by him, assessed under Schedule A (as reduced for the purpose of collection under section 35 of the Finance Act, 1894), for the year ending 5th April 1909 (including 140 Sauchiehall Street †),

£4763 8 0

“The annual value of properties occupied by him, assessed under Schedule B for the year ending 5th April 1909 (including the properties in respect of which the alleged farming losses were incurred),

146 7 0

“Income from investments,

5769 18 8

“Wife's income,

84 15 10

£10,764 9 6

“Deductions,

3474 19 6

£7289 10 0

“3. Included in the sum of £3474, 19s. 6d. for ‘deductions’ were mortgage interests, ground rents, and other charges which are admissible deductions, and in respect of which no question arises in this case. The said sum also included the following amounts, viz:—£727, 6s. 10d., being the amount of the alleged losses on Mains and Oliverburn farms, and £124, being the alleged loss of rent on 140 Sauchiehall Street. The Special Commissioners by whom the said

* Sec. 66 (2) is quoted in the rubric.
† This report is not concerned with questions affecting the Sauchiehall Street property.

July 12, 1912. assessment of £5140 was made disallowed the said sums of £727, 6s. 10d. and £124 as deductions, the assessment being arrived at as follows:—

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" Total income returned,	£7289	10	0
" <i>Add</i> said deductions disallowed,	851	6	10
	<hr/>		
" Total,	£8140	0	0
" Statutory allowance,	3000	0	0
	<hr/>		
" Amount of assessment,	£5140	0	0
	<hr/>		

" 4. The appellant claimed to deduct from the said sum of £5140—
 . . . (b) A sum of £146, 7s., being the amount of the assessment to the income-tax, Schedule B, for the year ended 5th April 1909, in respect of certain farms on said Balthayock estate on which the appellant alleges he sustained a loss. The said sum of £146, 7s. is included as one of the appellant's sources of income in arriving at the total aggregate income of £8140 shown in paragraph No. 3 of this case. (c) A sum of £727, 6s. 10d., representing the extent of the losses alleged to have been incurred by him in farming operations in the year ending 5th April 1909, in respect of certain farms, viz., Mains and Oliverburn farms, on the said Balthayock estate.

" 5. At the hearing of the appeal . . . as regards items (b) and (c), the appellant admitted that he had not claimed relief from income-tax for the year ended 5th April 1909 in respect of these items under section 23 (1) of the Customs and Inland Revenue Act, 1890,* within the time therein prescribed, or at all, or any other relief in respect thereof. This being so, we were of opinion that these deductions could not be allowed. . . .

" 10. The appellant immediately upon the determination of the appeal expressed dissatisfaction with our decision as being erroneous in point of law, and in due course required us to state and sign a case for the opinion of the Court of Session as the Court of Exchequer in Scotland."

The case was heard before the First Division (without Lord Mackenzie) on 25th June 1912.

Argued for the appellant;—The Act of 1910, which put on a new tax on a new principle, made it necessary for the appellant to make a return of income "from all sources." He had had no occasion to make such a return for income-tax purposes, and when he was called upon to make such a return for a new tax he was well entitled to consider and claim every deduction to which he was entitled, whether it had been claimed for income-tax purposes or not. This was all the more obvious when it was borne in mind that at the time he made his return for income-tax the Finance Act had not been passed

* The Customs and Inland Revenue Act, 1890 (53 and 54 Vict. cap. 8), enacts:—Sec. 23 (1). "Where any person shall sustain a loss . . . in the occupation of lands for the purpose of husbandry only, it shall be lawful for him, upon giving notice in writing to the Surveyor of Taxes for the district within six months after the year of assessment, to apply to the Commissioners for the general purposes of the Acts relating to income-tax for an adjustment of his liability by reference to the loss and to the aggregate amount of his income for that year estimated according to the several rules and directions of the said Acts."

and there was no such tax as super-tax. All that the Finance Act July 12, 1912. did was to provide that the total income should be estimated "in the same manner" as for exemptions or abatements from income-tax. That implied that all deductions which would have been good deductions for income-tax would also be good deductions for super-tax, and the deductions now sought would have been good deductions for income-tax. If it had been meant to provide that no deductions should be allowed for super-tax unless they had already been claimed and allowed for income-tax the Act would have said so expressly. In point of fact the Act contained no provision which, either expressly or by implication, barred the appellant from making his present claim for deductions.

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Argued for the respondents;—The statutory provisions regulating the manner in which total income from all sources fell to be estimated excluded the appellant's present claim to make deductions from his own previous returns of annual revenue.¹ The present claim for deduction was available only by virtue of the importation into the Finance Act of section 23 of the Customs and Inland Revenue Act, 1890. The provisions of that section accordingly ruled this claim and must be strictly observed. By subsection (1) notice must be given within six months, and by subsection (2) a certificate must be obtained. The appellant here had failed to carry out both of these requirements, and accordingly his claim was entirely inept.

At advising on 12th July 1912,—

LORD JOHNSTON.—The appellant was in 1910—the first year when super-tax became exigible—called on for a return. Now the Finance Act, 1910, was passed on 29th April 1910. It imposed a super-tax of 6d. in the pound on all incomes over £5000, to the extent to which they are in excess of £3000, for the year 6th April 1909 to 5th April 1910, that is, for a year already expired; but in estimating the income on which the tax was to be assessed the income of the year 1908-9 was directed to be taken.

The appellant was not asked to make a return until long after 5th April 1910, that is, long after the expiry of the year for which the tax was to be paid, and a good deal more than twelve months after the expiry of the year the income of which was to be the basis of assessment. He was thus called on in the later half of 1910 to make a return of his income from all sources for 1908-9. One source of his income for that year was profit from the occupation of land for agricultural purposes, that is, of income under Schedule B. He alleges that he sustained a loss on the occupation of certain farms. In making his ordinary return for income-tax for 1908-9 he had not claimed any deduction in respect of these losses, but had paid tax on the full assessment. But now that he is charged super-tax he has claimed such deduction in estimating his income for 1908-9, and the Special Commissioners refuse to entertain his claim because he did not make it, as they think, in due course—when being assessed for income-tax in the year 1908-9,—and paid income-tax for that year without claiming any return.

The question thus raised depends on the meaning of section 66 (2) of the Finance Act, 1910, and particularly of the words "estimated in the same

¹ Income-Tax Act, 1842 (5 and 6 Vict. cap. 35), secs. 163, 167, 190.

July 12, 1912. manner as," contained in that subsection. That section says that, "For
Hill v. Inland the purposes of the super-tax, the total income of any individual from all
Revenue. sources shall be taken to be the total income of that individual from all
Ld. Johnston. sources for the previous year." Pausing there, the first thing that is
apparent is that a new return and a comprehensive return is required,
embracing every item of income, whether falling under Schedule A, B, C,
D, or E, and whether the tax has been assessed or has been deducted at
the source. Is that return to be merely a combination of previous returns
made under the different schedules? Clearly not; for no previous return
includes income which is taxed at the source. Nor is there anything to
indicate that the Special Commissioners are bound by the previous assess-
ments or barred from going behind them.

The subsection then proceeds to say that the total income from all sources
is to be "estimated in the same manner as the total income from all sources
is estimated for the purposes of exemptions or abatements under the Income-
Tax Acts." It says it is *to be estimated*, not *is to be taken as it has been
estimated*, and accordingly an estimate in "manner" prescribed is required.

"In manner" prescribed throws the individual making the return back
immediately on the Customs and Inland Revenue Act, 1890, section 23 (1),
which provides that where any person shall sustain a loss in the occupation
of land for the purpose of husbandry only, it shall be lawful for him,
upon giving notice in writing to the Surveyor of Taxes for the district
within six months after the year of assessment, to apply to the General
Commissioners under the Income-Tax Acts "for an adjustment of his
liability by reference to the loss and to the aggregate amount of his income
for that year estimated according to the several rules and directions of the
said Acts." It does not appear to me that the six months' limitation
applicable to adjustment of liability by reference to the loss and to the
aggregate amount of income, in regard to the assessment for ordinary
income-tax, has anything to do with the "manner" of estimating income,
or is a condition of the operation which the individual is called on to
perform for the benefit of the Special Commissioners dealing with super-
tax. The manner of estimating total income is clearly that of the "several
rules and directions" of the Income-Tax Acts. That super-tax and every-
thing connected with it is something quite apart from income-tax is, if it
were necessary, clearly shown by the four special rules which are appended
to the subsection (2) which I have just examined.

I therefore think that the Special Commissioners are bound to consider
the appellant's demand for deduction in respect of his farming losses.

The LORD PRESIDENT and LORD KINNEAR concurred.

THE COURT pronounced an interlocutor in the following terms:—

"Reverse the determination of the Special Commissioners in
article 5 of the case; allow deduction under heads (b) and (c)
of article 4 of the case of such losses as the appellant may
instruct."

MAXWELL, GILL, & PRINGLE, W.S.—SIR PHILIP J. HAMILTON GRIERSON,
Solicitor of Inland Revenue—Agents.

THE COUNTY COUNCIL OF THE COUNTY OF LANARK, Claimants.—

No. 173.

Clyde, K.C.—Hon. W. Watson.

THE PROVOST, MAGISTRATES, AND COUNCILLORS OF THE BURGH OF
MOTHERWELL, Respondents.—*Sandeman, K.C.—D. P. Fleming.*

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Process—Sheriff—Extension of burgh boundaries—Adjustment of liabilities—Arbitration by Sheriff—Statement of special case for opinion of Court—Competency of stating case after findings and allowance of proof—Local Government (Scotland) Act, 1889 (52 and 53 Vict. cap. 50), sec. 50 (3)—Burgh Police (Scotland) Act, 1903 (3 Edw. VII. cap. 33), sec. 96.

Sec. 50 of the Local Government (Scotland) Act, 1889, as applied by sec. 96 of the Burgh Police (Scotland) Act, 1903, enacts that the Sheriff, when adjusting, as a single arbiter, the financial relations between a county and a burgh on the extension of the burgh, may state a special case on any question of law for the opinion of the Court.

Objection having been taken to the competency of such a special case on the ground that, not having been stated until after the Sheriff had made certain findings and allowed a proof, it was not timeous,—

Held that the case was timeously presented in respect that, no final judgment having been pronounced, it had been duly presented during the progress of the proceedings.

Johnston's Trustees v. Glasgow Corporation, supra, p. 300, distinguished.

Local Government—Burgh—County—Extension of burgh boundaries—Inclusion of portion of county—Adjustment of liabilities by arbiter—Method of adjustment—Local Government (Scotland) Act, 1889 (52 and 53 Vict. cap. 50), sec. 50—Burgh Police (Scotland) Act, 1903 (3 Edw. VII. cap. 33), sec. 96.

By sec. 50 of the Local Government (Scotland) Act, 1889, as applied by sec. 96 of the Burgh Police (Scotland) Act, 1903, it is provided that on the extension of the boundaries of a burgh so as to embrace part of a county, if the burgh and the county fail to agree as to the “adjustment of property and liabilities” consequential on the alteration of the boundaries, the adjustment may be determined by the Sheriff as arbiter.

In an arbitration between an extended burgh and the adjoining county the county maintained that the Sheriff was bound to make his adjustment of liabilities on the principle of apportionment according to the rateable values of the area taken into the burgh and the area retained by the county.

Held that there was no one particular method of adjustment incumbent on the arbiter; and, accordingly, that he was not bound to adopt the method suggested by the county, but was entitled to choose his own method, with which the Court would not interfere unless it was clearly wrong.

Opinion that a method of adjustment proposed by the arbiter was, in the circumstances, a fair and equitable method.

Local Government—Burgh—County—Extension of burgh boundaries—Inclusion of portion of county—Adjustment of liabilities—“Property”—Claim by county for loss of prospective and contingent income—Local Government (Scotland) Act, 1889 (52 and 53 Vict. cap. 50), sec. 50—Burgh Police (Scotland) Act, 1903 (3 Edw. VII. cap. 33), sec. 96.

A tramway company, authorised by Act of Parliament to lay tramways in a county, were bound, in every year in which their profits sufficed

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to provide a certain dividend, to pay the county £50 for every mile of tramway laid in the county.

A portion of the county in which lines were authorised but not laid having been transferred to a burgh, *held* that the contingent right to payments from the tramway company was not "property" within the meaning of section 50 of the Local Government (Scotland) Act, 1889, to be taken into account in adjusting the financial liabilities of the burgh and county.

1ST DIVISION.
Sheriff of
Lanarkshire.

THIS was a special case presented for the opinion of the First Division by the Sheriff of Lanarkshire (Millar), acting as an arbiter under the provisions of section 50 of the Local Government (Scotland) Act, 1889, as applied by section 96 of the Burgh Police (Scotland) Act, 1903,* and incorporated in the Motherwell Burgh Extension and Sewage Purification Act, 1908.†

The case stated:—

"1. By the Motherwell Burgh Extension and Sewage Purification Act, 1908, certain extensions of the burgh of Motherwell were authorised. The areas thus added to the burgh formed part of the Middle Ward of the county of Lanark, and as such were administered by the County Council of the county of Lanark, and the District Committee of the Middle Ward of said county. These areas were also partly comprehended within certain special districts for drainage, lighting, and scavenging. The area annexed to the burgh extends to 436 acres, while the extent of the remanent area of the county is 551,727 acres. The valuation of the annexed area at the date of the annexation was £21,765, and the valuation of the remanent area of the county was £1,917,089.

"2. The County Council of the county of Lanark (hereinafter

* The Local Government (Scotland) Act, 1889 (52 and 53 Vict. cap. 50), enacts:—

Sec. 50. "(1) Any councils and other authorities affected by this Act, or by any order, or other thing made or done in pursuance of this Act, may from time to time make agreements for the purpose of adjusting any property, income, debts, liabilities, and expenses of the parties to the agreement, so far as affected by this Act. . . .

"(2) In default of an agreement as to any matter requiring adjustment for the purposes of this Act, then, if no other mode of making such adjustment is provided by this Act, such adjustment may be made or determined by the Commissioners.

"(3) The Commissioners when making an adjustment under this Act shall be deemed to be a single arbiter within the meaning of the Lands Clauses Consolidation (Scotland) Act, 1845, and the Acts amending the same, and the provisions of those Acts with respect to an arbitration shall apply accordingly; and, further, the Commissioners may state a special case on any question of law for the opinion of either Division of the Inner House of the Court of Session, who are hereby authorised finally to determine the same along with any question of expenses."

The Burgh Police (Scotland) Act, 1903 (3 Edw. VII. cap. 33), enacts:—
Sec. 96. "On the formation of any new burgh or extension of the boundaries of any existing burgh, sec. 50 of the Local Government (Scotland) Act, 1889, relating to the adjustment of property and liabilities consequential on an alteration of boundaries, shall apply as if in lieu of that Act and the boundary commissioners, the Burgh Police Acts and the Sheriff (not being a Sheriff-substitute) were respectively mentioned therein. . . ."

† 8 Edw. VII. cap. lix.

called the 'claimants') having made certain claims against the Provost, July 12, 1912. Magistrates, and Councillors of the burgh of Motherwell (hereinafter called 'the respondents'), under and in virtue of the above statutory provisions, and the parties having failed to agree as to the same, the claimants made an application to me as single arbiter under said statutory provisions in order that adjustment of the indebtedness between them and the respondents might be made or determined by me, and answers thereto were lodged by the respondents. By their said application the claimants asked me to adjust the indebtedness by ordaining the respondents to pay to the claimants:—(1) The capital sum of £6399, 13s. 8d., with interest at 3½ per cent per annum from 1st August 1908 (the date at which the extension took effect) till paid; (2) The annual sum of £525, 11s. for sixteen years as from 1st August 1908, or alternatively, the capital sum of £6570; and (3) The capital sum of £1347, 6s. 8d., all in accordance with the proposals for the adjustment of the said indebtedness produced with the application, and which are printed in the appendix, and are part of this case.

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" I.—First Head of Claim.

" This head of claim relates to capital debts incurred by the claimants prior to—and outstanding at—the date of annexation, and the claimants propose that they should remain liable therefor, and that the respondents should pay to them in respect thereof the capital sum of £6399, 13s. 8d., with interest at 3½ per cent from 1st August 1908 until payment.

" This claim is framed upon the footing of taking the rateable value of the total area which was liable to be rated in respect of the particular debt immediately prior to the date of annexation, and apportioning the debt upon the portion of such area annexed to the burgh according to the rateable value of such annexed area. The sums thus brought out in each case amount to the sum claimed under this head.

" The claimants, in the second place, proposed that the property, such as administrative offices, hospitals, drainage works, &c., which, prior to the annexation, were common to the undivided areas, fell to be allocated by me, as arbiter foresaid, either to the claimants or respondents, subject to payment in respect of the property so transferred or retained of such sum, if any, as I should adjust in terms of section 50 of the said Act of 1889, and that the basis of the adjustment should be the relative rateable valuations of the transferred area and the remaining county area as at the date of transfer, which should be taken as the measure of the respective use of the property by the transferred and remaining areas prior to the date of transfer.

" The respondents, on the other hand, object to the method of apportionment proposed by the claimants, and maintain that this claim falls to be adjusted on the basis of payment by them to the claimants (a) of any debt existing at the date of the annexation due by the claimants in respect of property under the various heads detailed only so far as such property has been taken over by the respondents; (b) of a sum in respect of the debt on buildings and property outside of the area annexed, which are in excess of the requirements of the diminished county, Middle Ward, or special district respectively, and were built and acquired for the use of the whole area previous to the annexation; and (c) of the value of the hydrants or other property which have been directly taken over by the respondents.

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" II.—Second Head of Claim.

" This claim relates to standing charges and other continuing expenditure of the claimants, including the salaries of permanent officials.

" This claim is framed on the footing of an apportionment of the amount of such salaries, charges, and expenditure according to rateable value, on the same lines as proposed in the first head of claim, and of payment by the respondents in respect of the claimants' retention of such liabilities of a sum equivalent to the capitalised value (at $12\frac{1}{2}$ years) of the net proportion of such liabilities (after deducting the proportion of expenditure unnecessary consequent on annexation) as effects to the annexed area.

" The respondents object to this proposed method of adjustment, and maintain that such adjustment should proceed on the basis of a payment by them to the claimants in respect of said salaries, charges, and expenditure, in so far only as they are unnecessary for the present management of the affairs of the county, Middle Ward, or special district respectively, and that only in respect of such period as may be necessary for re-adjustment of such salaries, charges, and expenditure.

" III.—Third Head of Claim.

" This claim arises in the following circumstances, viz. :—

" By the Lanarkshire Tramways Order Confirmation Act, 1903 (3 Edw. VII. cap. cliii.), the Lanarkshire Tramways Company were authorised to construct certain tramways, *inter alia*, within the county of Lanark. Section 16 of the said Act provides as follows, viz. :—' If in any year ending on the 31st day of December the net profits of the undertaking of the company authorised by the Act of 1900 and this Order available for payment of dividends on the share capital of the company shall be sufficient to pay a dividend at the rate of 5 per centum on such share capital the company shall pay to the county authorities a sum calculated at the rate of £50 for every mile of highway, road, or street on which any part of the tramways by this order authorised is laid within the jurisdiction of the county authorities, and after every additional £1 per centum of dividend beyond 5 per centum on the said share capital, an additional sum of £50 per mile calculated as aforesaid . . . '

" Of the tramway lines authorised by the said Order, 53·9 chains were authorised to be laid down within the area now annexed to the respondents' burgh. In the event of that portion of line being laid, and upon the footing that the net profits of the Tramways Company will be sufficient to pay dividends at the rate of 6 per cent per annum, an annual payment of £67, 7s. 4d. would have been payable to the claimants by the Lanarkshire Tramways Company, but the claimants have lost said contingent right in consequence of the annexation of said area to the burgh.

" The claimants maintain that said contingent right was ' property ' affected by the Motherwell Burgh Extension Order within the meaning of section 50 of the Local Government (Scotland) Act, 1889, and that they are entitled to a payment in respect of the transfer thereof.

" The respondents deny that this claim forms any part of the ' property ' of the claimants in the sense of the said section.

" The parties concurred in asking me to consider and decide the principles on which the adjustment of the various heads of indebtedness should proceed, before inquiring into the details of each item, as,

once the principles were decided, the parties might be able thereupon July 12, 1912.
to settle matters between themselves, and thus avoid the necessity
for such a detailed inquiry.

“ After hearing parties I issued proposed findings, against which
representations were lodged by the claimants, and answers to the
latter were lodged by the respondents. After hearing parties thereon,
I issued the following findings, viz. :—‘ Glasgow, 14th February
1910.—The Sheriff having heard counsel for the parties and con-
sidered the representations and whole cause, finds under the first
head of the claim that the respondents are not liable to make pay-
ment to the petitioners of a share of the debts of the county at the
time of annexation in the proportion of the rateable value of the area
annexed to the rateable value of the whole county, but are liable
(First) to make payment to the county of any debt at present existing
due by the county in respect of property, under the various heads
detailed, which has been taken over by the burgh along with the
area annexed ; (Second) a sum in respect of the debt on buildings
and property outside of the area annexed which are in excess of the
requirements of the county and were built and acquired for the use
of its whole area previous to the annexation ; and (Third) a sum
in respect of value of the hydrants or other property which has been
directly taken over by the burgh : Finds under head two of the claim
that the respondents are not liable for any sum in connection with
the maintenance of the establishment under the various heads which
are detailed except to the extent that these are unnecessary for the
present management of the affairs of the county, and that the respon-
dents are only liable for their share of the cost of that proportion of
the establishment which is unnecessary until that part of it can be
readjusted : Finds that the third head of the claim is irrelevant, and
falls to be dismissed : Under reference to these findings allows to
both parties a proof of their averments, to proceed on a date to be
afterwards fixed.’

“ My opinion on the questions at issue between the parties is given
in the notes to the interlocutors pronounced by me on 8th December
1909 and 14th February 1910.*

* *Note appended to interlocutor of 8th December 1909 continuing cause
for further hearing :—*“ At the last hearing of this case it became apparent
that the parties were not in agreement with regard to the facts of the parti-
cular claims which are enumerated in the proposals by the County Council
for adjustment of indebtedness. Both parties agreed in asking me to
decide the general questions of law which were raised in the debate, and
once they had the opinion of the Court upon these matters, the questions
of detail necessary for the final decision of the case might be arranged
between them so that a final interlocutor should be issued. As this is an
arbitration under the Act I have avoided pronouncing any finding which
would be binding on the Court, in order that the parties might have an
opportunity of representing against the views which are expressed in this
note.

“ The questions that are raised depend upon the meaning of section 50
of the Local Government Act, 1889, as applied by section 96 of the Burgh
Police (Scotland) Act, 1903, to the extension of the boundaries of the
burgh of Motherwell. Section 96 of the Police Act says that on the
extension of the boundaries of any existing burgh section 50 of the Local
Government (Scotland) Act, 1889, relating to the adjustment of property
and liabilities consequential on the alteration of boundaries shall apply, and

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"The arbiter submits for the opinion of the First Division of the Court of Session the following questions of law:—'1. As regards the first head of the claim:—(1) Is the arbiter bound to adjust said claim on the basis of (a) an apportionment of the debt existing at the date of the annexation between the annexed area or so much thereof as at the date of annexation formed part of the county, Middle Ward, or special district respectively, and the remanent portion of the said county, Middle Ward, or special district respectively, according to the rateable value of said annexed area or part thereof, and county, Middle Ward, or special district as at the date of annexation; (b) a payment by the respondents to the claimants of the proportion of said debt effeiring to said annexed area or part thereof, and retained by the claimants; and (c) an adjustment of the properties and of the payments, if any, to be made in respect of the transfer or retention thereof? or (2) is the arbiter

section 50 of the Local Government Act says that any councils and other authorities affected by this Act, &c., may from time to time make agreements for the purpose of adjusting any property, income, debts, liabilities, and expenses of the parties to the agreement so far as affected by this Act, and subsection 2 provides that, in default of an agreement as to any matter requiring adjustment, then the adjustment may be made by the commissioners. The question, therefore, is whether the claims and the proposals made by the pursuers fall under the terms property, income, debts, liabilities and expenses. I think it is clear that these words refer to the period when the extension of the boundaries of the existing burgh takes place, and that they do not refer to any property, income, debts, liabilities, and expenses which may emerge to either of the parties to the case subsequent to that date. It is to be observed that the word used is not compensation but adjustment, and I think it is clear from the decisions in the House of Lords in the cases of *Urban District Council of Caterham v. Rural District Council of Godstone*, [1904] A. C. 171, and *Mayor, &c., of West Hartlepool v. The Council of Durham*, [1907] A. C. 246, that no compensation can be granted for the loss of assessable area for contribution to future rates. I think it is also clear that so far as possible all the property within the area annexed to the burgh which is necessary for the use of the inhabitants there and which formerly belonged to the county authority should be transferred to the burgh under the obligation of making such payment to the county as would relieve the county of the existing debt in connection therewith; and in the same way that the property in the county area should be free from any claim on the part of the inhabitants in the annexed area or of the burgh of which they now form part. The statute does not seem to contemplate that either the county or the burgh should have control or the right to interfere with the property which is outside their boundaries. Of course that necessarily implies that the authority to which property is transferred should relieve the other of any debt in connection with the property transferred.

"Turning now to the proposals by the County Council for adjustment of indebtedness in which the particular claims are set forth, I propose very generally to state the views with regard to them which in applying the principles above explained I have come to entertain.

"The first head is for debts effeiring to the added area prior to annexation. Under this head, the first claim is for highways and new district offices. With regard to new roads and bridges in so far as the County Council can prove that that debt is for roads and bridges within the annexed area, I think that the County Council would have a good claim. But if the debt is for roads and bridges outside of the annexed area, which are now the sole property of the county, I think this claim falls to be

entitled to adjust said claim on the basis of payment to the claimants by the respondents, (a) of any debt at present existing due by the claimants in respect of property under the various heads detailed which has been taken over by the respondents along with the area annexed; (b) of a sum in respect of the debt on buildings and property outside of the area annexed, which are in excess of the requirements of the county, Middle Ward, or special district, and were built and acquired for the use of the whole area previous to the annexation; and (c) of the value of the hydrants or other property which have been directly taken over by the respondents? 2. As regards the second head of claim, so far as relating to salaries of permanent officials, liability for which existed at the date of annexation:—(1) Is the arbiter bound to make an adjustment of such liabilities on the basis of (a) an apportionment of such salaries according to rateable value on the same lines as the apportionment referred to in question 1;

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dismissed. With regard to district offices, these will in future belong to the County Council. The facts with regard to these offices were disputed, and I find it very difficult in the present state of the case to come to a decision, but it seems to me that if these offices or any considerable part of them were erected with a view to the administration of the district now annexed, and would not have been erected if the annexed area had not at the time been part of the county, then it would be unfair to saddle the county with the whole burden of the debt, and that the burgh must relieve the county of such portion as can be proved to be unnecessary for the present administration of the present county area. The same principle applies to the public health offices at Hamilton, the Inebriate Reformatory at East Kilbride, and hospitals and public slaughter-houses. With regard to the drainage works, I think the rule which has been already laid down with regard to the new roads and bridges also applies to them. With regard to the lamps and lamp pillars, the defenders admit their liability for the lamps and lamp pillars within their district. With regard to the stables for Dalziel and Netherton scavenging district, I think they fall under the same rule as the new district offices, hospitals, &c. There is also a claim for fire hydrants within the area which has been annexed. The possession of these hydrants was a matter of dispute. The pursuers maintained that these in future would be under the control and management of the defenders, while the defenders stated that they will remain under the authority of the pursuers, as being the authority for water supply. I think this is a matter for inquiry, and, if it turns out that they are under the control of the burgh, then the property in them should be transferred to it, and their cost should be paid by it to the county.

“With regard to the second head of pursuers’ claim, namely, standing charges and other continuing expenditure, if these charges mean the future cost for salaries, wages, &c., in connection with the maintenance of the establishment under the various heads which are detailed, I think they must be disallowed under the ruling in the cases of *Caterham* and *West Hartlepool*, *supra*. Lord Atkinson in the latter case says:—‘The whole scheme of the statute, however, is that when administrative urban areas, whether county boroughs or not, are created they shall have power to tax themselves to the extent necessary to carry out the duties imposed upon them, and shall not be called upon to contribute to the cost of the services rendered outside their respective areas by which they are not directly benefited.’ According to that view the burgh is to tax itself for the payment of all services which are rendered within its boundary, and they are not to be liable for the payment of any services which are rendered outwith the area. Moreover, it seems to me that this is not a liability which existed at the time of the annexation, except to this restricted extent, viz.,

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(b) payment by the respondents to the claimants in respect of such liabilities of a sum equivalent to the capitalised value of the proportion of such liabilities effeiring to the annexed area, and of a sum to cover the period of necessary readjustment of the salaries in the remaining area? or, (2) Is the arbiter entitled to make such adjustment, on the basis of a payment by the respondents to the claimants in respect of said salaries, in so far only as they are unnecessary for the present management of the affairs of the county, Middle Ward, or special district respectively, and on the footing that the respondents are only liable for the cost of that proportion of the establishment which is unnecessary until that part of it can be readjusted? 3. Is the subject matter of the third head of claim "property" within the meaning of section 50 of the Local Government (Scotland) Act, 1889, and falling to be the subject of adjustment under and in terms of said section'?"

the county cannot be expected to discharge its officers at once on the occurrence of the annexation. If they can show that their establishment, therefore, was greater than was necessary for their own area, it may be that they would be entitled to a payment of such extra charges as might be necessary until an adjustment could be made. That seems to me to be a liability on the county at the time when the annexation took place which they may call upon the burgh to share.

"The third claim is in respect of the annual payment by the Lanarkshire Tramway Company. The position of this matter is that under the Lanarkshire Tramways Act, sections 16 and 17, the Tramway Company are bound, in the event of their constructing a tramway within the county, and the profits of their undertaking being sufficient to pay 5 per cent on the share capital, to pay to the county authorities a sum calculated at the rate of £50 for every mile of highway, road, or street within the county on which any part of the tramways is laid, and the same provision is made in favour of burghs. It seems, under the Act, that the Tramway Company have power to lay a line extending to 53·9 chains within the area annexed. No part of this line has been laid. The county claim, however, twenty years' purchase of the annual payment which, in the event narrated, will be due by the Tramway Company to the burgh. I think this claim must be disallowed entirely. The Act seems to contemplate that, when the tramway line passes through the territory of the county, the county authorities should receive the sum specified from the Company, and that, if it passes through a burgh, the burgh authority should receive the specified sum in the same way. It is difficult to say what is the exact reason for this payment, and counsel for the pursuers said that it was in respect of the county withdrawing its opposition to the Tramway Company's Act. It seems to me that the more probable explanation is that if the Tramway Company enters upon property of the Local Authority, as it does when it makes use of the highways and streets, then Parliament thought that the Local Authority should receive some return for that use after a fair profit had been made by the Tramway Company. That is rendered more probable, because by interference with the highway a burden might be placed on the Local Authority in providing for the passage of the public consequent on the Tramway Company's operations. As no part of this line has been made, it was not income transferred to the burgh at the time of the annexation. For this reason, I think the claim should be disallowed.

"Having expressed these opinions, I think it is proper to put out the case for further hearing, so that the future procedure may be determined on."

Note appended to interlocutor of 14th February 1910 :—"At the debate upon the re-hearing, it became apparent that the petitioners' position was that the whole debt of the county at the time of the annexation was proportion-

The case was called in the First Division on 31st May 1912, when July 12, 1912.
 counsel for the respondents objected to the competency of the special
 case, and argued ;—A special case was only competent while the arbi-
 tration was pending. Here it was not pending for the arbiter had
 already issued his findings. The sole object of a special case was that
 the arbiter might have the benefit of the opinion of the Court in mak-
 ing his findings. It did not permit of an appeal against findings
 already made, which was what the claimants were trying to secure in
 the present case.¹

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Counsel for the claimants were not called upon.

At advising on 5th June 1912,—

LORD PRESIDENT.—This is a special case stated by the Sheriff of Lanarkshire acting as an arbiter under section 17 of the Motherwell Burgh Extension and Sewage Purification Act, 1908, and section 50 of the Local Government (Scotland) Act, 1889, as applied by section 96 of the Burgh Police (Scotland) Act, 1903.

The Motherwell Act was, as its title indicates, an Act for the extension of the burgh. The area of extension had to be taken from the county of Lanark, and the sections of the statutes I have referred to provide for questions arising between the county and the burgh in consequence of the extension, and requiring adjustment in default of agreement, being determined by the Sheriff as a single arbiter. Applying subsection (3) of sec-

ally the debt of the part which had been taken from the county and added to the burgh. Therefore, the burgh in taking the annexed part took it with its debt, and in the adjustment of the debt with the county they were bound to make payment to the county of the due proportion. It seems to me that there is a fallacy here in thinking that the debt is a debt of each particular part of the county, and is not a debt of the county as a whole, for which it can assess the whole district within its area. If that be so, then the burgh in taking over the annexed part does not take over any part of the debt which remains with the county. To hold otherwise, I think, would be inequitable, for it would compel the burgh to pay for improvements and property of which neither it nor the part annexed to it could ever make any use. At the same time, I think that under the powers given by the section, the arbiter has a power to adjust the debt so as to work out an equitable result. Accordingly, I think he is entitled to call upon the burgh to make provision for the debt in respect of the property which is transferred to it. It would seem inequitable that the county should go on discharging debt for an improvement which was within the annexed part, and accordingly had become part of the burgh's property. Further, I think that the burgh are bound to make payment for any property such as hydrants which has been transferred to it. The same principle applies to the second head of the claim, which is in connection with the management and administration of roads, &c. If these are outside the limits of the district annexed, I think the expense of management and administration falls upon the county except in so far as the county authorities can prove that they undertook expenditure—in view of the annexed part remaining part of the county—which was now unnecessary. With regard to the third claim, which was still maintained, I am still of opinion that it is irrelevant."

¹ Johnston's Trustees v. Glasgow Corporation, *supra*, p. 300, Lord President, at p. 303; Steele v. M'Intosh Brothers, (1879) 7 R. 192; *In re Knight v. Tabernacle Permanent Building Society*, [1892] 2 Q. B. 613.

July 12, 1912. tion 50 of the Act of 1889, the Sheriff "may state a special case on any question of law for the opinion" of this Court.

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In an arbitration set up between the county and the burgh various claims were made, and the learned Sheriff issued proposed findings. After hearing parties upon representations by the county and answers for the burgh, he made certain findings and laid down certain legal propositions; and with reference to these allowed a proof. The Sheriff was then asked to state this special case.

The case being here, it is argued for the burgh of Motherwell that it comes too late, and they seek to assimilate the case to that of *Johnston's Trustees v. Glasgow Corporation*.¹ All that it is necessary to say upon the law was said in that case, and need not be repeated. I am clearly of opinion that the class of special case which is here presented is of the same character as that in *Johnston's case*,¹ which was presented under the Housing, Town Planning, &c., Act 1909, and that it must be presented during the progress of proceedings. I think that here the proceedings are in progress. In the case of *Johnston's Trustees*¹ there was nothing more to be done when the special case was presented, because the Sheriff had given judgment. Here he has not done so, and though no doubt he has made certain findings there is no decree and no final award. As matter of purity of expression he might have called them "proposed" findings, but I think it would be a denial of justice to throw the case out if, by a slip of the pen, he has omitted the word "proposed." He has pronounced no operative decree, and I think it is the intention of the Act that the opinion of this Court may be taken while matters are still inchoate.

LORD KINNEAR, LORD JOHNSTON, and LORD MAACKENZIE concurred.

The Court repelled the objection, and the case was further heard on 5th and 6th June 1912.

The contentions and arguments of parties are sufficiently indicated in the case stated by the Sheriff.²

At advising on 12th July 1912,—

LORD PRESIDENT.—This case has been stated by the Sheriff of Lanarkshire, upon a requisition of the parties, for the opinion of the First Division of the Court of Session upon certain questions of law arising in an arbitration in which he is arbiter. The arbitration is in pursuance of a provision in the Motherwell Burgh Extension and Sewage Purification Act, which incorporates the 50th section of the Local Government Act of 1889, as applied by section 96 of the Burgh Police (Scotland) Act, 1903, and by so doing provides that the arbiter may make an order "for the purpose of the adjustment of any property, debts, liabilities, or financial relations," which order may provide for "the transfer or retention of any property, debts,

¹ *Supra*, p. 300.

² *The following authorities were cited*:—Midlothian County Council v. Magistrates of Musselburgh, 1911 S. C. 463; Durham County Council v. West Hartlepool County Borough, [1905] 2 K. B. 340, [1906] 2 K. B. 186, [1907] A. C. 246; Caterham Urban Council v. Godstone Rural Council, [1904] A. C. 171.

and liabilities, with or without any conditions, and for the joint use of any July 12, 1912. property, and for the transfer of any duties, and for payment by either party to the agreement in respect of property, debts, duties, and liabilities so transferred or retained, or of such joint use, and in respect of the salary, remuneration, or compensation payable to any officer or person, and that either by way of a capital sum or of an annual payment."

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This adjustment follows upon the fact that by the Motherwell Burgh Extension and Sewage Purification Act a certain area which previously formed part of the Middle Ward of the county of Lanark was taken out of the county and put into the burgh. The clause which deals with the power to state a special case is this: The Commissioners, *i.e.*, the arbiter, "may state a special case on any question of law for the opinion of either Division of the Inner House of the Court of Session, who are hereby authorised finally to determine the same along with any question of expenses."

Now the learned arbiter here pronounced what may be called a set of preliminary findings, in which he dealt with the claims of the parties as raised. In particular, the county claimed that there must first be an adjustment of the outstanding debt in such proportions as the valuation of the part taken away bore to the part retained by the county. The learned arbiter refused to do that, and laid down certain rules according to which he proposed to decide the case; and upon the controversy so raised we are asked, as a question of law:—[His Lordship quoted the first question].

I am of opinion that questions so stated really involve a matter which is not a question of law at all. It would be a question of law if it was an immutable proposition that the arbiter must adjust the debt upon the basis of the apportionment of the debt. No doubt, then, that would be a question of law, and we could tell the arbiter that he must do so. But that position in law is clearly wrong. It is for the arbiter to find out upon what terms the adjustment is to be made. It would be possible to tell the arbiter in certain circumstances that what he proposed to do was quite wrong; and as a good illustration of what I mean I would quote the well-known *Caterham* case,¹ where the arbiter proposed to give an allowance in respect of the subtraction of a valuable rateable area as such. Well, that was *ultra vires*, and accordingly you could say of that method that it was wrong and that the arbiter must not do it. But I do not think we can lay down any one particular way in which the arbiter is to arrive at an adjustment, because if we did that we should be doing, I think, what the statute has said the arbiter is to do and not this Court.

I think, therefore, the first half of the first question is a question of law and should be answered in the negative. The second half is not a question of law at all; there are various methods of adjustment, and all I can say is that I do not find it here made out that the way in which the arbiter proposes to go is necessarily a wrong way, in which case I could treat it as a question of law and say that he may not do it. I do not think it is necessary for me to say whether I should have proceeded in exactly the same way or not. But, at any rate, I think the way in which the arbiter has proceeded, and which, I think, he has clearly explained in the note upon

¹ [1904] A. C. 171.

July 12, 1912. the re-hearing [the note of 14th February 1910], is quite a fair way. I do not think it is the only way he could have chosen; I think he might have proceeded in another way, and he might have proceeded in the way which began with adjustment of the debt according to the valuation and proceeded upon the other side of the account to make other calculations.

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Ld. President. Upon the whole matter, therefore, I am of opinion that we should answer the first branch of the first question of law in the negative, and the second branch in the affirmative.

These remarks really cover also the questions which arise on the second head of claim. I think the arbiter is entitled to proceed as he proposes, though I do not say that he must necessarily do so.

The third question will be answered in the negative.

LORD KINNEAR, LORD JOHNSTON, and LORD MACKENZIE concurred.

THE COURT pronounced an interlocutor in the following terms:—

“ Having heard counsel for the respondents on their objections to the competency of the special case, repel the same Answer the first and second questions of law in the case in the negative of the first branch and in the affirmative of the second branch of each of said questions: Answer the third question in the negative.”

ROSS SMITH & DYKES, S.S.C.—BRUCE, KERR, & BURNS, W.S.—Agents.

No. 174.

WILLIAM ARNOTT, Respondent.—*Constable, K.C.—Wilton.*

July 12, 1912.

THE FIFE COAL COMPANY, LIMITED, Appellants.—

Horne, K.C.—Russell.

Arnott v.
Fife Coal Co.,
Limited.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), First Sched. (1) (b) and (3)—Incapacity for work—Physical capacity—Wage-earning capacity.

A miner, who had lost one eye by an accident and who had been given work above ground and was receiving partial compensation, was examined by a medical referee, who reported that he was “as fit as any other one-eyed man to resume his work underground.” The employers having applied to have the compensation ended, the arbitrator, after a proof, found that the miner had made various applications for work underground without success, and that he “is presently working on the surface and is only able on account of his injuries to earn 18s. a week,” and dismissed the application.

In an appeal the Court *refused* to disturb the arbitrator's finding.

1ST DIVISION. REPORTED *ante*, 1911 S. C. 1029.

Sheriff of Fife
and Kinross.

In an application under the Workmen's Compensation Act, 1906, for review of weekly payments made to William Arnott, miner, Cluny, by his employers, the Fife Coal Company, Limited, the Sheriff-substitute at Kirkcaldy (Umpherston) dismissed the application, and, at the request of the employers, stated a case for appeal.

The case set forth:—

“The facts admitted or proved were as follows:—

“(1) On 8th September 1908 William Arnott, the claimant, was a miner in the appellants' employment at their Bowhill Colliery, Cardenden. On said date his left eye was injured, and it was removed on 23rd September 1908.

"(2) From the date of the accident until he started work above ground in the month of September 1909, the claimant was paid the maximum compensation at the rate of £1 per week.

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"(3) In the month of September 1909 the claimant started work above ground in the employment of the appellants. His partial compensation was fixed at 13s. 4d. per week, and he was paid at that rate until 13th January 1911. He has received no compensation since that date.

"(4) On said 13th January 1911 the claimant was examined by Dr George Mackay, 20 Drumshough Gardens, Edinburgh, medical referee in ophthalmic cases under the Workmen's Compensation Act, 1906, on a remit under section 15 of Schedule 1 of said Act.

"(5) The report of said medical referee lodged on 18th January 1911 is in the following terms:—'The said William Arnott had his left eye removed on 23rd September 1908, following upon the accident for which compensation is claimed. The socket is at present slightly inflamed as the result of wearing an artificial eye too freely. That, however, should soon yield to appropriate treatment. The right eye has a very slight error of refraction, but otherwise is quite a sound one. Though he complains of some subjective sensations of occasional headache, there does not appear to be any obvious cause for these which could be assigned to the injury, and his condition is such that, having for the past fifteen months been engaged in work at the pithead, he is now, in my opinion, as fit as any other one-eyed man to resume his work underground.'

"(6) Following upon said report the appellants lodged in process in the Sheriff Court at Kirkcaldy a minute craving the Court to end the claimant's compensation as at 13th January 1911. The claimant lodged answers to said minute stating, *inter alia*, that he had not recovered from the injuries which he had sustained, and that he had not recovered his earning capacity following upon said injuries; that he was still under medical treatment; that since the date of the accident the socket of the left eye, which had been removed, had been in an inflamed condition, painful and suppurating; that he suffered from headaches during his shift and after; that these headaches were brought about through his having to stoop or bend, and were a result of the injuries which he had sustained; that they interfered with his capacity for work and his earning ability; and, further, that the sight of the remaining eye was weak and became dim and fagged by the end of the shift. The claimant further stated that while his earning capacity had been, and was at that time, much reduced, as a result of the injuries which he had sustained, he was quite prepared to try work below ground so that his earning capacity might be properly tested. He averred, further, that a certain period at least should elapse to enable him to accustom himself to his altered condition.

"(7) After hearing parties' agents on the minute and answers, I repelled the answers for the claimant as irrelevant, and terminated his compensation from the date of the medical referee's report, namely, 13th January 1911.

"(8) Against this decision the claimant appealed by stated case to the First Division of the Court of Session, when the following question of law was submitted for the opinion of the Court:—'In the circumstances above stated was I entitled to end the compensation payable to the appellant (now respondent)?'

"(9) On 17th June 1911 the Court issued the following interlocutor:

July 12, 1912. — ‘The Lords, having considered the stated case on appeal, and heard counsel for the parties, answer the question of law in the case in the negative *in hoc statu*; recall the determination of the Sheriff-substitute as arbitrator, and remit to him to allow parties a proof of their averments, and to proceed as accords.’ *

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Limited.

“(10) I thereupon appointed proof to be led on 21st July 1911, when the following facts were proved, viz.:—(a) That the claimant, since the date of the accident, had not worked underground, but that he had made various applications for work underground without success. (b) That it was impossible to say whether, if the claimant had returned to work underground in January 1911, he would have regained his former earning capacity by 21st July. (c) That there is no standard of earning capacity for one-eyed miners who are able to work at the face. Each individual must have a standard for himself. The power of the sound eye, the inherent capacity of the individual to adjust himself to altered conditions of work, and the degree of self-confidence which enables a miner to overcome a natural, perhaps nervous, timidity, which is engendered by a sense of augmented danger in his occupation, are all elements personal to the injured man, which affect his earning capacity when he returns to his former occupation. Some men, after the loss of an eye, are able to return to work at the face, and, after a time, to earn as much as formerly. Others are unable to adapt themselves to the new conditions, and to continue work underground. (d) That the claimant is presently working on the surface, and is only able, on account of his injuries, to earn 18s. a week. There was no evidence before me as to his earnings prior to the accident, except that they were more than £2 per week. (e) It was not proved that the claimant, if he had been working at the coal face, would have been earning more than he was earning on the pithead.

“I accordingly dismissed the appellants’ application for review.”

The question of law for the opinion of the Court was:—“Was I entitled to dismiss the application of the appellants?”

The case was heard before the First Division on 2nd March 1912.

Argued for the appellants;—Wage-earning capacity depended primarily on physical capacity,¹ and here the medical referee had found conclusively that the respondent was physically capable of returning to his ordinary work. The onus of meeting that finding, by proving that nevertheless the wage-earning capacity was diminished,² lay on the workman³; and he had failed to discharge it. The mere fact that he happened to be earning a certain sum, or that he had unsuccessfully applied for other employment, was not conclusive as to his earning capacity.⁴ For all that was stated in the case his want of success might be due to the state of the labour market. There was nothing in the facts found by the arbitrator to justify his holding, and accordingly the question should be answered in the negative.

* Reported 1911 S. C. 1029.

¹ Carlin v. Stephen & Sons, Limited, 1911 S. C. 901, Lord Salvesen, at p. 907.

² Rosie v. Mackay, 1910 S. C. 714.

³ M’Ghee v. Summerlee Iron Co., Limited, 1911 S. C. 870.

⁴ Clelland v. Singer Manufacturing Co., (1905) 7 F. 975; Boag v. Lochwood Collieries, Limited, 1910 S. C. 51; Cardiff Corporation v. Hall, [1911] 1 K. B. 1009.

Argued for the respondent;—There was no onus on the workman here to prove diminished wage-earning capacity, for there was no finding of fully restored physical capacity. The referee had only found him “as fit as any other one-eyed man”; and that implied “not as fit as a two-eyed man.” In any case the test was not physical capacity but wage-earning capacity,¹ and no evidence had been led to show what work the workman was capable of doing and had an opportunity of obtaining. On the facts found proved by the arbitrator he had ample justification for continuing the partial compensation.²

At advising on 12th July 1912,—

LORD PRESIDENT.—[After narrating the circumstances, and referring to the fact that their Lordships had, in the former appeal, remitted to the arbitrator to allow a proof]—Your Lordships did that, I take it, because you considered that the report of the medical referee did not disclose complete recovery from the accident. The case had disclosed that the man was a one-eyed man, and it did not disclose complete capacity for his old employment underground, because it did not say that he was fit to resume his old employment, but that he was as fit as any other one-eyed man to resume. The case had also disclosed that there was a good averment by the workman that his earning capacity was interfered with by his present condition, which present condition was attributable to the accident.

Now, upon that the learned Sheriff-substitute allowed a proof, and he sets forth the facts. The first fact that he sets forth is that the claimant, since the date of the accident, had not worked underground, but that he had made various applications for work underground without success. He then goes on to say that there is no standard of earning capacity of one-eyed miners, that some one-eyed men get on better than others, and then he finishes up with the following finding: “That the claimant is presently working on the surface, and is only able, on account of his injuries, to earn 18s. a week.” Upon that he dismissed the appellants’ application for review, that is to say, he continued the old compensation.

I think it is impossible to disturb that finding, because I think the Sheriff-substitute has found as a matter of fact that the claimant is only able, on account of his injuries, to earn 18s. a week. We had already held that the medical report, as it stood, was not conclusive in the circumstances of this case as to the man’s capacity to resume work; and I think the matter is ended when the proof which was taken on that judgment discloses facts upon which the Sheriff-substitute has arrived at the finding—a finding upon fact with which we have no right to interfere—that the applicant has not worked underground, that he has not been able to secure work underground, and that he is only able, on account of his injuries, to earn 18s. a week, which, of course, is much less than his old wages were.

¹ Ball v. William Hunt & Sons, Limited, [1911] 1 K. B. 1048, Fletcher Moulton, L.J., at p. 1054; Clelland v. Singer Manufacturing Co. 7 F. 975.

² Proctor & Sons v. Robinson, [1911] 1 K. B. 1004; Cardiff Corporation v. Hall, [1911] 1 K. B. 1009.

July 12, 1912. I am therefore for answering the question of law in the affirmative, and saying that the learned Sheriff-substitute was right.

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LORD KINNEAR.—I agree with your Lordship. The Court considered that the report of the medical referee was not exhaustive of the question put to him, because, although he had given a report as to the man's condition, the result to which he came was, not that the workman was fit for his former work, but that he was as fit as any one-eyed man to resume his work underground. He did not tell us whether every one-eyed man is as fit to work underground as the man with two eyes, and his finding as to the present workman's fitness left it a matter of doubt whether he was still as able to work after having lost his eye as he was before the accident. Accordingly your Lordships remitted to the Sheriff-substitute to proceed to take proof, and upon that the question for him was obviously a pure question of fact—it was to ascertain whether this man was as fit or was not as fit for his work as before, notwithstanding his having lost an eye.

Well, then, he makes an answer in fact which appears to me to establish two propositions—in the first place, that the claimant has been working on the surface and has not been able to work underground because he has not been able to obtain work. He has made various applications for work underground without success. And, secondly, it establishes that, on account of his injuries, he can only earn 18s. a week, that is, by working on the surface.

The Sheriff-substitute also gives a finding with reference to the general question raised by the medical referee's report as to the ability of one-eyed men to work, and that shows that he had considered whether as matter of experience it had been found that a man who had lost his eye was as good for work underground as if he had two eyes, and the conclusion is that some men are able to work at the face although they are labouring under that misfortune and others are not. But that only shows that the arbitrator has fairly considered all the questions, and, as the result of his considerations, has reached a decision on the question of fact, which I do not think your Lordships can disturb.

I therefore agree that the question should be answered as your Lordship proposes, and that the Sheriff-substitute's decision is final.

LORD JOHNSTON.—I have great difficulty in this case owing to the way in which the learned Sheriff-substitute has stated the result of the proof before him, but as your Lordships are satisfied, I do not think it necessary or desirable that I should criticise further these statements. I agree in the judgment your Lordship proposes.

LORD MACKENZIE.—I agree with your Lordships. It was argued to us that the facts stated as proved did not conclusively show that the inability to get work was due to the injury, and that was based on a criticism of subhead (a), in which the Sheriff-substitute says "that the claimant, since the date of the accident, had not worked underground, but that he had made various applications for work underground without success." It was contended that that did not exclude the idea that his want of success in getting employment was due to the conditions of the labour market.

Then subhead (d) was criticised, of which the first clause was "that the July 12, 1912. claimant is presently working on the surface," and it was said that that might, taken along with subhead (a) be consistent with this view that the reason he was working on the surface was that he was unable to get work underground in consequence of the conditions of the labour market. But then I think it is impossible to construe the findings as a whole upon that view, because the arbitrator goes on to find, in express terms, that the workman is only able to earn, on account of his injuries, 18s. a week. I think that excludes altogether any idea of not finding employment because there was no work to be got, and affirms that the workman's incapacity to earn wages is solely because of his maimed condition. The result is that the Sheriff-substitute finds that whereas his earnings prior to the accident were more than £2 per week, his earning capacity had been so reduced by the injuries he had sustained that his wages now were only 18s. a week.

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kenzie.

On that statement I have come to the conclusion that the Sheriff-substitute was right.

THE COURT answered the question of law in the affirmative, and dismissed the appeal.

D. R. TULLO, S.S.C.—W. & J. BURNES, W.S.—Agents.

JOHN GRAY, Appellant.—*Moncrieff, K.C.—Keith.*

No. 175.

SHOTTS IRON COMPANY, LIMITED, Respondents.—*Cooper, K.C.—Strain.*

July 12, 1912.

Workmen's Compensation Act, 1906 (6 Edw. VII. cap. 58), First Sched.

(1) (b), (3), and (15)—*Incapacity for work—Wage-earning capacity—Report by medical referee of fitness for work—Finality of medical referee's report—Competency of further inquiry into wage-earning capacity.*

Gray v.
Shotts Iron
Co., Limited.

By agreement between a coal miner, who had received an injury to his thumb and was receiving compensation, and his employers the question of the workman's capacity to resume his former employment was referred to a medical referee under paragraph 15 of the First Schedule to the Workmen's Compensation Act. The medical referee reported that the workman was "quite fit to resume his ordinary employment as a coal miner, having recovered from" the injury. The employers thereupon applied to have the compensation ended, when the workman lodged answers in which he averred that having returned to work he had ascertained "that his earning ability has been considerably reduced from the effects of his injury," and maintained that he was still entitled to partial compensation. The arbitrator having ended the compensation, the workman appealed and craved leave to lead evidence in support of his averments.

The Court *dismissed* the appeal, *holding* that, as the medical referee's report was final, and was from its terms conclusive as to the question raised by the workman's averments, proof of these averments was inadmissible.

Ball v. William Hunt & Sons, Limited, [1912] A. C. 496, *supra* (H. L.) footnote, p. 77, and *Duris v. Wilsons and Clyde Coal Company, Limited*, *supra* (H. L.) 74, [1912] A. C. 513, *distinguished*; and observed that where a medical referee's report is not from its terms conclusive a proof may be admissible.

Question whether a proof might not have been admissible if the workman had averred that, owing to the consequences of the accident, he had been unable to obtain employment.

July 12, 1912. **IN** an application under the Workmen's Compensation Act, 1906, for review of a weekly payment made to John Gray, coal miner, Shotts, by his employers, the Shotts Iron Company, Limited, the Sheriff-substitute at Airdrie (Glegg) ended the compensation and, at the request of the workman, stated a case for appeal.

Gray v.
Shotts Iron
Co., Limited.

1ST DIVISION.
Sheriff of
Lanarkshire.

The case set forth :—

“This is an arbitration under the Workmen's Compensation Act, 1906, arising out of a minute by the parties craving the Court under paragraph 15 of the First Schedule of said Act to refer the matter as to the pursuer's capacity for his former work as a miner to a medical referee appointed under said Act, including in such reference whether any incapacity from which the said John Gray may now suffer is due to the accident.

“On 15th January 1912 a reference was made to Dr James Barras, Govan, who had previously acted as medical referee between the parties under said Act. On 20th January 1912 the medical referee lodged his report, which is in the following terms :—‘In accordance with the reference made to me by the Sheriff-Clerk of the Sheriff Court at Airdrie upon the application of John Gray, 25 Tarbothie, Stane, Shotts, v. Shotts Iron Company, Calderhead Colliery, Shotts, I have on the 18th day of January 1912 examined the said John Gray, and I hereby certify as follows :—(1) The said John Gray is in good health and his condition is such that he is now quite fit to resume his ordinary employment as a coal miner, having recovered from an accident to his thumb on 17th March 1911, now ten months ago. I reported upon this same case three months ago. Dated this 18th day of January 1912.—James Barras, M.D., Medical Referee.’”

“On 25th January 1912, in view of the terms of said medical referee's report, the defenders lodged a minute” craving the Court to end the pursuer's compensation as at 18th January 1912.

“On 2nd February 1912, when the minute for defenders was called in Court, the pursuer lodged answers in the following terms, viz. :—‘The pursuer objects to the craving of the defenders' minute being granted, in respect that he has returned to work, and has ascertained thereat that his earning ability has been considerably reduced from the effects of his injury, notwithstanding the fact that he has, from a medical point of view, recovered therefrom. Pursuer is prepared to accept compensation at such reduced rate as his earnings justify, and has been willing to do so all along. Pursuer should be found entitled to expenses. Arthur H. Frame, Silverwells, Hamilton, pur.'s pror.’

“The case was heard before me on 9th February 1912, when, after hearing parties' procurators, I ended the pursuer's compensation as at 18th January 1912, and found the pursuer liable to the defenders in the sum of one guinea of expenses.”

The questions of law for the opinion of the Court were :—“(1) Does the said finding of the medical referee preclude the workman from leading evidence to show that, as a result of the accident, he has not recovered his former earning capacity? (2) In the circumstances stated should I have allowed the pursuer a proof of his averment that the said pursuer had not recovered his former earning capacity?”

The case was heard before the First Division on 29th May 1912.

Argued for the appellant ;—There was a distinction between physical capacity and wage-earning capacity. The medical referee's

report might be conclusive as to physical capacity, but if the workman relevantly averred, as he did here, that his wage-earning capacity had been diminished by his accident, he was entitled to a proof of that averment.¹

Gray v.
Shotts Iron
Co., Limited.

Argued for the respondents;—The pursuer's averments here were irrelevant, for they raised no point which was not covered by the medical referee's report, and that was conclusive as to the matters with which it dealt. The cases relied on by the pursuer were distinguishable. In *Duris*,² and also in *Rosie*,³ the referee's report was not conclusive, and the workman's averments related to matters not disposed of by the report. In *Ball*⁴ there was no referee's report, and the workman relevantly averred inability to obtain employment owing to an effect of the accident which was disclosed in the stated case. In *Ball*⁴ Lord Shaw quoted with approval the dictum of Lord Salvesen in *Carlin v. Stephen & Sons, Limited*,⁵ to the effect that the workman's claim must depend on something which unfits him for obtaining employment.

At advising on 12th July 1912,—

LORD PRESIDENT.—John Gray, coal miner, in the employment of the Shotts Iron Company, received an injury to his thumb. Ten months after, the employers and the said John Gray, not being at one as to his condition or fitness for employment, agreed, in terms of the fifteenth paragraph of the First Schedule to the Workmen's Compensation Act, 1906, to refer the matter to a medical referee. The medical referee examined John Gray, and issued a certificate as follows:—"The said John Gray is in good health, and his condition is such that he is now quite fit to resume his ordinary employment as a coal miner, having recovered from an accident to his thumb on 17th March 1911, now ten months ago. I reported upon this same case three months ago."

In view of that report the employers lodged a minute in which they craved that compensation be ended. To that minute the workman lodged an answer in which he said that he objected to the crave "of the defenders' minute being granted, in respect that he has returned to work, and has ascertained thereat that his earning ability has been considerably reduced from the effects of his injury, notwithstanding the fact that he has, from a medical point of view, recovered therefrom. Pursuer is prepared to accept compensation at such reduced rate as his earnings justify." Upon that the learned Sheriff-substitute as arbitrator ended the compensation; and the question that is asked us is whether he was right in ending the compensation or whether he should have allowed the workman a proof.

It was strenuously contended for the workman that we were bound to allow him a proof, and that upon the grounds that were laid down by the House of Lords in the cases of *Ball v. William Hunt & Sons, Limited*,⁴

¹ *Ball v. William Hunt & Sons, Limited*, [1912] A. C. 496, also reported *supra* (H. L.) footnote, p. 77; *Duris v. Wilsons and Clyde Coal Co., Limited*, *supra* (H. L.) 74, [1912] A. C. 513; *Rosie v. Mackay*, 1910 S. C. 714, Lord President, at p. 720.

² *Supra* (H. L.) 74, [1912] A. C. 513.

³ 1910 S. C. 714.

⁴ [1912] A. C. 496, *supra* (H. L.) footnote, p. 77.

⁵ 1911 S. C. 901, at p. 907.

July 12, 1912. and *Duris v. Wilsons and Clyde Coal Company*.¹ I am of opinion that in this case the learned Sheriff-substitute was right, and that no proof ought to have been allowed. I think the case is a complete contrast to the case we have just disposed of—*Arnott v. Fife Coal Company, Limited*,²—and that we are not in any way bound to allow a proof in spite of the cases quoted, which, of course, we should be bound to follow if we thought they ruled the matter.

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Ld. President.

It is better, perhaps, that I should first examine the cases in the House of Lords. In the first case—which was an English case, the case of *Ball*³—the man had met with an accident a great many years ago by which he lost the sight of an eye. But then the condition of that eye was such that the ordinary beholder would not, by looking at the man, come to the conclusion that the man was blind in one eye, though in fact he was. And the consequence was that, inasmuch as he was perfectly able to do his work—which was that of an edge tool moulder—with one eye, and as no employer suspected him of having less than two sound eyes, he got as much wages as anybody else. But then he had another accident to the blind eye, and the result of this second accident did not, of course, make any difference in his sight, because the eye was blind already, but the eye had to be removed, and, consequently, anyone could see that he was a one-eyed man. Under those conditions he applied for compensation, because, he said, “the result of my accident has been to injure my earning capacity.” Now, the decision which the House of Lords had to review in that case was a decision to the effect that, inasmuch as the particular accident had not altered the physical capacity of the man, because he was a one-eyed man before the accident and he was an efficient one-eyed man after the accident, therefore there could be no compensation. The House of Lords reversed that decision, because they said that if the accident was the cause of a diminution of wage-earning capacity, whether that diminution was due to what may be called direct physical deterioration or not, he was entitled to compensation. That comes out perfectly clearly from what the Lord Chancellor said. In the ordinary and popular meaning which he attached to the language of the statute he thought there was incapacity for work “when a man has a physical defect which makes his labour unsaleable in any market reasonably accessible to him, and there is partial incapacity for work when such a defect makes his labour saleable for less than it would otherwise fetch.” And Lord Shaw of Dunfermline said:—“It is necessary to keep clearly in view in such cases the distinction between inability to obtain work arising as the result of the injured or disfigured condition of the workman and inability to obtain work arising from the state of the labour market. It does not appear to me to be any part of the scheme of the statute to make the employer responsible for a non-employment which is owing to general economic causes.” But he considered in the other case that where inability to obtain work was the result of injured and disfigured condition, then compensation might be awarded. And accordingly what their Lordships did there was to remit the case for proof to see whether the

¹ *Supra* (H. L.) 74, [1912] A. C. 513.

² *Supra*, p. 1262.

³ [1912] A. C. 496, *supra* (H. L.) footnote, p. 77.

man's averment could be substantiated—that now, as an obviously one-eyed man, he had a less earning capacity in the market than he had before his accident.

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The other case was the case of *Duris v. Wilsons and Clyde Coal Company*.¹ That was a case in this Division of the Court where the merits were not considered, because, when the case came before your Lordships, it was admitted by counsel that it was ruled by the case in the Second Division of *Boag*,² and they stated that it had been brought here in order that it might be taken to the House of Lords. Accordingly this Division pronounced a formal judgment following the case of *Boag*³; so that what was being reviewed was not so much the case of *Duris*¹ itself as the decision in *Boag*.² The facts in *Duris*¹ were that a workman was injured, and after the injury he had been taken into employment by his old employers to do light work—not to do his own work—and was paid at a certain rate per week. After a time they discharged him, and then he asked an opportunity of proving that his applications for work had been unsuccessful, and that his want of success had been due, not to the state of the labour market, but to his incapacity and to the very limited type of work which was now within his powers. It was held in this Court that there was no case for review, because the workman did not aver any physical change in his condition. In the House of Lords that was held to be wrong, and the case was held to be covered by the case of *Ball*.³ The man in effect said:—"I am in an injured condition, and I offer to prove that the effect of my injury is that when I go into the market I cannot get the wages which I otherwise would."

Now, the present case is not a case like that of *Duris*,¹ where a change of circumstance is averred, and the question is whether there should be a proof allowed in order that there may be a review of the compensation because this is a case where there has been a reference to a medical referee. It is very important to see what the statute precisely says about these references to medical referees. There are references of more than one kind. This case is one dealt with in the first part of the First Schedule, paragraph 15, which, after providing for periodical examinations of an injured workman, goes on to say that, in the event of no agreement being come to between the employer and the workman as to the workman's condition or fitness for employment, the Registrar of a County Court, on application being made to the Court by both parties, may, on payment of a certain fee, refer the matter to a medical referee. Your Lordships will notice, first of all, that this reference can only be of consent. There is no possibility of forcing a workman to go to a referee; and if he does not consent then there must be a proof in the ordinary way. If he does consent, the Schedule goes on to say:—"The medical referee to whom the matter is so referred shall, in accordance with regulations made by the Secretary of State, give a certificate as to the condition of the workman and his fitness for employment, specifying, where necessary, the kind of employment for

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² *Boag v. Lochwood Collieries, Limited*, 1910 S. C. 51.

³ [1912] A. C. 496, *supra* (H. L.), footnote, p. 77.

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¹ *Supra* (H. L.) 74, [1912] A. C. 513.

² *Boag v. Lochwood Collieries, Limited*, 1910 S. C. 51.

³ [1912] A. C. 496, *supra* (H. L.), footnote, p. 77.

July 12, 1912. which he is fit, and that certificate shall be conclusive evidence as to the matters so certified." It is quite obvious that the view of the statute is that there is to be finality as to the matters referred. Of course, one must then take the report of the medical referee and see what it says. The case of *Arnott v. Fife Coal Company*,¹ which we have just decided, is a very good instance of a case in which the report of a medical referee is not entirely conclusive—does not end the matters but still leaves them open; because there the medical referee did not affirm the fitness of the man for the particular class of work which he had been engaged in before the accident, but only said he was as fit as any other one-eyed miner was fit, leaving us to discover what that fitness came to, and this could only be discovered in a proof. We accordingly directed proof to be led in that case. But here, what the medical referee says is that the man is in good health and quite fit to resume his employment as a coal miner, having recovered from the accident to his thumb. Now, that report, like everything else, must be read fairly and read in the light of common sense, and not read in any extravagant sense that the words might possibly bear. Read in the light of common sense it is perfectly plain that this medical man says that the man had an accident to his thumb, but that it is completely well and has no effect upon his condition at all, and that the accident is merely historical. If I thought that the real meaning of the report was anything else I should come to a different conclusion, but I am quite certain that that is the meaning of the report.

Now, if that is so, I ask what is left to be proved. The claimant does not say that he cannot get work, but he says that he has gone to work and he has ascertained thereat that his earning ability has been considerably reduced, notwithstanding the fact that he has, from a medical point of view, recovered therefrom. That, I think, is a perfect contradiction in terms. Supposing we allowed a proof, what would the pursuer prove? I suppose he would prove that, whereas his earnings before the accident had been so-and-so, he had, as a matter of fact, been paid rather less since the accident. Why is he paid less? I suppose that he would show that, whereas he filled so many hutches in a day before the accident, he filled rather fewer hutches since the accident, and therefore did not get so much. Why! There might be one very good reason why—a possible reason—viz., that he did not choose to work so hard. There is also the possible reason that he had not such a good thumb; but he cannot say he has not got such a good thumb because he has consented to referring the question of the condition of his thumb to somebody else whose pronouncement upon that matter is to be conclusive. As a practical matter, I ask whether, if we are bound to allow a proof here, it would not be simply opening the door wide to malingering? What possible evidence could the employers lead? If it is the fact that a man has not worked so hard, the employers could not contradict the fact that the man had not turned out so many hutches since the accident. They could get evidence, doubtless, of doctors to say, "We do not believe this man when he says that his thumb is weaker, because we can see it is as good as ever it was." But that would

¹ *Supra*, p. 1262.

be perfectly needless, because they have got the certificate of the medical July 12, 1912. referee, who, by the statute, is made final upon that matter, to say that that is so. Therefore it seems to me that it would be entirely wrong to allow the workman a proof of the fact that he is getting less wages, when the underlying reason for that fact would be a matter which it was entirely impossible to get at the real truth of, namely, whether his diminution in working capacity was due to his own laziness or not.

Not only must the report be read to ascertain what it really means to say, but it must also be remembered that there are accidents and accidents. If the accident is of the sort that occurred in *Ball's* case,¹ where the man is a one-eyed man, then there is a continuing injury even although the man, in one sense of the word, has recovered. The term "recovery" is, in a way, an ambiguous term. You may have recovered from an accident and yet you may not be exactly the same man as you were before. On the other hand, you may recover from an accident and you may be exactly the same man as you were before—the accident is merely historical. Now, wherever the accident is of such a character as to leave you after immediate recovery what we may call a different sort of man, there is always a question whether in the market your earning capacity is not different. Illustrations of these two cases are given in the House of Lords cases which I have just quoted. Another illustration was given in the case of *Rosie v. Mackay*,² where there is a sentence in the judgment which I humbly think is precisely in accordance—although it was our decision that was upset in *Duris*³—with what the House of Lords said. In *Rosie v. Mackay*² the principal question was the penny question; but, incidentally, I happened to say something about the accident there. That was a case of rupture. The man had completely recovered from the immediate effects of the rupture and he could work; but the rupture was there—it would never be cured. At any moment, either by carelessness in not wearing a truss or from some other cause, the rupture might become strangulated and give him very severe trouble; and what is more, if he had to answer to an employer as to his physical condition—if he had to confess himself a ruptured man and that he was now wearing a truss—the employer might say, "Well, I don't want you; I would sooner have a man perfectly sound who has not the chance of breaking down with rupture." And accordingly I said this: "The report of the medical referee on the agreed-on remit was conclusive as to the man's physical condition, and that condition was a condition of capacity to do what he had done before the accident. It was not, however, conclusive as to what has been conveniently called his wage-earning capacity, and, in my judgment, it would have been perfectly proper for the workman, had he so wished, to have tendered evidence to show that the wage-earning capacity of a ruptured man was less than the capacity he had before the accident; in other words, that he was not now worth so much in the labour market as he had been, and on that evidence the Sheriff might have come to a conclusion." Well, that was a good proposition in that case, but it is a bad proposition here, because the claimant does not

¹ [1912] A. C. 496, *supra* (H. L.) footnote, p. 77.

² 1910 S. C. 714.

³ *Supra* (H. L.) 74, [1912] A. C. 513.

July 12, 1912. and cannot aver that the fact that he had in the past an accident to his thumb was such as to incapacitate him in the labour market from getting employment that he otherwise would have got. He does not say there is any employer who, on seeing his thumb, would say, "No, I won't take you." All he says is, "I do not earn as much as I could and did before." If that is not due to his own idleness, it can only be due to his thumb not being as strong as it was ; but he is barred from saying that because he has excluded himself by taking a reference to another person who has conclusively, in terms of the statute, said his thumb is as good as it was before.

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Accordingly, I am of opinion that the judgment of the learned arbitrator here was right when he ended the compensation and refused further proof.

LORD KINNEAR.—I agree with your Lordship. I think that what was decided in the case of *Ball*¹ we may take, as your Lordship takes it, from the judgment of the Lord Chancellor. Now in that case it was alleged that the result of the second accident by which the man was obliged to submit to the entire removal of an eye was that his disfigurement prevented him from obtaining work ; and the ground of the decision stated by the Lord Chancellor is that his injury did not prevent him from being able to work, but it did reduce him to a physical condition which prevented him from getting work suitable in the circumstances. Of course, it remained for the workman to prove that the physical condition of which he complained was due to an injury caused by an accident. That is the assumption of the Lord Chancellor's judgment, and upon that assumption he says if the man, as a consequence of the accident, is reduced to a physical condition which prevents him from getting work, then his earning capacity is so far diminished.

The question, therefore, seems to me, in the application of this case, to be whether we can find that this workman is entitled to prove that his physical condition consequent upon the accident prevents him from getting work. I think the conclusive answer to that is the answer your Lordship has given—that he himself agreed to submit that question to a referee whose deliverance upon it is final and conclusive in terms of the statute. The question to be referred to the referee, according to the terms of the statute, is as to the workman's condition and fitness for employment, specifying where necessary the kind of work, or whether he is unfit for work. To that the referee says he is now quite fit to resume his ordinary employment as a coal miner. I do not think we can allow that question to be reopened without going directly against the provision that the referee's decision is to be final. The advantage to both workman and employer of this form of procedure is obvious. But at all events when people agree that a question between them shall be settled by the final decision of a referee, they must be bound by his decision when it is given. I quite agree that, if the workman could have said, "Notwithstanding my fitness, the condition to which I have been reduced by the accident is such that people will not give me employment," that would, no doubt, be a good case for inquiry.

¹ [1912] A. C. 496, *supra* (H. L.) footnote, p. 77.

But he does not say so. I cannot read his statement as meaning that July 12, 1912. in fact he is not able to obtain work. He says he has obtained work. ^{Gray v.} All he says about it is that he has not been able to earn as much, which, ^{Shotts Iron} I presume, means that he is not able to do as much work since the accident ^{Co., Limited.} as before it. That would have been a very material point for him to Lord Kinnear. prove if the question had been still open, but that is just the question which he agreed to submit to the medical referee, and upon which the medical referee's judgment is final.

I am therefore unable to see any ground for differing from the Sheriff-substitute.

LORD JOHNSTON.—The real question in this case is, What is the effect and value of the answer of the medical referee on the points which the schedule provides may be put to him? Upon that point I concur in the judgment of your Lordships, and I would not venture to add anything but that I desire to state my view of the relation of this question to certain decisions in the House of Lords.

The peculiarity of the situation created by these decisions is this: that one of them proceeds in a case where there was no reference to a medical referee: the other proceeds in a case where there was such a reference; and yet they are treated by the House of Lords as if they raised the same question. In the case of *Ball*,¹ which is the leading case of the two, there had been no reference. Equally in the case of *Boag*,² decided in the other Division, which was commented on in *Ball's* case,¹ there had been no reference; and therefore the case of *Ball*¹ may be taken as an implied reversal of the case of *Boag*.² On the other hand, in the case of *Duris*³ there had been a reference; and yet the same law and the same reasoning was applied to the case of *Duris*³ as to the case of *Ball*.¹ Therefore one is led to ask how that is to be reconciled. It appears to me that it can only be reconciled in this way, viz., by noting that the medical referee's answer to the reference may be absolute, or it may be qualified; and that where it is qualified, as it certainly was in the case of *Duris*,³ there is left practically the same situation as if there had been no reference at all. But where, as here, the reply of the medical referee is absolute, the case is different. And there would be no value whatever in the finality clause if the workman was to be entitled, not to explain away a qualification, but to meet by a direct counter the absolute finding of the medical referee.

For these reasons I think that this case raises a totally different question from that which was before the House of Lords in the cases of *Ball*¹ and of *Duris*,³ and that it is open to us to consider it as such.

LORD MACKENZIE.—I am of the same opinion. The difficulty in the case is as to the construction of the report by the medical referee and what effect is to be given to it. The argument on behalf of the workman was that that report was conclusive so far as regarded the medical aspect of the case, but that there remains over another and further question, with which

¹ [1912] A. C. 496, *supra* (H. L.) footnote, p. 77.

² 1910 S. C. 51.

³ *Supra* (H. L.) 74, [1912] A. C. 513.

July 12, 1912. the medical referee could not deal, namely this, whether the man's earning capacity after the accident was as great as it was before. Now, it appears to me that that is not a fair way to deal with the report of the medical referee. I think the effect to be given to the report is that it certifies that the man had recovered his fitness for his work.

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Lord Mac-
kenzie.

If there had been in this case any averment on the part of the workman that, notwithstanding the facts being as set out by the medical referee, yet he was left, as the result of the accident, with a misshapen thumb or with some visible external injury which handicapped him, when he went into the labour market, from getting employment on equal terms with his competitors, then that would have raised a different question. But there is no suggestion in this case of anything of that kind. Accordingly, once the report of the medical referee is construed in the way I have indicated, the rest follows as has been said by your Lordship in the chair, and I agree with what your Lordship has said.

THE COURT answered the first question of law in the affirmative and the second question in the negative, and dismissed the appeal.

SIMPSON & MARWICK, W.S.—W. & J. BURNES, W.S.—Agents.

No. 176.

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Wilson.

WILLIAM ROBERTSON, Pursuer.—*G. Watt, K.C.—Lippe.*
JAMES WATT WILSON, Defender.—*Chree, K.C.—A. R. Brown.*

Reparation—Negligence—Collision of vehicles—Side road entering main road—Duties of drivers on side road and main road respectively.

While it is the duty of vehicles approaching a main road from a side road to give way to vehicles on the main road, this rule does not absolve vehicles on the main road from the duty of approaching the entrance to the side road with caution.

Macandrew v. Tillard, 1909 S. C. 78, commented on and explained.

1ST DIVISION. WILLIAM ROBERTSON, M.D., Scone, brought an action against J. W. Lord Dewar. Wilson, Perth, concluding for £500 as damages in respect of injuries received by him in a collision between his motor cycle and the defender's motor car.

The case was tried before Lord Dewar, with a jury, on 19th January 1912. The facts of the case are stated in the following passage from the opinion of the Lord President:—"The facts are briefly these. A motor car was proceeding from Perth to Coupar-Angus along the main road. At a certain point on the road a side road, known as Crossford Road, enters the main road on the right hand side at an angle of about 60 degrees. Consequently a person coming from Crossford Road and proceeding to Perth enters the main road at an acutely re-entrant angle. In front of the motor car was a cart which was going in the same direction as the car. At the time the accident happened the motor car had assumed such a position—I suppose with the intention of getting past the cart—as placed it, i.e. the car, considerably to the right of the *medium filum* of the road, and in fact very near the verge. At that moment a motor cyclist emerged from the cross road on his way to Perth, and a collision followed. In

respect of the injury which he thereby sustained the motor cyclist has July 12, 1912. brought the present action against the owner of the car."

Lord Dewar, in his charge, *inter alia* directed the jury:—"That it was the duty of the pursuer, before he emerged from the side road, to look out for and, if necessary, give way to all traffic on the main road; but there was also a duty on those using the main road to take all reasonable care of traffic coming from the side road." Counsel for the defender thereupon excepted to the portion of this ruling beginning with the word "but." Counsel for the defender further asked his Lordship to direct the jury "that if the jury are satisfied that the pursuer entered the main road from Crossford Road at a period when a collision with the defender's motor car was inevitable, the collision was caused by the fault of the pursuer, who cannot recover damages." Lord Dewar refused to give this direction, whereupon counsel for the defender excepted to this refusal.

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The jury returned a verdict for the pursuer.

The defender presented a bill of exceptions, and, on 5th March 1912, moved for and obtained a rule on the pursuer to show cause why a new trial should not be granted on the ground that the verdict was contrary to the evidence, in respect that the pursuer had been guilty of contributory negligence.

On 12th July 1912 counsel were heard before the First Division (with Lord Dewar) on the bill and on the rule.

Argued for the pursuer;—(1) The direction to the jury was correct. The rule laid down in *Macandrew v. Tillard*¹ did not relieve the user of the main road of all duty with regard to traffic approaching by a side road. (2) The question raised in the case was a simple question of fact, and the decision of the jury could not, therefore, easily be set aside. Whether there was contributory negligence on the part of the pursuer depended upon the circumstances of the case²; and the jury were well qualified to decide this point also.

Argued for the defender;—(1) The direction to the jury was inconsistent with the Lord President's statement in *Macandrew v. Tillard*¹ "that where there is any possibility at all of collision it is the business of the person on the side road to give way to the person on the main road," and that the driver of a vehicle on the side road was bound to have it under control in readiness for whatever state of affairs he might find on the main road. The Lord Ordinary was wrong, therefore, in the second branch of the direction which he gave, and he should also have charged the jury in terms of the direction which he had refused to give. (2) The verdict was wrong, as the evidence disclosed contributory negligence on the part of the pursuer, especially in the speed at which he approached the main road.

LORD PRESIDENT.—[After the statement of facts quoted *supra*].—In order to recover damages the pursuer has to show two things—first, that there was fault on the part of the driver of the car; and second, that there was no contributory negligence on his own part, the onus as to this latter question, however, being upon the other side if he has established the first proposition. In the course of his charge to the jury Lord Dewar gave the following direction: "That it was the duty of the pursuer before he

¹ 1909 S. C. 78.

² *Campbell v. Train*, 1910 S. C. 556.

July 12, 1912. emerged from the side road to look out for and, if necessary, give way to
Robertson v. all traffic on the main road, but"—and here follow the words which give
Wilson. rise to the first exception—"there was also a duty on those using the main
road to take all reasonable care of traffic coming from the side road." Now,
Ld. President. it is clear that if this exception is valid it must be because the proposition
which begins with the word "but" is unsound. It is impossible to say
that it is so. In support of his argument counsel for the defender cited
the case of *Macandrew v. Tillard*,¹ and especially certain words which I
there used, namely, "that where there is any possibility at all of collision
it is the business of the person on the side road to give way to the person
on the main road." Now, I think no one can read my remarks in that
case, and also those of Lord Mackenzie, without seeing that that case does
not support the defender's contention, for what I pointed out in that case
is this, that while there is a duty on those using the main road towards the
traffic on the side road, there is a greater duty on the part of those coming
from the side road with regard to traffic on the main road. That case,
therefore, in no way supports this exception, for it must be assumed that
the Lord Ordinary said all that was necessary regarding the higher duty
incumbent on those using the side road.

The second exception is as follows:—"Counsel for the defender further
asked the Lord Ordinary to direct the jury 'that if the jury are satisfied
that the pursuer entered the main road from Crossford Road at a period
when a collision with the defender's motor car was inevitable, the collision
was caused by the fault of the pursuer, who cannot recover damages.'" To
have given a direction in such terms would, I think, simply have been to
mislead the jury. The proposition is expressed in a way which is not only
confusing, but is not even a correct use of English, for one cannot conceive
of the pursuer entering the main road in the knowledge that a collision was
inevitable—it was only upon entering that he became aware that a collision
must ensue. The underlying idea of the sentence, however, is clear enough,
viz., that the defender's counsel wanted the Lord Ordinary to tell the jury
what, we must assume, he had already told them—that where two persons
are approaching each other, one on the side road and the other on the main
road, and if owing to the direction they are taking—be it with due care on
the part of each—they would be bound to meet, it is the person coming
from the side road who must give way and not the other. So much for
the bill of exceptions.

With regard to the motion for a new trial, there is no doubt that the
motor car was on the right-hand side of the *medium filum* of the road—
probably with the intention of getting past the cart—when the collision
occurred. But it was for the jury to say whether the driver of the car was
in fault in choosing the debouchment of a side road for executing such a
manœuvre. It was also for the jury to consider whether the pursuer was
or was not guilty of such contributory negligence as to disentitle him to
succeed. I do not, of course, mean that there must necessarily be the same
degree of contributory negligence as was present in the case of *Watson v.*
North British Railway Company,² for the degree of caution required must

¹ 1909 S. C. 78.

² (1904) 7 F. 220.

vary with the circumstances of each case. In that connection I would specially refer to what was said by Lord Low in the case of *Campbell v. Robertson v. Train*,¹ where his Lordship pointed out that what was reasonable care depended very much upon circumstances. Whether the pursuer emerged from Crossford Road with reasonable care and caution, or whether he did so recklessly, was a question of fact for the jury, and they were quite entitled to find, as they did, that on his part there was no contributory negligence.

I am therefore of opinion that the bill of exceptions should be repelled, and the motion for a new trial refused.

LORD KINNEAR.—I agree with your Lordship on both points. As regards the bill of exceptions, I have only to add that I should have thought the first exception could not be sustained even if that part of the sentence to which it is taken were open to challenge, which I do not consider it to be. If the exception were good the proper direction to the jury would have been that it was the duty of the pursuer to look out for, and give way to, all traffic on the main road, and that there was no corresponding duty of care laid on the defender—for the exception is taken solely to the second branch of the direction quoted in the bill. Now I think if the case had been left to the jury on a statement of the pursuer's duty only and without reference to the defender's duty, the jury would have been misled, not because the law so laid down taken by itself would have been wrong, but because it would have been incomplete—it would be a misstatement of the rule stated by the Lord President in the case of *Macandrew v. Tillard*.² That rule is that it is the business of those who are on the cross road and going to cross the main road to look out when they enter the main road and to give way to traffic which is coming along the main road, but at the same time that it is certainly the business of persons driving on the main road to approach a crossing with caution. The direction to which exception is taken is entirely in accordance with the law so laid down. The rule laid down in that case applies to the drivers on both roads, and a duty of caution is imposed on the driver on the main road as well as upon the driver on the side road. As regards the second exception, I have no doubt that the direction asked for was properly refused.

On the question of the rule both questions contained in the issue, namely, that of the defender's fault and that of the pursuer's contributory fault, are questions of fact for the jury to decide, and there was ample evidence to justify the verdict if the jury were of that opinion.

LORD JOHNSTON.—I agree with your Lordships. In this case not only was there ample evidence to entitle the jury to arrive at their verdict, but I think that it was a sound verdict. I should have said no more but that I think this case is a valuable corollary to that of *Macandrew*.¹ In that case when one person was driving along a main road and the other was approaching by a side road, it was held that it was the duty of the latter to give way. That does not mean that the person driving along the main

¹ 1910 S. C. 556.

² 1909 S. C. 78.

July 12, 1912. road is relieved of all duty to the other. On the contrary he also must
Robertson v. attend to the safety of the other, although he is entitled to expect that the
Wilson. person coming in from the side road will give way. That, however, only
Ld. Johnston. applies when there is no other traffic. It assumes that the person on the
main road is keeping to his own side so as to leave space for other traffic.
This distinguishes the present case from that of *Macandrew*,¹ where there
was no other traffic. In the present case there was a cart going along the
main road in the same direction as the defender; and it was on that account
that the defender failed to take proper care for the safety of the pursuer by
choosing his opportunity to pass the cart just when the cart was passing
the end of the side road. There is a passage in Mr Rollo's * evidence
which is practically decisive of the case. He says that the car was travel-
ling at sixteen miles an hour, and was so near to the cart that it could not
have stopped behind it. "We were almost on the cart at the time of the
collision. Evidently the horse when it heard the noise had made a jump,
and our chauffeur had to get past to keep clear, and after we passed he
came in front of the cart for a short distance. I shouted to the driver, and
it was on my instruction that he passed the cart and stopped where he did.
He was just going to stop when I said, 'Go on.' The car was going at
such a speed that it could easily have been stopped in a short distance. I
should think it was going at somewhere between sixteen and seventeen
miles an hour." He also says: "I remember him (the driver of the cart)
saying that his horse was very nearly into us. I said, 'Yes; if we had
not gone on a little bit he would have been.' That referred to the instruc-
tion I had given to the chauffeur to go on."

The result is to show that the motor car was on the point of passing the
cart at such a speed and so driven as to imply fault on the part of the
driver and his master as responsible for him. This narrative of the occur-
rence reveals a state of matters which fully justifies the verdict.

LORD MACKENZIE.—I agree with your Lordship in the chair.

LORD DEWAR.—I also agree.

THE COURT discharged the rule; disallowed the bill of excep-
tions; refused to grant a new trial; and of consent applied
the verdict.

P. MACLAGAN MORRISON, Solicitor—AITKEN & METHVEN, W.S.—Agents.

¹ 1909 S. C. 78.

* A witness for the defence who was in the motor car with the defender
on the occasion of the collision.

THE COUNTY COUNCIL OF THE COUNTY OF STIRLING AND OTHERS, No. 177.
Pursuers (Reclaimers).—*Constable, K.C.—D. P. Fleming.*

THE PROVOST, MAGISTRATES, AND COUNCILLORS OF THE BURGH OF FALKIRK, Defenders (Respondents).—*D.-F. Dickson—Hon. W. Watson.* July 12, 1912.
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Title to Sue—Ratepayer—Burgh—Rates and assessments—Declarator at instance of individual ratepayers that assessments by magistrates illegal.

The magistrates of a burgh, in fixing the burgh general assessment for the year, included in their estimate a sum for defraying a portion of the expenses incurred by them in the unsuccessful promotion of a provisional order for the extension of the burgh boundaries. The remainder of the expenses they proposed to defray out of the assessments for the following years.

Held that certain individual ratepayers, who had paid their assessments for the year, had a good title to bring an action against the magistrates for declarator that the defenders had no right to levy or exact rates from the pursuers for the purpose of paying these expenses.

Ewing v. Glasgow Commissioners of Police, (1837) 15 S. 389, (1839) M'L. & Rob. App. 847, *distinguished*.

Burgh—Powers of magistrates—Rates and assessments—Right of magistrates to levy rates to pay expenses of provisional order.

Held that the magistrates of a burgh had no right at common law or under statute to levy rates in the burgh to be applied towards the payment of expenses incurred by them in the unsuccessful promotion of a provisional order for, *inter alia*, the extension of the burgh boundaries.

ON 14th January 1912 the County Council of the county of Stirling, the Carron Company, William Forbes of Callendar, and others, owners of property and ratepayers within the burgh of Falkirk, brought an action against the Provost, Magistrates, and Councillors of the burgh of Falkirk, in which they craved the Court, *in the first place*, to declare "that the defenders have no power, and are not entitled under the Burgh Police (Scotland) Acts, 1892 to 1903, the Town-Councils (Scotland) Acts, 1900 and 1903, or any other statutes, or at common law, to levy or exact any rates from the pursuers or other ratepayers in the burgh of Falkirk to be applied, directly or indirectly, in or towards payment, in whole or in part, of any expenses incurred by the defenders in the promotion of or in connection with an application made by them in the session of 1911 to the Secretary for Scotland under the Private Legislation Procedure (Scotland) Act, 1899, for a provisional order to extend the boundaries of the said burgh, to dissolve the Falkirk and Larbert Water Trustees, and transfer the powers and undertaking of the said trustees to the defenders, and for other purposes, or to apply any part of the rates levied or collected, or which may be levied and collected by them under the authority of the foresaid statutes during the assessment year 1911-1912, or in any future year, directly or indirectly, in or towards payment, in whole or in part, of the aforesaid expenses"; and *in the second place*, to interdict them "from levying or exacting from the pursuers or other ratepayers in the said burgh any rates under the said Burgh Police (Scotland) Acts, 1892 to 1903, or the Town-Councils (Scotland) Acts, 1900 and 1903, or otherwise, to be applied, directly or indirectly, in or towards payment, in whole or in part, of the fore-

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said expenses, and from applying any part of the rates levied or collected, or which may be levied and collected by them under the authority of the said last-mentioned statutes, or otherwise, during the assessment year 1911-12, or in any future year, directly or indirectly in or towards payment, in whole or in part, of the aforesaid expenses."

There were also conclusions in the summons relating to assessments levied under the Falkirk Corporation Gas Acts, which were not ultimately insisted in and with which this report is not concerned.

The facts out of which the action arose were as follows:—

In 1911 the Magistrates of Falkirk made an unsuccessful application for a provisional order for the extension of the boundaries of the burgh and the dissolution of the Falkirk and Larbert Water Trust, and its transference to the Magistrates of Falkirk. The expenses incurred by them amounted to over £4000, which they paid to the parties entitled thereto by a draft on the general bank account of the burgh. In September they resolved to raise the amount of these expenses out of the general rates levied by them under their statutory powers on the owners and occupiers of property within the burgh, their intention being to spread the burden over the rates of the next few years. Accordingly the assessment of rates for the year 1911-1912 included a sum which was to be devoted to this purpose. A portion of these rates was collected prior to the raising of the present action on 14th January 1912, and the remainder subsequently to that date. The pursuers in the present action all paid their assessments timeously, with, in one case, a special reservation of a right to recover.

The pursuers pleaded, *inter alia*;—(1) The defenders having no power to levy any burgh assessments or to apply the proceeds of any burgh assessments for the purpose of defraying the expenses of promoting the said provisional order, the pursuers are entitled to decree in terms of the . . . first conclusion of the summons. (3) The proposed application by the defenders of the burgh assessments levied by them . . . in or towards payment of the said expenses being *ultra vires* and illegal, the pursuers are entitled to interdict in terms of the second conclusion of the summons.

The defenders pleaded, *inter alia*;—(1) The pursuers having no title to sue the present action, the action should be dismissed. (2) The action is incompetent. (5) The actings of the defenders complained of being legal and *intra vires*, the defenders should be assoilzied.

On 10th April 1912 the Lord Ordinary (Cullen) sustained the first plea in law for the defenders, and dismissed the action.*

* "OPINION.—In 1911 the defenders, who are the Provost, Magistrates, and Town-Council of the royal burgh of Falkirk, made application to the Secretary for Scotland under the Private Legislation Procedure (Scotland) Act, 1899, for a provisional order, the objects of which were to obtain a large extension of the boundaries of the burgh and to transfer to the defenders the powers and undertaking of the Falkirk and Larbert Water Trust. The application was opposed, and, after inquiry, was thrown out. The expenses incurred by the defenders exceeded £4000.

"The question on the merits intended to be raised in this action is whether it is lawful for the defenders to provide the amount of these expenses out of the burgh general assessment. The pursuers are owners of property and ratepayers within the burgh for the year 1911-12. They conclude (first) for declarator that the defenders have no power under their statutes or at common law 'to levy or exact rates from the pursuers or

The pursuers reclaimed, and the case was heard before the First July 12, 1912. Division on 11th, 12th, and 18th June 1912.

Argued for the reclaimers;—*On the question of Title.*—The pursuers had a good title to sue. The Lord Ordinary had come to the conclusion that they had not, because of the decision in *Ewing v. Glasgow Police Commissioners*.¹ The soundness of that decision had in some respects been doubted,² but, in any event, the circumstances of that case were quite different from the present. In that case the pursuers were not vindicating their own individual patrimonial interests, but, in an *actio popularis*, were attacking the magistrates for malversation. Here, on the other hand, each of the pursuers had a patrimonial interest to vindicate. Each had paid the rates for the current year, and each would have to pay rates in the years immediately to come. The right of individual ratepayers to sue actions as to matters in which they, along with the rest of the community in which they

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"Two questions have been argued: (1) Whether the pursuers have a sufficient title to insist in a declarator in such terms as they ask; and (2) on the merits, whether the defenders have power under the burgh statutes or at common law to provide the amount of the said expenses out of the burgh general assessment.

"As regards the first of these questions, it will be observed that the pursuers' declarator is not limited to such interest as they individually may have in the matter, and is not designed merely for the protection of themselves and their own properties from the exaction of an alleged illegal assessment. It extends to the interest of the whole ratepayers of the burgh. Further, it is not limited to the year 1911-12, *quoad* which the pursuers are within the body of burgh ratepayers, but extends to future years during which they may not be ratepayers. As regards the year 1911-12, the position is that the pursuers have paid the amounts of the assessment levied on them. No question of repetition is involved, so as to give the pursuers any direct and immediate patrimonial interest in the result of the suit. The assessment for 1911-12 was *ex facie* imposed and levied in a regular manner. The defenders have collected the amount of it. And the money so levied being thus in the coffers of the burgh, the question, so far, relates to an apprehended application of part of it to purposes which the pursuers allege are not in accordance with a due administration of the affairs of the burgh. As no question of repetition is involved, the effect of a decree decisive of the legality or illegality of an application by the defenders of part of the 1911-12 assessment towards particular objects will not directly benefit the pursuers. The money in question, if it cannot legally be applied to these objects, will remain in the hands of

¹ (1837) 15 S. 389, *aff.* (1839) M'L. & Rob. App. 847.

² *Conn v. Corporation of Renfrew*, (1906) 8 F. 905, Lord Kyllachy, at p. 911.

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lived, were interested had often been recognised,¹ even where such actions were at the instance of a single individual.² The defenders further challenged the form of action adopted by the pursuers, contending that the only competent form of action was suspension. This contention was entirely without foundation. It might be that, where the wrong complained of was a thing of the past, suspension would be the appropriate action,³ but where, as here, the wrong was an existing one, which was certain to be repeated in the future, an action of declarator with, if desired, a conclusion for interdict was the recognised remedy,⁴ even if the illegal act was merely threatened.⁵ It was, moreover, absurd to contend that the situation was in any way affected by the fact that the creditors had already been paid by drafts on the bank account of the burgh; and the suggestion that the proper defenders to the action would have been the persons who drew these cheques was also obviously untenable, if it was borne in mind that

the defenders as part of the fruits of an assessment regularly imposed and paid. And therefore the pursuers will not in any way obtain any patrimonial benefit. The result, on this view, might be to diminish the defenders' estimates and lighten the amount of the burgh assessment for a future year. But it is impossible to say that this will benefit the pursuers. For they may not continue to be ratepayers within the burgh.

"Such being the conditions under which the pursuers' proposed declarator falls to be considered, it appears to me that, as the defenders contend, the principle of the decision in the case of *Ewing v. Glasgow Commissioners of Police* (15 Shaw 389, Maclean & Robinson's App. 847) applies; and that the pursuers have not set forth such 'a direct or immediate interest in the result' as to sustain their title to insist in the action. The pursuers might have brought a suspension of the assessment so far as sought to be levied from them respectively, as was done in the recent case of the *Leith Dock Commissioners v. Magistrates of Leith* (25 R. 126, 1 F. (H. L.) 65). The burgh Acts further provide them with the remedy of comparing at the audit of the burgh accounts. I am aware that in more than one case it has been said that an action of declarator is a form of remedy competent to a ratepayer. But it is not any declarator that is so competent. And, as the conclusions of the present summons stand, and no amendment has been proposed, it appears to me that it would be inconsistent with the case of *Ewing* to give effect to them.

"I am accordingly of opinion that the defenders' first plea in law falls to be sustained.

"As, however, the question on the merits was very fully argued, and as it is one of some general importance, I think it right that I should express my view upon it. I am of opinion that the defenders are not empowered by the burgh statutes or by common law to assess for the expenses of their unsuccessful attempt to extend the area of the burgh and, incidentally thereto, to obtain a transfer to themselves of the undertaking of Falkirk and

¹ *Cowan and Mackenzie v. Law, &c.*, (1872) 10 Macph. 578; *Wakefield v. Commissioners of Supply of Renfrew*, (1878) 6 R. 259; *Blackie, &c., v. Magistrates of Edinburgh*, (1884) 11 R. 783, (1886) 13 R. (H. L.) 78.

² *Grahame v. Magistrates of Kirkcaldy*, (1882) 9 R. (H. L.) 91.

³ *Leith Dock Commissioners v. Magistrates of Leith*, (1897) 25 R. 126, (1899) 1 F. (H. L.) 65.

⁴ *Mackay's Manual of Practice*, pp. 139 and 375; *British Fisheries Society v. Magistrates of Wick*, (1872) 10 Macph. 426; *Hedde v. Magistrates of Leith*, (1897) 24 R. 662.

⁵ *Edinburgh and Glasgow Railway Co. v. Meek*, (1849) 12 D. 153, at p. 158; *Scottish North-Eastern Railway v. Gardiner*, (1864) 2 Macph. 537.

one of the objects of the action was the protection of the pursuers in July 12, 1912. the future, and that the only persons who had the right of imposing rates, and against whose actings accordingly protection was required, were the Magistrates. If there was any doubt as to the competency of the action *quoad* the interests of the other ratepayers, the pursuers would not press for inclusion in the declarator of the words "or other ratepayers in the burgh of Falkirk," or of the concluding words "or to apply any part of the rates," &c. *On the Merits.*—The Magistrates were not entitled to assess for these expenses. They were only entitled to use their statutory powers of assessment to provide funds for carrying out the administrative purposes of the statutes which authorised these assessments.¹ Among these purposes the promotion of a provisional order for the extension of burgh boundaries was not included. It was not included in the Burgh Police (Scotland) Acts of 1892² or 1903,³ nor the Town-Councils

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Larbert Water Trust. So far as the statutes are concerned, it appears to me that the principles laid down in the well-known case of *Cowan v. Law*, 10 Macph. 578, apply. The defenders are only entitled to use their statutory powers of assessment to provide funds for carrying out the administrative purposes of the statutes which authorise these assessments. Under the Burgh Police Act of 1892, the extension of a burgh is, to a defined extent, included within the sphere of burgh administration. It is so, however, only under certain statutory conditions. Further, the method of procedure to be followed—an application to the Sheriff of the county—is prescribed. Now the defenders' proceedings in connection with the proposed extension of the burgh were quite outwith these provisions of the statute and, therefore, not sanctioned by it as being within its administrative purposes. The defenders, however, appeal to sections 45 and 46 of the Act of 1892. These relate to certain kinds of special powers, outwith the normal powers of administration conferred by the Act, and provide procedure for obtaining them by way of an application to the Secretary for Scotland for a provisional order. They do not mention the subject of burgh extension; and, looking to the kinds of powers which are specially enumerated, and also to the fact that, as I have mentioned, burgh extension is made matter of express provision in an earlier compartment of the Act, I am inclined to think that the special powers contemplated in sections 45 and 46 do not include an extension of the burgh of such a nature as is not provided for under sections 11 to 14 of the Act. But, be it otherwise, section 46 assigns to the Secretary for Scotland the discretionary power of authorising a charge on the burgh assessments of the expense of proceedings for obtaining such special powers as sections 45 and 46 contemplate. And the defenders' proceedings here in question for the extension of the burgh of Falkirk were not taken under these sections.

"Reference was made to certain legislative enactments subsequent to the Act of 1892, and, in particular, to sections 11 and 16 of the Private Legislation Procedure (Scotland) Act, 1899. But it appears to me that these do not materially affect the issue, and that the question continues to be whether proceedings for the extension of a burgh, such as were here taken by the defenders, were within their normal administrative powers under the Act of 1892, for the expense of which they are entitled to assess the ratepayers within the burgh as for the purposes of the Act. In my opinion this question falls to be answered in the negative.

"The defenders submitted an argument to the effect that as they are the administrators of a royal burgh, and thus not merely administrators for

¹ *Cowan and Mackenzie v. Law*, 10 Macph. 578.

² 55 and 56 Vict. cap. 55.

³ 3 Edw. VII. cap. 33.

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(Scotland) Act, 1900.¹ It was true that burgh extension was, in the Act of 1892, regarded as being within the sphere of burgh administration, but there the method of procedure was specified, viz., an application to the Sheriff of the county.² The defenders, however, relied on sections 45 and 46. These sections, it was true, provided for procedure by provisional order in certain expressly specified matters, but among them burgh extension was not included. Further, the provisional orders there provided for were to be applied for to the Secretary for Scotland according to a form of procedure which had not been complied with by the defenders. The Private Legislation Procedure (Scotland) Act, 1899,³ did not affect the matter, as it did not profess to deal with the question of the funds out of which Town-Councils might pay provisional order expenses. The fact that County Councils required a special statutory enactment in order to make the promotion and opposition of bills in Parliament special county purposes, the expenses of which might be defrayed in the ordinary way, told against and not in favour of the defenders. The fact, too, that the burgh of Falkirk was a barony burgh was quite immaterial. The defenders argued that, the burgh being a barony, they had powers of administration over and beyond those conferred by the Burgh Police Acts on ordinary burghs. That might be true if the barony burgh possessed a common good, so far as regarded the administration of the common good, but did not affect the fact that the defenders' powers of assessment were statutory and could only be used for statutory purposes. The fact that the immediate purpose of the assessment was in a sense legitimate, viz., the repayment of a debt due by the burgh to the bank on its current account, was obviously quite immaterial.⁴

Argued for the respondents;—*On the question of Title.*—The pursuers had no title to sue the present action. The action was an *actio popularis* at the instance of one or two ratepayers, the object of which was to call the Magistrates to account for their alleged illegal proceedings, and it had been settled in the case of *Ewing*⁵ that such an action was incompetent. Apart from the fact that the declarator was professedly on behalf of all the ratepayers, the pursuers had no personal

defined statutory purposes, they fall to be regarded as having wider powers in regard to such a matter as burgh extension than the burgh statutes confer. This may be true, and it may follow that, where a burgh possesses a common good the disposal of which is not regulated by statute, it may be lawful for the corporation to defray out of the common good the cost of such an attempt at burgh extension as was in this case unsuccessfully essayed by the defenders. I express no opinion on this question, which is not raised for determination. The actual question at issue relates to the purposes for which the defenders may lawfully exercise their statutory powers of assessment. These are limited to providing funds for the statutory purposes. And, as I have said, the attempted extension of the burgh here in question does not, in my opinion, fall within these purposes."

¹ 63 and 64 Vict. cap. 49.

² Secs. 11 and 12.

³ 62 and 63 Vict. cap. 47, secs. 11 and 16.

⁴ The case of *Lang v. Magistrates of Selkirk*, (1748) M. 2515, was also referred to.

⁵ 15 S. 839, M'L. & Rob. App. 847; see also *Magistrates of Lauder v. Spence*, (1821) 1 S. 17; *Burgesses of Inverury v. The Magistrates*, Dec. 14, 1820, F. C.; *Trinity House of Leith v. Magistrates of Edinburgh*, (1829) 7 S. 374.

patrimonial interest in the action. Their possible interest in future years could not be considered, as it could not be taken for a fact in this case that they would continue to be ratepayers and, as they did not now ask repetition of the rates which they had already paid, they could derive no pecuniary benefit from success in the action, and pecuniary benefit was the test of patrimonial interest. The proper course for them to have adopted was either that each for himself should have brought a suspension of the assessment imposed on him,¹ or else that they should have taken the remedy provided by the Burgh Police Acts and appeared at the audit of the burgh accounts and stated their objections. In no view could a declarator be used for the purpose of determining the legality of future assessments.² Further, and in any view, the persons who had done the wrong, and who ought to have been sued, were the persons who had actually paid away the money, and not the present defenders. The expenses, moreover, had in fact been already paid out of the bank account, whereas the pursuers' action was based on the assumption that the expenses had not been paid. *Cowan and Mackenzie v. Law*,³ on which the pursuers founded, was distinguishable in that there the question of title was not raised and the funds were still extant, whereas in the present case they had been spent. Further in that case the individual wrongdoers and not the trustees were the parties sued, and the case of *Ewing*⁴ had not been cited. *On the Merits.*—The defenders were entitled to defray the expenses in question out of the rates, on the broad ground that they were incurred in the proper administration of the affairs of the burgh. Moreover, the Burgh Police Act, 1892, authorised the promotion of provisional orders by the magistrates of burghs,⁵ and thereby made the promotion of such orders one of the "purposes" of the Act for which the magistrates were empowered to levy assessments.⁶ The Private Legislation Procedure (Scotland) Act, 1889, contained sections⁷ which were explicable upon no other hypothesis, and the Town-Councils Act, 1900,⁸ conferred on the magistrates of all burghs the very widest powers. In this connection it should not be forgotten that the defenders were administrators of a barony burgh and so had wider powers than those conferred by the burgh statutes. In any view it could hardly be denied that rates might be levied to repay the bank which had advanced the money in reliance on the financial stability of the burgh.

At advising on 12th July 1912,—

LORD MACKENZIE.—The pursuers in this case are owners of property and ratepayers in the burgh of Falkirk, and the defenders are the Provost, Magistrates, and Council of the burgh of Falkirk. The purpose of the action is to determine whether it is lawful for the defenders to provide, out

¹ *Leith Dock Commissioners v. Magistrates of Leith*, 25 R. 126, 1 F. (H. L.) 65; *Parochial Board of Bothwell v. Pearson*, (1873) 11 Macph. 399.

² *Allgemeine Deutsche Credit Anstalt v. Scottish Amicable Life Assurance Society*, 1908 S. C. 33; *Cuthbert v. Cuthbert's Trustees*, 1908 S. C. 967.

³ 10 Macph. 578.

⁴ M'L. & Rob. App. 847.

⁵ Secs. 45 and 46.

⁶ Secs. 55 (3) and 59.

⁷ Secs. 11 and 16.

⁸ Sec. 7.

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of the burgh general assessment, for the expenses incurred by them in the unsuccessful promotion of a provisional order to extend the boundaries of the burgh and to transfer to the defenders the undertaking of the Falkirk and Larbert Water Trust. That provisional order was opposed, and was thrown out, and the expenses which were incurred by the defenders amounted to over £4000. The conclusions of the action are for declarator and interdict. The conclusion for interdict was not pressed; and, accordingly, the question is whether the pursuers are entitled to get a decree of declarator and, if so, to what extent.

The case is in a somewhat different position, as regards the argument submitted, from that in which it was before the Lord Ordinary, because in this Court the pursuers did not insist upon their right to get a declarator that the defenders are not entitled to levy or exact rates from "other rate-payers," the pursuers' counsel recognising that, if that declarator were insisted in, this would be a *popularis actio*, and their position would conflict with the decision in *Ewing's* case.¹ Nor did the pursuers' counsel see their way to maintain that they were entitled to declarator that the defenders were not entitled to apply "any part of the rates" towards payment of the expenses. And, accordingly, the way in which the case comes before your Lordships is this, that all that the pursuers seek to resist is the proposed imposition upon them of any rates which are to be applied directly or indirectly in or towards payment in whole or in part of the expenses incurred by the defenders in connection with the provisional order. The question is whether that is a demand that they have a title to insist in.

The Lord Ordinary's view is that they have no title, and that view proceeds upon the decision, in the House of Lords, in the case of *Ewing v. Glasgow Commissioners of Police*.¹ The opinion of the Lord Ordinary is that what the pursuers are here attempting to do is not to vindicate a patrimonial right. If it be the case that the pursuers here have a direct patrimonial interest in the action to the extent to which they now insist in it, then the case of *Ewing*¹ will not apply, for in that case it was recognised, both in the Court of Session and also in the House of Lords, that an individual patrimonial interest is enough to entitle a pursuer to object to the imposition of an illegal tax. In *Ewing's* case¹ the Court of Session and the House of Lords extended the law laid down in previous cases, such as *Inverury*,² that private parties have no right to bring an action against the magistrates of a burgh in relation to matters connected with the common good. If such an action is to be brought, it must be brought at the instance of the Crown. In order to understand what was decided in *Ewing*,¹ it is necessary to have in view the fact that all the cases that were referred to by the Lord Chancellor, in the House of Lords, were cases dealing with common good in royal burghs. *Ewing's* case¹ extended the principle to the case of police funds raised by assessment which are under the administration of a town-council as police commissioners. This is pointed out by Lord Kyllachy in the case of *Conn*.³

If the action is not for the purpose of preventing malversation, but for

¹ 15 S. 389, M'L. & Rob. App. 847.

² Dec. 14, 1820 F. C.

³ 8 F. 905.

the purpose of protecting a direct patrimonial interest, then the case of July 12, 1912.

*Ewing*¹ is not an authority against the pursuers insisting in it. The conclusion in *Ewing's* case¹ brings out quite clearly what the meaning of the decision was, because there was no conclusion there which would have protected the pocket of the pursuers. The conclusion was to have the defenders ordained to pay back into the funds of the police establishment money which, it was said, was being diverted from those funds. Accordingly, I think, when the modifications in the demand which is now made are taken into account, a great deal of the difficulty which the Lord Ordinary had is removed.

The point is made against the pursuers by the defenders that they have paid the assessments for the year 1911-12. But one of them—the County Council—paid under reservation of a claim for repayment; and the question raised in this case is not limited to the application of the assessments of one year, it is whether the defenders are right in the position which they have taken up, under which they propose to devote the burgh general assessment to liquidate this debt by instalments in future years. That raises a question which will directly affect the pecuniary interests of the pursuers. It is plain on the facts that that is what the defenders propose to do, because at a meeting on the 28th September 1911, they approved and adopted a minute of the finance committee, held two days before, to the effect that “it was agreed to defray the expense partly out of the rates levied by the defenders under their statutory powers from the owners and occupiers of property within the burgh.” And then there is a further part of the minute with regard to the payment of part of the expenses out of the gas assessment, a proposal which has now been dropped. The averment of the pursuers is not only that the defenders’ intention is to defray the expense to the extent of £1000 out of the burgh rates collected within the current year, but that they intend to defray the balance of the expense in a similar way in future years. That raises sharply the question whether they are entitled so to deal with the assessment. If they levy rates and apply them to that purpose, they must come out of the pocket of the pursuers, because I cannot regard as of serious importance in this case the suggestion that it is possible they may part with their property in the burgh.

The defenders further contended that there is only one way in which a party in a burgh on whom an assessment is imposed can protect himself, and that is by suspension and interdict. I think it is clear, on the authorities, that suspension and interdict is not the only remedy which is open to a person who is threatened in this way. I do not require to refer to any other authority than the opinion of Lord Watson in the case of *Grahame*.² It is there made clear that, when a person has an individual right, he can have a declarator in order to ascertain what that right is. The authorities cited by the defenders were cases in which the Court refused to decide hypothetical cases. The resolution of the defenders at their meeting of 28th September 1911 raised the question on which a decision is now sought. It was then agreed to defray these expenses out of rates to be paid by the

¹ 15 S. 389, M'L. & Rob. App. 847.

² 9 R. (H. L.) 91.

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pursuers. The circumstances are thus different from those in *Bothwell*,¹ which was urged as an authority by the defenders. The two cases in 1908—*Allgemeine Deutsche Credit Anstalt*² and *Cuthbert*³—were premature declarators. For an instance of cases where a declarator was granted I refer to the case of *Edinburgh and Glasgow Railway v. Meek*⁴ and the *Scottish North-Eastern Company v. Gardiner*.⁵ Opinions were expressed in favour of trying such questions by way of declarator in the cases of the *British Fisheries Societies*⁶ and *Heddle*.⁷ Accordingly, I do not consider that the argument founded upon this being an inappropriate form of action is sound.

Another point was argued. It is said the whole of this sum of £4182, 17s. 2d. has been paid to the original creditors. Their debt is discharged; and therefore, the argument is, you cannot bring an action against the Magistrates in order to get back that money. It is no longer the original creditors who are to get the money; it is the bank. The date at which the whole of the creditors are said to have been paid was 26th October 1911. I am altogether unable to follow that argument. If what the defenders propose to do is illegal it obviously is out of the question to allow them, by borrowing money and paying it away, to say that now the matter is closed. The fact that cheques were drawn upon their bank account, and that these were cashed, and that the original creditors discharged their claims, cannot alter the true position of parties. It is at this point that another argument was used—that the wrong parties were being sued. It was maintained that those who had drawn the cheques are the people who ought to be sued. But the pursuers in this action seek to have it declared that the Magistrates of Falkirk are not entitled to take, in future years, rates from them for the purpose of replacing money that has been applied in paying the expenses of this unsuccessful bill. The only persons you could call in order to obtain complete protection is the body who impose the assessments.

The pursuers, in my opinion, have a title to insist in the action. On the merits there is nothing to be added to what is said by the Lord Ordinary. There is no answer to the pursuers' contention. Once it is decided that the pursuers have a title, the necessary result seems to me to be that the whole pleas of the defenders ought to be repelled.

There is no doubt that the defenders have been acting in perfect good faith, and that leads me to make the suggestion to your Lordships that, in a case of this kind, instead of proceeding at once to pronounce a decree of declarator, it might be appropriate, in order to give the defenders an opportunity of considering what they should do in view of the decision of the Court, to pronounce findings:—that the defenders have no power and are not entitled, at common law or under statute, to levy or exact any rates in the burgh of Falkirk from the pursuers to be applied, directly or indirectly, in or towards payment, in whole or in part, of the expenses incurred by the Provost, Magistrates, and Councillors of the said burgh in the unsuccessful promotion of the provisional order referred to on record.

LORD PRESIDENT.—I concur in the opinion which has just been delivered.

¹ 11 Macph. 399.

² 1908 S. C. 33.

³ 1908 S. C. 967.

⁴ 12 D. 153.

⁵ 2 Macph. 537.

⁶ 10 Macph. 426.

⁷ 24 R. 662.

To begin at the other end—Were the defenders here entitled to raise a July 12, 1912. general assessment for the purpose of paying the bill which they had incurred by the unsuccessful promotion of a provisional order? Upon that question there has really been no serious argument. After all, the inhabitants of Falkirk are only liable to be assessed for the purposes for which, and in the way in which, the statute says they may be assessed, and as soon as you get outside these purposes the assessment becomes simply and purely illegal. Therefore, when that is once settled, good faith has really very little, or nothing, to do with the legal question. It comes to this that, if what are called the preliminary defences of the defenders here are right, there is no malversation of statutory funds raised by assessment that a set of burgh magistrates could carry through which might not be successfully defended—in this sense that, according to the defenders' argument, no remedy could be obtained in this Court. I put it to Mr Watson several times during the debate that his arguments, especially his argument about payment to the bank, would have been equally good or equally bad if, instead of the money having been taken for the purpose of paying the expenses of this unsuccessful provisional order, it had been taken by the Magistrates in order to allow themselves a trip to Monte Carlo. According to Mr Watson's argument all you have got to do is, not to take the money directly out of the coffers of the town, but to borrow the money from the bank. And then, says he triumphantly, the person now to be repaid is the honest bank, which must get back the money it has lent. I am loath to suppose that our justice has come to that; and accordingly I do not think that the mere fact that the Magistrates here, instead of waiting until they got the assessment and then paying the money out of the assessment, first passed a cheque upon their general account in the bank and took the money in that way, can possibly make any difference.

The only other remark I want to make is that I agree with Lord Mackenzie's view of what was decided by the House of Lords in *Ewing*.¹ What was decided there was, in the first place, that the object of the action being to make the Magistrates restore a sum to the coffers of the town which they had improperly diverted, such an action was an *actio popularis*—and, secondly, that individual parties had no title to follow it forth. But where the action is at the instance of a man who says that you are telling him that you are assessing him for a purpose which is not within the powers of assessment of your statute, then he certainly and undoubtedly has a good cause of action.

I am of opinion therefore with Lord Mackenzie that we can give a remedy; and I think, in order to bring the two cases * which are now before us into line, there is no objection to making the findings which he suggests at this time. But assuredly it will further result that, if the town do not choose to pay attention to the findings that have been pronounced against them, I do not think we shall be so impotent as not to find a personal remedy. It is for the town to get out of this trouble into which they have

¹ 15 S. 389, M'L. & Rob. App. 847.

* The other case referred to is *Farquhar & Gill v. Magistrates of Aberdeen*, reported *infra*, p. 1294.

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July 12, 1912. fallen. If they have no common good, and in the case of Falkirk I should not suppose they had, the sooner they raise action against the persons who misused their funds the better, otherwise they will certainly find themselves before long subject to the penal consequences of an interdict.

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LORD KINNEAR.—I concur.

LORD JOHNSTON.—The defenders in this case, the Magistrates of Falkirk, promoted unsuccessfully a provisional order in 1911 for extension of the burgh boundaries and acquisition of the undertaking of the local water trust, and in this unsuccessful promotion incurred expenses to the extent of over £4000. On 28th September 1911 they resolved to defray these expenses out of the general rates levied by them under their statutory powers from the owners and occupiers of property within the burgh. It may be taken as admitted that the burgh general assessment for the year was laid on in September; that it was in course of collection during the winter 1911-12, a portion having been collected prior to the raising of this action on 14th January 1912, and a portion subsequently to that date; that the actual accounts incurred, and amounting to over £4000, have *de facto* been paid by drafts on the general bank account of the burgh; also that the Council, before the raising of this action, had resolved to provide for a portion of the expenses in question out of the assessment of the year 1911-12, and had estimated and assessed accordingly, but had resolved to postpone the provision for the remainder of the sum in question, to be spread over future years. Three ratepayers, two who are owners and occupiers and one who is an owner only, raise this process to challenge the legality of the action of the Town-Council. It is admitted that all have paid their assessments for the year, though one has done so under special reservation of the right to recover.

The Lord Ordinary has indicated the opinion that the action of the Council is *ultra vires*, and in this, in common, I understand, with your Lordships, I agree. But the Lord Ordinary, holding himself bound by the decision in *Ewing v. Glasgow Commissioners of Police*,¹ has sustained the defenders' plea to the pursuers' title to sue, and that question has been keenly contested.

The precise form of action is one of declarator and interdict, which at first sight would appear to be a most convenient mode of raising the question, and I think it would be unfortunate if we were compelled by any rule of practice to sustain the plea of no title. For in the declarator the question of right would be determined, and the pursuers have intimated, not (as the Lord Ordinary seems to think) that they did not stand upon their conclusions for interdict, but that if they obtained declarator in the terms concluded for they would not press for the interdict, which would naturally follow as an ancillary, so as to embarrass the Council, but would rely upon their naturally complying with any declarator obtained without their being placed under the sanction of interdict. The question of title must therefore be considered in view of the full conclusions of the summons of declarator and interdict.

The pursuers sue the Town-Council as Town-Council, and, therefore,

¹ 15 S. 389, and M'L. & Rob. App. 847.

having perpetual succession, for declarator that the defenders have no power, July 12, 1912.
 by statute or at common law, "to levy or exact any rates from the pursuers or other ratepayers in the burgh of Falkirk to be applied, directly or indirectly, in or towards payment in whole or in part of the expenses incurred by them in the promotion" of the foresaid provisional order, or to apply any part of the rates levied or collected, or which may be levied and collected, by them under the foresaid statutes during the assessment year 1911-12 or any future year, directly or indirectly, in or towards payment in whole or in part of the aforesaid expenses. The relative conclusion for interdict against levying and applying the rates is an exact echo of the declarator.

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The Lord Ordinary founds the rejection of the action on three considerations:—First, that the declarator is not limited to the pursuers' individual interests, but extends to the interest of the whole ratepayers. If that be a good objection it is easily cured, either by the pursuers deleting the words "or other ratepayers in the burgh of Falkirk," or by the Court not including these words in the decree to be granted. But, as the pursuers have no exceptional position, it follows that if they have right to the declarator they ask in their individual case, they have only such right on grounds of universal application to all ratepayers. The question remains, Have the pursuers right as individual ratepayers to the remedy they crave?

Second, that they do not limit their conclusions to the year 1911-12, and *quo modo constat* that they will be ratepayers in any subsequent year? To that I think it is a sufficient answer both that *pluris petitio* will not in itself destroy their title to sue, and that as proprietors, if they have an interest to obtain this declarator regarding the year 1911-12, they have also an interest, in respect of their properties, to obtain it regarding future years, as the intended action of the Town-Council affects the value of their properties.

Third, that, as they have paid their assessments and do not in this action raise any question of repetition, they do not show any patrimonial interest. The money, his Lordship assumes, is ingathered and in the coffers of the burgh. If the pursuers succeed in their action, it will remain there as the fruits of an assessment regularly imposed and paid. The pursuers do not ask any of it back. The result of the excess assessment, if the pursuers are right, may diminish the assessment next year. But *quo modo constat* that the pursuers will have any interest in that year? This view appears to me to be too narrow. Not only have the pursuers as proprietors an interest in respect of their properties, but I think as ratepayers they have an interest in the administration of a burgh fund to which they have contributed. Admittedly they have an interest to avoid the contribution, and could have effected this by suspension. Equally I think they have an interest to prevent the misapplication of their contribution, and can effect this by interdict, which may conveniently, in accordance with our practice, be prefaced by declarator. And it must be remembered that the assessment was a general assessment, not restricted to the particular object to which part of it is proposed to be applied, and that, therefore, it was not necessarily known to them at the date of assessment that they were to be over-assessed for an improper object, nor is it clear that they could be heard to stay the levying of a general assessment, *ex facie* legal, because a portion of it was threatened to be devoted to an illegal object. It appears to me that

July 12, 1912. the conclusions of the summons include the really appropriate remedy, which is to stay the application of the assessment levied to the illegal purpose to which it is proposed to be diverted, and to that probably our decree may be conveniently restricted.

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The Lord Ordinary has held himself bound by the case of *Ewing*.¹ But I do not think that that judgment has any real application. The illegality complained of was indeed the same as here, but the form of action was, as your Lordship has shown, wholly different. If after they have obtained their declarator and interdict in this case the pursuers find themselves obliged to take steps to compel the refunding of moneys illegally paid away, which I can hardly anticipate, they may find difficulty in the judgment in *Ewing's* case,¹ though I do not think that it is difficulty which will pass the wit of counsel to surmount. But the judgment is no obstacle to the remedy which they seek at present. Moreover, the value of *Ewing's* case¹ as an authority is a good deal detracted from by the fact that the Lord Chancellor, under misapprehension, bases his judgment upon certain cases which had to do with maladministration of common good and similar funds, which, according to our law, can only be challenged by the Crown.—*Conn v. Magistrates of Renfrew*.²

For these reasons I think that the Lord Ordinary's judgment falls to be recalled.

THE COURT pronounced the following interlocutor:—"Recall said interlocutor [of 10th April 1912]: Repel the whole pleas in law for the defenders: Find that the defenders have no power and are not entitled at common law or under statute to levy or exact any rates in the burgh of Falkirk from the pursuers to be applied directly or indirectly in or towards payment in whole or in part of any expenses incurred by the Provost, Magistrates, and Councillors of the burgh of Falkirk in the unsuccessful promotion of the provisional order referred to on record, and continue the case: Find the pursuers entitled to their whole expenses, and remit," &c.

JOHN C. BRODIE & SONS, W.S.—MACPHERSON & MACKAY, S.S.C.—Agents.

No. 178. FARQUHAR & GILL AND OTHERS, Complainers (Reclaimers).—*Moncrieff, K.C.—Lippe.*

July 13, 1912. THE LORD PROVOST, MAGISTRATES, AND COUNCILLORS OF THE CITY AND ROYAL BURGH OF ABERDEEN, Respondents (Respondents)—*D.-F. Dickson—Chree, K.C.—Mercer.*

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of Aberdeen.

Title and interest to sue—Ratepayer—Burgh—Rates and assessments—Illegal assessments by magistrates—Suspension and interdict at instance of individual ratepayers.

The magistrates of a burgh, in fixing the water-rates for the current year, included in their estimate of expenditure to be paid out of the rates a sum representing half of the expenses incurred by them in the unsuccessful promotion of a provisional order and private bill. In an action of suspension and interdict brought against them by certain individual ratepayers in the burgh a plea of no title or interest to sue *repelled*.

¹ 15 S. 389, M'L. & Rob. App. 847.

² 8 F. 905.

Burgh—Powers of magistrates—Rates and assessments—Right of magistrates to levy rates to pay expenses of provisional order and private bill— July 13, 1912.
Aberdeen Police and Waterworks Act, 1862 (25 and 26 Vict. cap. cciii.)— Farquhar & Gill v.
Aberdeen Corporation Water Act, 1885 (48 and 49 Vict. cap. cxxiii.)— Magistrates of Aberdeen.

Held that the magistrates of Aberdeen were not entitled, under their private water Acts or otherwise, to impose any assessment upon, or levy or exact any rates or charges from, ratepayers to be applied towards the payment of expenses incurred by the magistrates in the unsuccessful promotion of a provisional order and private bill for a new water supply.

Limitation of actions—Public Authorities Protection Act, 1893 (56 and 57 Vict. cap. 61), sec. 1 (a)—Time limit—Applicability to action of interdict.

Observed by the Lord President that the provisions of the Public Authorities Protection Act, 1893, which impose a limit of time within which actions must be brought against public authorities, cannot be prayed in aid in a question of interdict, because the Court can only give interdict against what is a continuing wrong.

ON 13th October 1911 Farquhar & Gill, manufacturers, St Paul Street, Aberdeen, and others, all being ratepayers in the city and royal burgh of Aberdeen, brought an action of suspension and interdict against the Lord Provost, Magistrates, and Town-Council of the city and royal burgh of Aberdeen, in which they craved the Court “to suspend the proceedings complained of, and to interdict, prohibit, and discharge the respondents from laying any assessment upon or levying or exacting any rates or charges from the complainers or other ratepayers or contributors to the water revenue of the respondents in the district over which the respondents have powers of assessment under the Aberdeen Police and Waterworks Act, 1862, and Acts amending the same, to be applied directly or indirectly in or towards payment in whole or in part of any costs incurred by the respondents or others in connection with an application made by them in the session of 1910, to the Secretary for Scotland, under the Private Legislation Procedure (Scotland) Act, 1899, for a provisional order to authorise them to obtain a new supply of water from the River Avon, or in connection with a private bill promoted by the respondents in Parliament in the said session of 1910 for the same purpose; or alternatively to interdict, prohibit, and discharge the respondents from applying any part of the rates and charges which may be levied and collected by them for the purpose of the said water revenue during the assessment year 1911-12, directly or indirectly, towards payment in whole or in part of the aforesaid costs; or to do otherwise in the premises as to your Lordships shall seem proper.” *
 1ST DIVISION.
 Lord Cullen.

* The Aberdeen Corporation Water Act, 1885 (48 and 49 Vict. cap. cxxiii.), which amended the Aberdeen Police and Waterworks Act, 1862 (25 and 26 Vict. cap. cciii.), and subsequent relative Acts, by sec. 20 authorises the Town-Council to supply water for commercial purposes at rates to be fixed by the Town-Council from time to time. The Act provides:—Sec. 35. “The Town-Council . . . are hereby authorised . . . once in every year to estimate and fix the amount of money necessary to be levied for the purpose of defraying the costs and expenses of the water department for and during the year then current . . .”

Sec. 36. “The estimate to be made up in manner before provided shall

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The following averments and answers were, *inter alia*, made by the parties:—(Stat. 4) “In the session of 1910 the respondents by a majority of 19 to 13 resolved to make application, and thereafter did make application, to the Secretary for Scotland under the Private Legislation Procedure (Scotland) Act, 1899, for a provisional order to authorise them to obtain a new supply of water from the River Avon in Banffshire. On the draft order coming before the Chairman of Committees of the House of Lords and the Chairman of Ways and Means in the House of Commons for consideration and report under section 2 of the last-mentioned statute . . . the Chairmen, after hearing parties, reported to the Secretary for Scotland that the application should not proceed by way of provisional order. The respondents then proceeded by way of private bill and promoted the Aberdeen Corporation Water Bill, 1910, with the result that the subsequent procedure took place in London instead of locally. The said bill was opposed by a number of traders, who, under section 20 of the said Act [Aberdeen Corporation Water Act] of 1885, were supplied with water and charged according to meter, and also by a section of the ratepayers. The said bill came before a Select Committee of the House of Lords, who decided that it was not expedient that the bill should proceed. The respondents incurred

be submitted to and considered by the Town-Council, at a meeting to be held as soon as conveniently may be after they shall have obtained a copy of the Valuation-roll for the year then current, and at such meeting, or any adjournment thereof, the Town-Council may, and they are hereby authorised and required, in order to raise such a sum of money as, along with the public water-rate after mentioned and other water revenues of the Town-Council, shall be sufficient for the purposes aforesaid, annually to impose, assess, and levy a rate to be called ‘The Domestic Water-rate,’ upon and from the occupiers of all dwelling-houses, and of such parts of all shops and buildings as may be used as dwelling-houses, within the city, according to the yearly value thereof as entered in the Valuation-roll for the year then current. . . .”

Sec. 37 provides for the imposition of a public water-rate.

Sec. 42. “If in any year the revenue of the water department shall be more than sufficient for all the purposes to which it is applicable, the Town-Council shall, and they are hereby required to, carry the surplus to the credit of the account for the following year in reduction of the estimate of money required for such year; and when a deficiency occurs in one year it shall be provided for in the estimate and by assessment in the next year; and the Town-Council shall, as nearly as possible, so regulate the domestic water-rate that it may, one year with another, produce the amount of money required. . . .”

Sec. 43. “The rates and charges levied under . . . this Act and the other income of the water department shall be applied in manner following . . . First, in defraying the expenses of the management and maintenance of the water undertaking . . . the annual costs, charges, and expenses of providing and supplying water. . . . Second, in payment of the interest of money borrowed under the authority of the recited Acts and of this Act, in connection with the water undertaking. Third, in payment of the sum by the recited Acts, and this Act, directed to be set apart as a sinking fund in connection with the water undertaking. Lastly, in payment of such portion of the cost of enlarging or increasing and renewing and from time to time extending the works, mains, and pipes as the Town-Council shall think it reasonable to charge against the revenue for the year, and of any other necessary annual expenditure.”

great expense in connection with promoting the said bill in Parlia- July 13, 1912.
ment. The total amount of the said expenses is believed to be £15,521, 6s. 5d. The promotion of the said bill was inexpedient and ill-advised, and was not in the interests of the community. . . . With reference to the explanation in answer that the said sum of £15,521, 6s. 5d. has been paid out of the bank account kept by the respondents for the water undertaking and police purposes, it is explained that the ratepayers were not informed, and had no knowledge, before such payment, of the mode in which the said expenses were to be defrayed. . . .” (Ans. 4) “ . . . The total amount of the costs incurred by the respondents in connection with said draft order and private bill were paid by the respondents on or before 1st March 1911 out of the bank account kept by them for the water undertaking and general police purposes. Before the respondents as then constituted proceeded with the said provisional order and substituted bill, and conducted the case before the said Select Committee, they were advised by competent advisers and *bona fide* believed that the present supply of water to the city was unsatisfactory, both as regards its amount and its liability to dangerous contamination. . . .” (Stat. 5) “ . . . On 4th September 1911 [a resolution of the finance committee fixing the water-rates for the current year] was considered by the respondents and adopted by them, or by a majority of them. The complainers have reason to believe, and they aver, that the respondents, or a majority of their number, have included in the estimate of the expenditure of the water department for the current year ending 15th May 1912 the sum of £7760, being one-half of the said expenses incurred by the respondents in connection with the promotion of the said provisional order and bill. The complainers further believe and aver that the respondents have, for the purpose of meeting the said estimated expenditure of the water department, resolved to impose a public water-rate of 1½d. per £, in addition to imposing the said domestic water-rate of 5d. per £, and continuing the existing meter rates for supplies for other than domestic purposes. . . . Explained that there is no warrant either in the before-mentioned statutes or otherwise for any specific item of expenditure being charged against any specific item of revenue, and that it is *ultra vires* of the respondents to do so. The whole water revenue from whatever source it is derived constitutes trust money in the hands of the respondents to be administered by them for the statutory trust purposes. The respondents have been able to debit the said sum of £7760 in the estimated expenditure of the current year without increasing their rates or charges only in consequence of the fact that the payment to sinking fund in the current year has fallen to £8770, this being the last instalment, as against about £20,000 in previous years. The result of debiting the said sum of £7760 to the expenditure of the current year is thus to deprive the ratepayers of the benefit which would otherwise have resulted to them in the form of decreased rates and charges in consequence of the large diminution in the contribution to sinking fund for the current year.” (Ans. 5) “Admitted that the estimated expenditure of the water department for the current year includes the sum of £7760. Explained that the estimate provides for said sum being met out of the sum of £20,780 proposed to be levied from special water charges and from charges for water supply to shipping, being charges for other than domestic purposes.

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Explained that the respondents, while including the said sum of £7760 in the expenditure for the current year, have not increased the public water-rate, the domestic water-rate, or the rates and charges for supplies of water for other than domestic purposes. . . .” (Stat. 6) “It is illegal and *ultra vires* of the respondents to include in the said estimate of expenditure any part of the said expenses of promoting the said provisional order and bill, or to levy any assessments or exact any rates or charges under their Acts for the purpose of defraying the said expenses or any part thereof. If the said expenses were excluded from the said estimate, the rates chargeable as public water-rate and domestic water-rate would fall to be reduced and also or alternatively the charge to manufacturers and others taking water for other than domestic purposes under section 20 of the Act of 1885 would fall to be reduced. . . .” (Ans. 6) “ . . . The respondents are acting in accordance with what has always been the invariable practice of municipal bodies in Scotland, the promotion of such orders and bills and the payment of the cost thereof being in the circumstances regarded as incidental to and necessary for the proper discharge of the duties of the bodies concerned, as in fact they are. The promotion of the order and bill in question, and the payment of the costs thereof were in fact incidental to and necessary for the proper discharge of the respondents’ duties.”

The complainers pleaded, *inter alia*;—(2) The proposed use by the respondents of the funds obtained or to be obtained by them by assessment under the powers conferred on them by the Aberdeen Corporation Water Act, 1885, and relative statutes being illegal and *ultra vires*, interdict should be granted as craved. (3) It being *ultra vires* of the respondents under the statutes libelled to levy any assessments or exact any rates or charges to be applied in payment of the expense of promoting the Aberdeen Corporation Water Bill, 1910, or, alternatively, to apply any rates or charges levied and collected by them under the said statutes in payment of the said expense, the complainers are entitled to interdict in terms of one or other alternative of the prayer of the note.

The respondents pleaded;—(1) The action is excluded in respect of the provisions of the Public Authorities Protection Act, 1893. (2) The complainers having neither title nor interest to insist in the present action, the note should be refused. (3) The complainers’ averments are irrelevant and insufficient to support the prayer of the note. (4) The expenditure in connection with the promotion of the provisional order and private bill having been incurred by the respondents in good faith in the execution of their statutory duties, the note should be refused. (5) The complainers’ averments, so far as material, being unfounded in fact, the note should be refused. (6) The assessment, and the rates and charges referred to, and the application of the proceeds thereof being according to law, the note should be refused.

On 10th April 1912 the Lord Ordinary (Cullen) pronounced an interlocutor sustaining the second plea in law for the respondents, and refusing the note.*

* “OPINION.—This case raises substantially the same question as that which has come before me for determination in the case of the *County Council of the County of Stirling and Others v. The Provost, Magistrates, and Councillors of the Burgh of Falkirk* [*supra*, p. 1281]. I accordingly refer *brevis-*

The complainers reclaimed, and the case was heard before the First July 13, 1912. Division on 18th June 1912.

The argument for the reclaimers was substantially the same as that submitted for the Stirling County Council in the preceding case — *Stirling County Council v. Falkirk Magistrates*.¹ In addition they maintained, in answer to the respondents' argument *infra* on the Public Authorities Protection Act, 1893,² that that Act could in no event apply, as the earliest action on the part of the respondents to which they took exception was their resolution of 4th September 1911.

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The argument for the respondents followed the line of argument submitted for the Falkirk Magistrates in the preceding case. They presented, however, the following additional arguments:—The Aberdeen Water Act of 1885, section 43, expressly authorised them to use the rates in paying the cost of "enlarging," "increasing," and "extending" the "works," and the expenses in connection with the provisional order and private bill for the new water-supply were incurred in furtherance of a proposed enlargement or extension of their works, and therefore were expressly authorised by their Act of Parliament. The wrong, if there had been a wrong, had already been done, and an action of suspension and interdict was too late.³ In any event, they were protected⁴ by the Public Authorities Protection Act, 1893,² section 1 (a). The wrongful act was the payment of the expenses, and that had been made in March 1911, more than six months prior to the raising of the present action. The under-noted case was also referred to.⁵

At advising on 13th July 1912,—

LORD MACKENZIE.—This case is really *a fortiori* of the case of the

tatis causa to my opinion in the latter case. In accordance with it, I am of opinion that the defenders' second plea in law falls to be sustained and the note refused. While this is so, I am equally of opinion that the defenders' unsuccessful essay to obtain an extension of their existing powers under the Aberdeen Police and Waterworks Act, 1862, and subsequent and amending Acts administered by them, mentioned on record, does not form a purpose under these Acts for the expense of which they are entitled to exercise the powers of assessment which the Acts confer on them."

¹ *Supra*, p. 1281. The following additional authority was cited:—*Eadie v. Glasgow Corporation*, 1908 S. C. 207.

² The Public Authorities Protection Act, 1893 (56 and 57 Vict. cap. 61), enacts:—Sec. 1. "Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect:—(a) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or in case of a continuance of injury or damage, within six months next after the ceasing thereof"

³ *Steuart v. Parochial Board of Keith*, (1869) 8 Macph. 26.

⁴ *Spittal v. Corporation of Glasgow*, (1904) 6 F. 828; *Christie v. Corporation of Glasgow*, (1899) 36 S. L. R. 694; *Earl of Harrington v. Corporation of Derby*, [1905] 1 Ch. 205; *Attorney-General v. West Ham Corporation*, [1910] 2 Ch. 560.

⁵ *Perth Water Commissioners v. M'Donald*, (1879) 6 R. 1050.

July 13, 1912. *County Council of Stirling and Others v. Burgh of Falkirk*,¹ which was disposed of yesterday. It raises a question whether the Magistrates of Aberdeen are entitled to impose and levy rates under the powers of assessment which they have under the Aberdeen Police and Waterworks Act, 1862, and Acts amending the same, in order to meet the expenses—which amount to £15,521, 6s. 5d.—which were incurred by them in an unsuccessful attempt to obtain an extension of their existing powers under the Waterworks Act of 1862, the proceedings having been first by provisional order, and then by a private bill.

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The complainers have presented a note of suspension and interdict in general terms. The rates have not been paid—the assessments were laid on, but the rates were not levied, and the reclaimers describe themselves as being all owners of heritable property liable to pay the public water-rate; William-son, one of the reclaimers, is liable to pay the domestic water-rate, and Farquhar & Gill are consumers of water for other than domestic purposes.

The same argument was submitted here that was submitted in the *Falkirk* case¹ in regard to the point that the costs have all been paid. No doubt the costs were paid to the original creditors, as is set out in the pleadings, by 1st March 1911; but for the reasons that have been already given in the *Falkirk* case,¹ I do not think that that can affect the right of the complainers to have the remedy that they ask. It was not until September that the finance committee of the respondents resolved out of what fund this money should be taken. They had a meeting on the 1st September 1911, when it was resolved to impose the assessments for domestic water-rate at a particular rate on the different classes of proprietors and to provide for the supply of water for other than domestic purposes at the table of rates fixed in a previous year. Then, on the 4th September, the resolution was considered by the respondents and adopted by them. And the case made by the complainers—and about this there is no doubt—is that, in the estimate of the expenditure of the Water Department for the year ending 15th May 1912, the sum of £7760—being one-half of the expenses incurred by the respondents in connection with the promotion of the provisional order and the bill—was provided for, and, in the appendix with which we have been furnished, the way in which the budget is made up is perfectly clear.

I should notice in passing a point which is made by the respondents in Ans. 5—that, by including this sum of £7760 in the expenditure for the current year, the respondents have not increased the public water-rate, the domestic water-rate, or the rates and charges for the supply of water for other than domestic purposes. The broad fact, however, remains that the expenditure which is budgeted for in the year 1911-12 by the respondents amounts to the sum of £34,385—that is the expenditure that they have got to find revenue to meet; and, accordingly, they impose their charges in order to make up that figure. But for the charge which it is said is illegal, of £7760, their budget would only have required to be for a sum of £26,625. That would have been the figure which would have been required to have been made up out of revenue. In these circumstances

¹ *Supra*, p. 1281.

it appears to me that the complainers have a direct patrimonial interest July 13, 1912.
 to say that "But for your illegal charge, what we would have been called upon to make up would have been less by £7760." It is out of the question, I think, for the respondents to contend that they can apply the revenue they get from water sold to this illegal charge, and then say to those who are ratepayers under the public and domestic water-rates that their rates are not going to be raised, and, therefore, they cannot complain. I think that is a way of dealing with the budget to which no countenance can be given.

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The position, therefore, is that in September the respondents resolved to meet the expenses in what, it is said, is an illegal manner. In October the interdict was applied for. It appears to me that the case of *Cowan*¹ is a direct authority for what is asked by the complainers here. It was argued by the Dean of Faculty that, in the case of *Cowan*,¹ the costs had not been paid. For the reasons already explained, I do not think that that makes any difference. Another point was taken—that in *Cowan's* case¹ the question of title was not raised, and that the case of *Ewing*² was not cited. Also for the reasons already explained, that can make no difference in the present case. Then it was suggested that, in *Cowan's* case,¹ the pleadings showed that it was the individual wrongdoers and not the trustees who were sued. I think it is quite plain, from the report and from the pleadings, that in that case the Court considered they were interdicting the trustees from laying on assessments and from levying rates.

The only point argued upon the merits of the case was one on the terms of the statute—that this was, under section 43, only an extension of existing works. I think, when the circumstances of the scheme are examined, it will be found that that argument is untenable.

Therefore I think that the complainers have a title and, on the merits, that the respondents have no defence.

It is right to notice one point which was pressed, which is this, that the respondents are here protected by the provisions of the Public Authorities Protection Act of 1893. That Act protects persons who are acting in the execution of a statutory or other public duty to this extent, that proceedings must be brought within six months next after the act or neglect or default complained of. I do not think it is necessary to go into the question whether the provisions of that Act apply to such a case as we are dealing with here. The conclusive answer is that it is impossible to say that there was any act to which the complainers could have objected until the resolution of the Town-Council in September. The contrary argument was that the wrong was done when the expenses were paid. In my opinion the wrong was done in September, because, until that date, the complainers could not be certiorated whether or not the respondents were going to take the necessary amount out of the common good. Accordingly, on the question of date, I think that any argument founded upon the Public Authorities Protection Act fails.

¹ *Cowan & Mackenzie v. Law*, (1872) 10 Macph. 578.

² *Ewing v. Glasgow Commissioners of Police*, (1837) 15 S. 389, (1839) M'L & Rob. App. 847.

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I propose to your Lordships that the same course should be followed here as was followed in the case of *Falkirk*.¹ This is an application for interdict, and, of course, to put the respondents under interdict forthwith would be a stringent remedy. In order that the respondents may consider their position, I would suggest that an interlocutor should be pronounced repelling the whole pleas in law for the respondents; finding that they are not entitled to impose any assessment or levy or exact any rates upon the complainers under the Aberdeen Waterworks Act, 1862, and Acts amending the same, to be applied directly or indirectly in or towards payment in whole or in part of the costs incurred by the Lord Provost, Magistrates, and Town-Council of the royal burgh of Aberdeen in connection with the application made by them, in session 1910, to the Secretary for Scotland under the Private Legislation Procedure (Scotland) Act, 1899, for a provisional order to enable them to obtain a new supply of water from the River Avon, and in connection with the promotion of a private bill in the same session for the same purpose; and continuing the cause.

LORD PRESIDENT.—I agree. I hope in this case there can be no difficulty, because we are given to understand that there is common good from which the money can be taken. I should like to add this—I do not understand how the Public Authorities Protection Act can ever be prayed in aid in a question of interdict, because I take it the Court can only give interdict against what is a continuing wrong.

LORD KINNEAR.—I concur.

The Lord President intimated that LORD JOHNSTON, who was absent at the advising, also concurred.

THE COURT pronounced the following interlocutor:—"Recall said interlocutor [of 10th April 1912]: Repel the whole pleas in law for the respondents: Find that the respondents are not entitled to impose any assessment upon or levy or exact any rates or charges from the complainers under the Police and Waterworks Act, 1862, and Acts amending the same, to be applied directly or indirectly in or towards payment in whole or in part of the costs incurred by the Lord Provost, Magistrates, and Town-Council of the city and royal burgh of Aberdeen in connection with the application made by them in the session of 1910 to the Secretary for Scotland under the Private Legislation Procedure (Scotland) Act, 1889, for a provisional order to authorise them to obtain a new supply of water from the River Avon, or in connection with the private bill promoted by them in Parliament in said session for the same purpose, and continue the cause."

DALGLEISH, DOBBIE, & Co., S.S.C.—GORDON, FALCONER, & FAIRWEATHER, W.S.—
Agents.

¹ *Supra*, p. 1281.

STEPHEN MASON RAE (George Brodie Paul's Trustee), First Party.— No. 179.

D. Anderson—W. L. Mitchell.

THOMAS JUSTICE & SONS, LIMITED, Second Parties.—*Horne, K.C.*— July 18, 1912.

W. T. Watson.

Paul's
Trustee v.
Thomas
Justice &
Sons, Limited.

Company—Members—Register of shareholders—"Holder" of shares—Company's lien over shares for debts due by "holder"—Person owning radical right in shares, but not on register.

The articles of association of a limited company bore that the company should have a lien on shares for debts due to it by "the holder" of the shares. A shareholder, in security for debts due by him to two banks, transferred to nominees of the banks certain shares of which he was the registered holder and they were registered in the names of the banks' nominees; and he also purchased certain other shares and registered them in the names of the same nominees. After the shareholder's death his estates were sequestrated. The banks, having recovered payment of the debts due to them from other securities, were prepared to transfer the shares in question to the trustee in the sequestration, whereupon the company claimed a lien over the shares in respect of a debt due to it by the deceased.

Held that "holder" in the articles of association meant "registered holder"; and, as the deceased was not the registered holder of the shares, that the company had no lien over them for his debt.

ON 9th December 1911 a special case was presented to which the 2^D DIVISION. *first party* was Stephen Mason Rae, C.A., trustee on the sequestrated estates of the deceased George Brodie Paul, and the *second parties* were Thomas Justice & Sons, Limited, Dundee.

The following narrative of the facts of the case and the contentions of parties is taken from the opinion of Lord Guthrie:—

"The late Mr George Brodie Paul, solicitor, Dundee, at the date of his death on 23rd January 1911, stood on the register of Thomas Justice & Sons, Limited, as the owner of certain shares in that Company. Certain other shares, which had been acquired by him and which had been registered in his name, had been transferred by him to nominees of the Bank of Scotland and the British Linen Bank in security of sums due by him to these banks respectively, and, at the date of his death, these shares stood registered in the names of these nominees. Certain other shares were acquired by Mr Paul, but were never registered in his name, the transfers having been taken direct from the sellers to the banks' nominees.

"After his death Mr Paul's estates were sequestrated on 29th July 1911, and the first party to this special case is the trustee on his sequestrated estates. Thomas Justice & Sons, Limited, are the parties of the second part. At his death Mr Paul was indebted to the second parties. Their claim in the sequestration amounts to £3854, 8s. 3d.

"The question relates to an alleged right of lien over certain of the shares mentioned in the case, claimed by the second parties for all moneys due to them by the late Mr Paul. The first party claims these shares as part of the bankrupt estate, to be distributed by him among Mr Paul's creditors.

"The banks are not parties to the case, because it is admitted that Mr Paul's obligations to them have been liquidated out of other estate of his held by them in security. Their nominees admit that they hold the shares for the first party, and are ready to transfer them to him.

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"So far as regards the first set of shares above mentioned, namely, those standing at Mr Paul's death in his name on the Company's register, the first party admits that they are covered by the second party's lien. The dispute is confined to the other two sets of shares, namely, those which, at one time registered in his name, had been transferred by him to the banks' nominees in security of his obligations to the banks, and those which, although equally acquired by him and equally held at the time of his death by nominees of the banks in security of his obligations to the banks, were never registered in his name, the transfers having been taken direct from the sellers to the banks' nominees.

"Something was said about the second parties' common law right of lien over their shares, but the argument before us was confined to the right of lien, if any, created in their favour by article 27 of their articles of association.* By that article they obtain a right of lien on their shares for all moneys due to them from a 'holder' or 'joint holders' of the shares. The first party maintains that the word 'holder' is equivalent to 'registered holder,' and he, accordingly, as above mentioned, makes no claim to the shares standing registered in Mr Paul's name at his death. On the other hand, if, as the second parties maintain, the word holder means, or at least includes, the person having the radical interest in the shares, whether registered or not, the first party admits that the second parties will have a lien equally over the shares which are actually in dispute.

"Therefore, the only question in the case is whether the word 'holder' in article 27 of the articles of association includes owners of the shares—those having the radical right, whether registered or not—at the date when the question arises, or at any time."

The question of law for the opinion and judgment of the Court was:—"Are the second parties entitled to a lien in terms of their articles of association over the shares held by the deceased George Brodie Paul in their Company, so far as these shares were transferred to and held by nominees of the said banks at the date of the sequestration of the deceased George Brodie Paul?"

The case was heard before the Second Division on 10th July 1912.

Argued for the first party;—"Holder" in article 27 meant the registered holder, and could have no other meaning. The registered holder, whether or not he was in fact a trustee, and whether or not he

* The articles of association of Thomas Justice & Sons, Limited, provided:—

"27. The Company shall have a first charge or paramount lien on all shares (and such lien shall extend to all dividends and bonuses from time to time declared thereon) for all moneys due to it from the holder or any of the joint holders thereof, either alone or jointly with any other person, including all calls the resolutions for which shall have been passed by the directors, although the times appointed for their payment may not have arrived."

"35. The instrument of transfer of any share in the Company shall be executed by both transferor and transferee, and the transferor shall be deemed to remain the holder of the shares until the name of the transferee is entered in the register of members in respect thereof."

"39. The board may in their discretion, and without assigning a reason therefor, refuse to register the transfer of any share to any person whom they shall not approve of as transferee. . . . The board may also refuse to register any transfer of shares on which the Company has a lien."

was registered as a trustee, was the only person who had any rights or liabilities in respect of the shares.¹ The beneficial owner was not recognised by the Company in any way, and the Company could have no claim against him. The banks could have realised the shares and applied the proceeds towards reduction of their debts, and had they done so, the second parties' right of lien would have been defeated. The second parties could not be in a better position because the banks had not exercised their right. The second parties were protected against the loss of their security through their power, under article 39, to refuse to register any transfer.

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Argued for the second parties ;—The correct description of a person whose name was on the register was “member”²; “holder” was a wider term and included the owner of the radical right in a share. If, as was the case, such radical right could be arrested,³ it could also be the subject of a lien. In a question with the banks, the second parties admittedly had no claim to the shares, but when the security rights possessed by the banks had been satisfied, the right of lien which the second parties had, both at common law and under the articles, revived, and even if the question of law were answered in favour of the first party, the second parties would still be entitled to refuse to put him on the register.⁴ The case of the *Mexican Santa Barbara Mining Company*⁵ was distinguishable, for there the lien was, by the express terms of the articles, restricted to debts due by the “registered” holder.

At advising on 13th July 1912,—

LORD GUTHRIE.—[After the narrative quoted above]—I think the question of law falls to be answered in the negative, that is to say, in favour of the first party, first, on a construction of article 27 taken by itself, and, second, on that article, when read along with other articles in the articles of association.

The word “holder” does not seem to me applicable in any sense, either popular or technical, to the late Mr Paul, in regard to shares, which were either never registered in his name, or which, having been at one time registered in his name, had been subsequently registered in the names of others. In the one case, he never held the shares ; in the other case he had ceased to hold them. In the one case, his membership of the Company in respect of the shares had ceased, and he had no longer a holding in the Company ; in the other case, his radical right in the shares, or their value, never made him a member of, or gave him a holding in, the Company. It would not even be correct or proper to call him without qualification, in either case, the owner of the shares. He was not either the nominal, or

¹ *Ex parte Mexican Santa Barbara Mining Co.*, (1890) 24 Q. B. D. 613 ; *Muir v. City of Glasgow Bank*, (1878) 6 R. 392, *aff.* 6 R. (H. L.) 21 ; *Gillespie & Paterson v. City of Glasgow Bank*, (1879) 6 R. 714, *aff.* 6 R. (H. L.) 104 ; *Companies (Consolidation) Act*, 1908 (8 Edw. VII. cap. 69), sec. 27 ; *Buckley on Company Law*, 9th ed., pp. 74, 75.

² *Companies (Consolidation) Act*, 1908 (8 Edw. VII. cap. 69), secs. 24, 25.

³ *Lindsay v. London and North-Western Railway Co.*, (1860) 22 D. 571.

⁴ *Bell's Trustee v. Coatbridge Tinplate Co., Limited*, (1886) 14 R. 246.

⁵ 24 Q. B. D. 613.

July 13, 1912. the true, holder. Nor was he the apparent or nominal owner ; he was the true owner, that is the owner of the radical right to the shares, or their value. Paul's Trustee v. Thomas Justice & Sons, Limited. Lord Guthrie. This view is strengthened by reference to the other articles. It is admitted that, wherever the word "holder" occurs, as it frequently does, in other articles, it is always used in the sense of "registered holder." Reference may be made to the preceding articles, and to article 35.

But the second parties argued on the alleged hardship resulting from the first party's construction. It might be sufficient to say that the question is one of construction of a contract, and that there is no room in such a case for equitable considerations, except as affording a presumption where the expressions used are ambiguous, which they do not seem to me to be in this case. But, apart from this view, and the consideration that there may be equities both ways, article 39 disposes of any question of hardship, because, under that article the second parties could have refused to remove Mr Paul's name from the register, and could, at their own hand, have retained the right of lien against him, which they thus chose voluntarily to give up.

The case of the *Mexican Santa Barbara Mining Company*,¹ quoted by the first party, is instructive, although it is not directly in point. The Mexican Company sought a bankruptcy order against their debtor Perkins. He had obtained judgment against Dickey, a registered shareholder of the company, to the effect that he, Dickey, was a trustee of some of the shares registered in his name for Perkins. The company founded on one of their articles of association, giving them a first and paramount lien on all shares for all moneys due to the company from "the registered holder or holders thereof or other the person for the time being entitled thereto as against the company." The Court held that the company had no title to petition for Perkins' sequestration in virtue of their lien over the shares belonging to him but registered in Dickey's name. They negatived the contention that, Perkins being in equity the owner of the shares of which Dickey the registered holder had been declared to be a trustee for him, the articles gave the company a lien over that equitable interest for the debt which Perkins owed them. But, in that case, the expression "registered holder" made impossible the argument, which the second parties maintained before us. The company had to found on the later phrase "or other the person for the time being entitled thereto as against the company," words which seemed to lend some colour to their contention. I think the reluctance which the Court showed to give these words the meaning contended for by the company shows that, had the clause before them been expressed in the terms of article 27 in this case, they would have required much stronger grounds than any that have been stated to us for holding that Mr Paul, who had only the radical right, was, in the sense of that article, the holder of the shares.

I therefore think the question should be answered in the negative.

LORD DUNDAS.—I am of the same opinion. It was, I think, conceded—it is at all events, in my judgment, clear—that if "holder" in article 27 means "registered holder," the case for the second parties is gone. The registered holders of the shares owe them no debt in respect of which a lien

¹ 24 Q. B. D. 613.

could be asserted. I do not know whether Mr Paul was in fact indebted July 13, 1912. to the second parties when the transfers were taken in favour of the nominees of the banks. But it is immaterial to inquire into that, for, if the relation of debtor and creditor did then subsist between Mr Paul and the second parties, the latter missed the opportunity, which they had, of refusing to register the nominees, and thereby lost their lien in a question with Mr Paul; and if the relation did not subsist, the second parties cannot plead that any advances they subsequently made to Mr Paul were made upon the faith or on the security of shares held by him in their Company. Now, it seems to me to be quite plain that "holder" in article 27 does mean "registered holder," and that the word cannot, in any reasonable sense or upon any stateable ground, be held to apply to or include a person who may have the radical right to shares, but whose name does not appear upon the Company's register as holding them. I think the question must be answered in the negative.

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Something was suggested during the argument as to possible future difficulties, if the result of our decision should be adverse to the second parties. I do not see that any difficulty need necessarily arise, and there is no occasion to anticipate or speculate upon anything of the sort. I apprehend that the second parties' power under their articles to refuse to register transferees of shares is one which must be exercised by them in a reasonable manner.

The LORD JUSTICE-CLERK and LORD SALVESEN concurred.

THE COURT answered the question of law in the negative.

MACPHERSON & MACKAY, S.S.C.—WALLACE & BEGG, W.S.—Agents.

HUGH TENNENT AND OTHERS (James Brown Montgomerie-Fleming's Trustees), Pursuers (Reclaimers).—*Blackburn, K.C.—D. P. Fleming.* No. 180.

ALEXANDER KENNEDY, Defender (Respondent).—*Chree, K.C.—D. M. Wilson.* July 13, 1912.

Property—Building restriction—Superior and Vassal—Buildings to be "occupied as self-contained lodgings."

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Certain ground, with buildings thereon, was feued out by a feu-contract which, besides a general nuisance clause against the carrying on of certain specified trades, contained a clause declaring that the feuar "and his foresaids shall be bound and obliged to maintain and uphold in good repair in all time coming on the said three steadings of ground the three lodgings now erected thereon which shall be occupied as self-contained lodgings." All the restrictions, prohibitions, &c., in the feu-contract were declared to be real burdens affecting the ground and buildings.

The proprietor of one of these self-contained houses proposed to convert the basement floor into premises to be occupied for a cabinet-making business (which was not a trade prohibited by the general nuisance clause), by gutting it, and severing it from the upper floors, and giving it a separate entrance. In an action at the instance of the superiors to interdict him from doing so—

Held (rev. judgment of Lord Skerrington) that the proposed occupation of the premises was in contravention of the restrictions in the feu-contract, and interdict *granted* against such occupation.

July 13, 1912. ON 30th June 1911 Hugh Tennent and others, the testamentary trustees of James Brown Montgomerie-Fleming, and as such superiors of certain subjects at 1 Grosvenor Terrace, Glasgow, on the lands of Horselethill, brought an action against Alexander Kennedy, their vassal in these subjects, for declarator that under the feu-contract upon which they were held "the defender, as now proprietor of the *dominium utile* of the said feu, Number thirty-eight, is not entitled to convert the basement floor of the self-contained lodging, forming No. 1 Grosvenor Terrace aforesaid, erected on said feu Number thirty-eight into premises for or in connection with a cabinetmaking and upholstery business, or to a purpose other than occupation as a part of the said self-contained lodging: And further, it ought and should be found and declared, by decree foresaid, that the said conversion, if so carried out, is and will be in breach and in contravention of the provisions of the said feu-contract: And upon it being so found and declared, the defender ought and should be interdicted, prohibited, and discharged, by decree foresaid, from making the said conversion, and from occupying, by himself or others, the said basement floor of said lodging for any purpose other than in connection with the occupation of the building as a self-contained lodging."

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The following narrative is quoted from the opinion of the Lord Ordinary (Skerrington):—

"This is an action for the purpose of enforcing an alleged obligation in a feu-contract relative to the maintenance and use of the buildings on the feu. The pursuers are the trustees of the late Mr Montgomerie-Fleming of Kelvinside, and as such they are the superiors of the defender, who purchased in 1909 the house No. 1 Grosvenor Terrace, Glasgow. This terrace extends from east to west along the south side of the Great Western Road. The house No. 1 is the eastmost house in the terrace, and it forms the corner house at the junction of the Great Western Road and Byres Road, which latter runs southward to the Dumbarton Road. The house No. 1 is also the eastmost point of the Kelvinside estate, a feuing property which extends for a long distance westward along the Great Western Road. The three 'steadings of ground' on which the houses Nos. 1, 2, and 3 Grosvenor Terrace had been already built 'with the lodging and other buildings erected thereon' were feued to a builder by the owners of the estate of Kelvinside conform to feu-contract, dated 27th November 1856. The present action relates only to the house No. 1. The defender is in course of converting the basement floor of this house (both in Grosvenor Terrace and Byres Road) into a cabinetmaker's and upholsterer's shop with a new and separate entrance from Byres Road. The defender's right to construct this entrance was challenged on record, but this point was given up by the pursuers' counsel. No interference is contemplated with the external wall of the basement fronting the sunk area in Grosvenor Terrace, except that a lavatory is to be constructed in the sunk area under the front door steps. This involves opening an access to the lavatory through the front wall of the basement, but the pursuers' counsel did not maintain that the defender was not entitled to do this. With these two exceptions, and also with the exception of certain buildings on the background and the opening of new windows facing Byres Road (none of which operations were challenged as illegal), the proposed operations are entirely within the house, and consist of the removal of the internal partitions on the basement floor and the substitution of metal beams

and pillars for the support of the upper floors. The only question between the parties is whether the defender is entitled to separate the basement floor from the rest of the house, and to use that floor as a shop. That question cannot be answered without reading the whole feu-contract, but the clause principally founded on by the pursuers' counsel is as follows:—'Declaring as it is hereby expressly provided and declared, that the said Thomas Philip and his foresaids shall be bound and obliged to maintain and uphold in good repair in all time coming on the said three steadings of ground the three lodgings now erected thereon which shall be occupied as self-contained lodgings, and to rebuild the same when necessary of the same height, elevation and style of architecture, and upon the same foundations or sites with those now erected, to form a component part of the range or compartment of Grosvenor Terrace.' " *

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* By a previous clause in the feu-contract it was provided as follows, viz., that the vassal, i.e. the second party, "or his foresaids shall not dig nor dispose of any clay, nor make nor burn any bricks, tiles, or pottery ware out of or upon the said grounds hereby disposed: And also declaring that the said second party and his foresaids, and the tenants and possessors of the said three steadings of ground, or of any part thereof, or of the houses or buildings erected or to be erected thereon, or any of them, shall not have power to carry on, erect or set down, and they are hereby expressly prohibited, interdicted, and discharged in all time coming from carrying on, erecting, or setting down upon or within the said three steadings of ground, or any part thereof, or the buildings erected or to be erected thereon, or any of them, any trade, business, or process of brewing, distilling, tanning, calico-printing, singeing muslin, making or preparing of candle, soap, starch, black ashes, tallow, oil lampblack, glue catcut, tripe, caoutchouc or Indian rubber, guttapercha, cudbear, vitriol, prussian blue, blood alum, soda, tartaric acid or bleaching or chemical acid or powder salt, or alkali of any kinds, boiling blubber, burning lime, manufacturing or grinding bones, slaughtering of animals, smelting or calcining of any metal or metallic ore, bones, or other substances, or any steam-engine, air-engine, starching work, glasswork, sugarwork, saltwork, deftwork, potterywork, ironwork, foundry, smithy forge furnace, machinework, cottonmill, flaxmill, silkmill, weaving shop or power-loom factory, and from letting out or using any part of the said ground for depositing dung or rubbish thereon, excepting what dung may be made or used as manure on the said ground itself, and in general from exercising or carrying on any of the said trades, businesses, processes, occupations, or manufactures, or any other trade, business, process, occupation, or manufacture; and from erecting any building on the said three steadings of ground, or either of them, that shall be hurtful, nauseous, or noxious, or occasion disturbance to the houses or inhabitants upon any part of the said lands of Horselethill belonging to the said first party in property and superiority, in favour of whom and their heirs, successors, feuars, and disponees, past and future, in the said lands, and each of them, the foregoing declaration and prohibition shall operate as a real lien and servitude upon the said three steadings of ground hereby disposed, and the buildings erected and to be erected thereon, and the same shall be and is hereby constituted a real lien and servitude upon the other parts of the said lands of Horselethill still belonging in property to the said first party, in favour of the said second party and his successors, in the said three steadings of ground hereby disposed; and the said first party bind and oblige themselves and their foresaids to insert a similar prohibition against nuisances in all dispositions and feu-rights to be hereafter granted by them of the other parts of the said lands of Horselethill belonging to them: And declaring that the said second party and his foresaids, and the tenants and

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The feu-contract also contained this provision:—"All which reservations, burdens, servitudes, conditions, restrictions, prohibitions, provisions, declarations, obligations, prestations, irritant clauses and others before written shall be real liens, burdens, and servitudes affecting the said pieces of ground and buildings thereon, and as such are hereby appointed to be engrossed in the instrument of sasine to follow hereon, and in all the future charters, precepts of *clare constat*, dispositions, conveyances, instruments of sasine, and investitures of the said three steadings of ground, or of the buildings thereon, or of any part thereof, otherwise the same shall, in the option of the said first party or their foresaids be void and null."

The pursuers pleaded, *inter alia*;—(1) Under the feu-contract founded on the defender is bound to maintain the self-contained lodging forming No. 1 Grosvenor Terrace as a self-contained lodging, and to rebuild it when necessary of the same height, elevation, and style of architecture and upon the same foundations or sites, and he is therefore not entitled to make on the basement floor of said self-contained lodging the structural alterations and additions complained of, for the purpose of converting said floor to a use other than part of a self-contained lodging.

The defender pleaded;—(1) The pursuers' averments are irrelevant and insufficient to support the conclusions of the summons. (2) The alterations proposed by the defender not being struck at by the feu-contract the defender is entitled to absolvitor. (3) The pursuer having no interest to object to the operations proposed by the defender, the defender is entitled to absolvitor. (4) *Esto* that the operations proposed by the defender are in breach of the provisions of his feu-right, the pursuers having permitted similar or greater deviations by their other vassals, are barred from insisting in the present action.

On 9th February 1912 the Lord Ordinary (Skerrington) dismissed the action.*

possessors of the said three steadings of ground and building thereon, or any part thereof, shall not have power, and he and they are hereby prohibited and discharged from erecting thereon any inn, hotel, or public stables, and from carrying on thereon the business of an inn, or hotelkeeper or stabler, or of selling porter, ale, beer, wines or spirituous liquors either by wholesale or retail without the express consent in writing of the said first party or their foresaids."

* "OPINION.—[After the narrative quoted above, the Lord Ordinary proceeded]—The pursuers' counsel interpreted this clause, and in particular the parenthetical expression 'which shall be occupied as self-contained lodgings,' as imposing upon the feuar and his successors a restriction as to the manner in which he and they might lawfully use the three several lodgings. Any use of the subjects except (1) as a dwelling-house, and (2) as a self-contained dwelling-house (whatever that may mean), was according to this argument expressly forbidden. I am of opinion that the clause quoted has nothing to do with the use of the subjects, but deals merely with the maintenance of the 'lodgings' or dwelling-houses erected thereon prior to the granting of the feu. The elaborate nuisance clause, which I have not thought it necessary to quote, implies that the feuar's common law right to carry on any unobjectionable trade in the premises is not taken away by the feu-contract; and I cannot hold that the parenthetical expression quoted has any such effect. Nor can I hold that the use of the word 'self-contained' (which is a word descriptive of the structure of a building) can

The pursuers reclaimed, and the case was heard before the First July 13, 1912. Division on 27th and 28th June 1912.

Argued for the reclaimers;—The Lord Ordinary was wrong in holding that the restriction here was not a restriction on occupation. It was not to be disregarded merely because the main restrictions on occupation were contained in a general nuisance clause and this restriction was introduced parenthetically in a subsequent clause.¹ When the deed here was examined the reason for that method of treatment was obvious. The general nuisance clause was framed to apply to all the lands of Horselethill, and the superior was taken bound to introduce similar restrictions in future feus of these lands. But this restriction was limited to this small portion of residential property only, and there was no obligation on the superior to burden the rest of Horselethill (much of which might not be residential) with a similar restriction. If, then, this was a good restriction on occupation, the defender's proposals were a direct contravention of it. Occupation as a "self-contained lodging," excluded conversion of the premises for the purpose of two separate and different occupations. In the cases in which an opposite conclusion had been reached the decisions had turned on the question of the structure only, and had proceeded on the ground that occupation by a single family was not precluded by the structural proposals there before the Court.² In the present case the basement of the defender's house, as altered, would be unsuitable for occupation as a dwelling-house, and accordingly the alteration would clearly be a contravention of the restric-

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be twisted into meaning that the feuar shall not be entitled to let the subjects to more than one tenant at a time—a prohibition of a very unusual kind which if lawful would require to be very clearly expressed. I construe the parenthetical words as qualifying and interpreting the obligation of maintenance. In other words, each of the three houses must be maintained in such a state that it could be occupied as a dwelling-house by a single family. This obligation would, in my opinion render it unlawful for the feuar to make an external structural alteration, converting part of the dwelling-house into a shop with doors and windows of the kind appropriate for a shop and not for a dwelling-house. But it would not, in my opinion, prevent the feuar from using his dwelling-house or some part of it as a shop, or from making purely internal alterations with that object. If it had not been for the authorities I should have thought that the use of the word 'self-contained' would have made it incumbent on the feuar to resort to the device of maintaining an inside stair of communication between the basement and the upper storeys (which stair could be permanently closed by a locked door) but the decisions seem to be to the contrary effect. I accordingly dismiss the action. In the view which I have taken of the case it is not necessary to pronounce any decision on the defender's pleas of want of interest and acquiescence, but as these pleas were carefully argued, I may say that in my opinion the defender has not stated a relevant case in support of either of them.

"The following decisions were referred to as regards the construction of the feu-contract:—*Moir's Trustees v. M'Ewan*, (1880) 7 R. 1141; *Buchanan v. Marr*, (1883) 10 R. 936; *Miller v. Carmichael*, (1888) 15 R. 991; *Assets Company v. Ogilvie*, (1896) 24 R. 400; and *Forrest v. Watson's Hospital*, (1905) 8 F. 341."

¹ *Ewing, &c. v. Hastie*, (1878) 5 R. 439.

² *Fraser v. Downie*, (1877) 4 R. 942; *Moir's Trustees v. M'Ewan*, (1880) 7 R. 1141; *Buchanan, &c. v. Marr*, (1883) 10 R. 936; *Miller v. Carmichael*, (1888) 15 R. 991.

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tion in question.¹ That the feu-contract did not provide that the subjects were to be occupied "only," or "in all time coming," as self-contained lodgings did not limit the clause in question to a restriction as to structure. As to interest, the pursuers clearly had an interest to preserve the residential character of Grosvenor Terrace, which consisted of large dwelling-houses of the highest class.²

Argued for the respondent;—The object of the clause in question in the defender's feu-contract was to secure the feu-duty and to preserve uniformity of appearance in Grosvenor Terrace. The proposed alterations here would not affect the appearance of the terrace, and would only increase the security of the feu-duty by providing an additional source of rent. If there was any ambiguity in the restrictions in the feu-contract they fell to be construed in favour of the freedom of the vassal.³ The elaborate restrictions in the nuisance clause of the contract must be taken as exhausting the restrictions intended to be imposed on occupation or use, and as there was no prohibition of cabinetmaking that occupation was not excluded.⁴ If the pursuers' contention was right that the clause here in question imposed a restriction on occupation, there would have been no necessity for inserting the nuisance clause at all. The only logical construction that could be put upon the terms of the feu-contract was that this clause of restriction dealt with structure only, and not with use. The defender's proposed alterations were not in violation of a structural restriction.⁵ Even though there should be two occupiers in the defender's premises, that was not inconsistent with its structural character as a self-contained lodging, because there might be more than one occupying tenant in a single self-contained lodging. The terms of the feu-charter in the case of *Ewing v. Hastie*,⁶ requiring use as "dwelling-houses only in all time coming," distinguished that case from the present, where neither the words "only" nor "in all time coming" were employed. The English decisions referred to for the reclaimers dealt with circumstances which were distinguishable from the present. In any event the condition of the neighbourhood surrounding the defender's premises had so changed since the date of the feu-contract that any interest which the pursuers might formerly have had in maintaining these restrictions had now ceased to exist.⁷ Further, the terms in which declarator and interdict were sought were too wide. Where interdict was pronounced against use of property the use prohibited must be clearly and definitely specified,

¹ *Rogers v. Hosegood*, [1900] 2 Ch. 388; *Ilford Park Estates, Limited, v. Jacobs*, [1903] 2 Ch. 522.

² *Grant v. Langston*, (1900) 2 F. (H. L.) 49, [1900] A. C. 383, was also referred to.

³ *Middleton v. Leslie*, (1894) 21 R. 781, Lord Kinneir, at p. 786.

⁴ *Russell v. Cowper, &c.*, (1882) 9 R. 660; *Fraser v. Downie*, 4 R. 942, Lord Shand, at p. 946.

⁵ *Inglis v. Boswell*, (1849) 6 Bell's App. 427, L. C. Cottenham, at p. 439; *Moir's Trustees v. M'Ewan*, 7 R. 1141; *Buchanan v. Marr*, 10 R. 936; *Miller v. Carmichael*, 15 R. 991; *Assets Co., Limited, v. Ogilvie*, (1896) 24 R. 400, Lord Trayner, at p. 410.

⁶ 5 R. 439.

⁷ *Earl of Zetland v. Hislop, &c.*, (1882) 9 R. (H. L.), 40; *Menzies v. Caledonian Canal Commissioners*, (1900) 2 F. 953, Lord McLaren, at p. 963.

so that the person interdicted might have no doubt as to what use he might make of his premises.¹

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At advising on 13th July 1912,—

LORD PRESIDENT.—This is an action brought by the superior of lands in Kelvinside against the proprietor of the house known as No. 1 Grosvenor Terrace, in order to enforce restrictions in the title of the house, which is one of a row of houses, and is what is known as a self-contained house. The proprietor has recently made some alterations with a view to changing its character. He has gutted the basement floor, and he proposes, in that basement floor, to establish a cabinetmaking and upholstery business. He has altered the rooms in the upper floors, having to find room for the kitchen which he has displaced; but in the upper floors he has made no structural alterations of a kind that need be noticed.

Now, of course, the matter depends upon the title. The title is contained in the feu-contract which was given out by the then proprietor of the lands of Kelvinside, and it contains various stipulations. The Lord Ordinary has held that the title does not contain any prohibition against use as business premises, but only contains certain prohibitions against structural alterations, which prohibitions, he considers, have not been infringed by the fact that the basement floor has been gutted. There is in the title this phrase:—"Declaring, as it is hereby expressly provided and declared, that the said Thomas Philip"—that was the original feuar—"and his foresaids shall be bound and obliged to maintain and uphold in good repair in all time coming on the said three steadings of ground the three lodgings now erected thereon which shall be occupied as self-contained lodgings, and to rebuild the same when necessary of the same height, elevation and style of architecture." Now, that, upon the face of it, looks like a prohibition against occupation except as self-contained lodgings, but the Lord Ordinary has held that it is not, upon the grounds (first) that it is expressed in a parenthetical form, and (secondly) that if it was meant as a prohibition against a certain occupation, he would have expected it in another portion of the deed, namely, in the long clause which prohibits any trade, business, or process of brewing, distilling, tanning, calico printing, and various other unpleasant commercial businesses which are all described, and, in general, prohibits the vassal from exercising or carrying on any of the said trades, businesses, processes, occupations, or manufactures, or any trade, business, process, occupation, or manufacture.

I do not think either of the reasons of the Lord Ordinary is sufficient to lead to that result. So far as the mere parenthetical expression is concerned, that makes no difference, as was shown in the case of *Ewing v. Hastie*.² There is no virtue or magic in an expression in a parenthetical form or in any other form. The whole question is, as was laid down long ago in the *Tailors of Aberdeen v. Coutts*,³ to discover from the deed whether the prohibition is intended to be a real burden upon the lands or merely a

¹ Reference was made to the case of *Tailors of Aberdeen v. Coutts*, (1834) 13 S. 226, 1 Rob. App. 296.

² 5 R. 439.

³ 13 S. 226, 1 Rob. App. 296.

July 13, 1912. prohibition which is personal to the first taker. I do not think, from the phrase I have already read, there is any question but that this is intended to be a real burden upon the lands. It is in collocation with the obligation to rebuild the self-contained dwelling-house in the same style of architecture, if for any reason it should get into disrepair or tumble down.

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Ld. President. That seems to me to make it perfectly clear.

As regards the other matter, I think the Lord Ordinary omitted to notice that the superior here was proprietor of a large estate, over the whole of which he wished to put certain restrictions against what might be called noxious trades, and that that long clause was a clause which was applicable to the whole of his estate ; not only to what may be called the front ground of it, but to the back ground. When, however, he came to feu out a particular stance in what might be called the residential portion of his estate, he very naturally wished to impose other and further restrictions which would not have been at all proper for the whole of the ground, because, of course, he did not wish or propose that the whole of his ground should be occupied as self-contained lodgings.

Now, as to the meaning of a self-contained lodging, it is a well-known phrase in what may be called the Scottish building trade. No house-agent would have any difficulty in understanding it, and it means a house which has nothing of the common stair in it, which has its own door, and where the door gives access to the hall of the house ; and it certainly does not mean a house in which the basement storey is lopped off for the purpose of a shop with a separate entrance. Accordingly, I have no doubt that what is here proposed to be done is a contravention of the occupation clause.

I think that is enough, and indeed it is really all that we can do in the disposal of this case, because, so far as construction is concerned, although there are various conclusions in the summons as to construction, I do not think that you necessarily destroy the character of a self-contained house because you gut the basement. I quite agree that it is an unusual thing in a self-contained house to have a gutted basement ; but if you choose, I do not know why you should not clear out all the partitions upon your ground floor in order to make a ball-room, a billiard-room, or a skating rink, or anything you like, just as you might clear out the partitions of one of the upper floors, if you chose, for the same purposes.

Accordingly, I propose to your Lordships that, while the Lord Ordinary's interlocutor should be recalled, we should give something a good deal short of what the pursuers ask for in the form of a declarator. And the declarator I should propose is a declarator that "under and by virtue of the feu-contract mentioned in the declaratory conclusions of the summons, the defender as now proprietor of the *dominium utile* of the feu No. 38 therein mentioned, is not entitled to occupy the self-contained lodging forming No. 1 Grosvenor Terrace therein mentioned, erected on said feu No. 38, otherwise than as a self-contained lodging." And then, when it comes to the interdict, I do not propose to give any interdict against anything other than the one thing which the defender has proposed to do, and therefore I think the interdict should read, "Interdict, prohibit, and discharge the defender from occupying, by himself or others, the basement floor of said lodging for the purpose of a cabinetmaking or upholstery business." I do not think interdict could

be given in larger terms than these, because, after all, that is the only thing the defender has proposed to do at present, and I do not see that it follows, when he is told that that is wrong, that he will propose to do anything else wrong. If we gave an interdict in general terms about a self-contained lodging, I think there would not be enough precision in it to put the defender in the position in which he is entitled to be when he has hanging over his head the danger arising from breaking an interdict.

July 13, 1912.
 —
 Montgomerie-
 Fleming's
 Trustees v.
 Kennedy.

—
 Ld. President.

I therefore move accordingly.

LORD KINNEAR and LORD MACKENZIE concurred.

The Lord President intimated that LORD JOHNSTON, who was absent at advising, also concurred.

THE COURT recalled the interlocutor reclaimed against, and pronounced an interlocutor in the following terms:—"Find and declare that under and by virtue of the feu-contract mentioned in the declaratory conclusions of the summons, the defender as now proprietor of the *dominium utile* of the feu No. 38 therein mentioned is not entitled to occupy the self-contained lodging forming No. 1 Grosvenor Terrace therein mentioned erected on said feu No. 38 otherwise than as a self-contained lodging, and interdict, prohibit, and discharge the defender from occupying, by himself or others, the basement floor of said lodging for the purpose of a cabinetmaking or upholstery business, and decern."

H. B. & F. J. DEWAR, W.S.—PATRICK & JAMES, S.S.C.—Agents.

H. S. MACPHERSON & COMPANY, Appellants.—*Macmillan, K.C.*—
Hon. W. Watson.

No. 181.

JOHN MOORE (Surveyor of Taxes, Glasgow), Respondent.—
Sol.-Gen. Anderson—J. A. T. Robertson.

July 16, 1912.

Revenue—Income-tax—Assessment—Trade "exercised within the United Kingdom"—Income-Tax Act, 1853 (16 and 17 Vict. cap. 34), sec. 2, Sched. D.

Macpherson
 & Co. v.
 Inland
 Revenue.

A firm of manufacturers of yarns in Belgium employed as agents for the sale of their yarns in the United Kingdom a firm of yarn merchants and commission agents in Glasgow. The agents submitted the offers of intending purchasers to the Belgian firm for approval, and, after approval, entered into contracts on their behalf. The goods were consigned to the agents, by whom they were invoiced to the customers, and by whom payment was received and accounts were discharged on behalf of the Belgian firm. Monthly account sales and quarterly statements of expenses and commission were rendered by the agents to the firm.

Held that the Belgian firm exercised a trade within the United Kingdom in the sense of sec. 2, Schedule D, of the Income-Tax Act, 1853.

THIS was an appeal by stated case under the Taxes Management Act, 1880, at the instance of H. S. Macpherson & Company, yarn merchants and commission agents, Glasgow, John Moore, Surveyor of Taxes there, being the respondent, against a decision of the Income-Tax Commissioners whereby the appellants were assessed under, *inter alia*,

July 12, 1912. **Macpherson & Co. v. Inland Revenue.** the Income-Tax Act, 1842, section 41 (as amended by the Income-Tax Act, 1853, section 5), and the Income-Tax Act, 1853, section 2, Schedule D,* as agents for Peltzer et fils, Verviers, Belgium, in respect of profits derived by Peltzer et fils from carrying on the trade or business of vendors of yarns within the United Kingdom, for the year ending 5th April 1911.

The case stated that the following facts were proved or admitted:—
 “(1) Peltzer et fils are manufacturers of yarns at Verviers in Belgium. (2) The appellants carry on business as yarn merchants and commission agents in Glasgow, and are agents for the sale of the yarns of Peltzer et fils in the United Kingdom. (3) The appellants stated that they have no written agency agreement between them and Peltzer et fils; but they are paid by commission on the business done, and are liable for one-half of the bad debts. (4) The orders received by the appellants are submitted to Peltzer et fils for approval, and, if approved, contracts are entered into in this country by the appellants on behalf of Peltzer et fils. (5) The goods are consigned to the appellants for delivery to the customers in this country to whom the goods are invoiced by the appellants in the form of invoice produced. (6) The appellants send account sales to Peltzer et fils monthly. A quarterly statement is rendered for expenses and commission. (7) The appellants receive payment for the goods and discharge the accounts on behalf of Peltzer et fils.”

A number of documents were also included in the case, consisting of sale-notes, invoices, and account forms of Macpherson & Company, and a correspondence relating to a particular transaction between a customer and Macpherson & Company on the one hand, and Macpherson & Company and Peltzer et fils on the other.

The sale-notes were signed H. S. M. & Co., and stated that the orders were booked “on account of the spinners P. & F.” The name of P. & F. did not appear on the invoices or accounts which bore to be rendered by “H. S. Macpherson & Co., Agents.” The correspondence showed that H. S. Macpherson & Company had no discretion in the matter of fixing prices, and that this fact was known to the customers, and that H. S. Macpherson & Company endeavoured to arrange prices to suit both parties.

The case was heard before the First Division (consisting of the Lord President, Lord Mackenzie, and Lord Cullen) on 16th July 1912.

Argued for the appellants;—The question to be determined was, Were Peltzer et fils carrying on a trade within the United King-

* The Income-Tax Act, 1842 (5 and 6 Vict. cap. 35), sec. 41 (as amended by the Income-Tax Act, 1853, sec. 5), enacts:—“Any person not resident in [the United Kingdom] whether a subject of Her Majesty or not, shall be chargeable in the name of . . . any factor, agent, or receiver having the receipt of any profits or gains arising as herein mentioned and belonging to such person in the like manner and to the like amount as would be charged if such person were resident in [the United Kingdom] and in the actual receipt thereof. . . .”

The Income-Tax Act, 1853 (16 and 17 Vict. cap. 34), sec. 2, Schedule D, imposes income-tax, *inter alia*, “For and in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of Her Majesty or not, although not resident within the United Kingdom, from . . . any profession, trade, employment, or vocation exercised within the United Kingdom. . . .”

dom? They were not trading within the United Kingdom,¹ but July 16, 1912. were merely trading with the United Kingdom, which was an entirely different thing.² The question was really a jury one, but the following points were conclusively in favour of the appellants' contention. Peltzer et fils had no branch or office and kept no stock in this country, and their name was nowhere exhibited, and they had no bank account. Their place of business was in Belgium, where all offers were finally considered and all contracts finally concluded, and these facts were within the knowledge of the customers, as was proved by the correspondence produced. The appellants were ordinary commission agents, the channel through whom the goods of Peltzer et fils, and also the goods of numerous other foreign traders, were distributed in the United Kingdom. They were not employees of Peltzer et fils, and had nothing to do with the handling or ascertainment of profits. They had not even the means of knowing whether the Scottish transactions of Peltzer et fils were in fact profitable, and could not compel their principals to disclose that information. What the Income-Tax Acts meant to tax was the foreign firm which had a branch of its business in this country. It was out of the question to say that the appellants, a firm of commission agents, were a branch of Peltzer et fils. The cases where income-tax had been held to be payable were all distinguishable from the present. In *Watson v. Sandie & Hall*,³ the goods were shipped to this country before the contracts were made, and the agents in the United Kingdom had full discretion as to prices. They invoiced the goods in their own names and guaranteed payment by the customers. In *Turner v. Rickman*,⁴ the agents paid freight, were liable for damage *in transitu*, and kept a stock of goods. In any event, *Grainger & Son v. Gough*⁵ was preferable to the last-mentioned case, and was in favour of the appellants. In *Pommery & Greno v. Althorpe*,⁶ the foreigner had an office, stock, and bank account in this country. In *Werle & Company v. Colquhoun*,⁶ the contracts were concluded in the United Kingdom and there was a branch office.

Argued for the respondent;—Peltzer et fils were carrying on or exercising a trade within the United Kingdom. The appellants were agents for Peltzer et fils, and as such made contracts, delivered goods, and received payment therefor in this country. These elements constituted the carrying on of a trade in this country. *Grainger & Son v. Gough*² was distinguishable, for in that case the contracts were not made and the goods were not delivered in this country. The appellants suffered no hardship in being assessed on the profits earned by Peltzer et fils, from whom they could recover any payments they made for income-tax on these profits. The fact that the appellants had not the information necessary to make a return was immaterial.⁷

LORD PRESIDENT.—The question in this class of case really comes to be a question of fact—whether foreign merchants do or do not exercise a

¹ *Crookston Brothers v. Inland Revenue*, 1911 S. C. 217.

² *Grainger & Son v. Gough*, [1896] A. C. 325.

³ [1898] 1 Q. B. 326.

⁴ (1898) 4 T. C. 25.

⁵ (1886) 56 L. J., Q. B. 155, 2 T. C. 182.

⁶ (1888) 20 Q. B. D. 753.

⁷ *Pommery & Greno v. Althorpe*, (1886) 56 L. J., Q. B. 155, *per* Denman, J., at p. 159.

July 16, 1912. trade within the United Kingdom. The mere fact that they are attacked, so to speak, not directly but through their agents, is an accident. Section 41 of the Income-Tax Act of 1842 allows the Revenue to collect the tax easily by proceeding against an agent in whose hands are the principal's moneys. Now in this case the agents are thus proceeded against, and there is no controversy that the agents have the principal's money in their hands, therefore there is no difficulty of the kind which wrecked the case of *Crookston Brothers v. Inland Revenue*.¹

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Coming to the question whether Peltzer et fils are or are not exercising a trade in the United Kingdom, I rather think that it is truly a jury question. I do not think I should be adding to the store of knowledge in the profession if I again went through the long series of cases which have been decided on these points, all the more so because that has been done with great minuteness by the various learned Judges who delivered opinions in the case of *Crookston Brothers v. Inland Revenue*¹; and were I to do so, I should be doing little more than repeating what they there said. I therefore go straight to the facts of this case. Although it is a jury question, the facts are found for us. No doubt in those revenue cases we are always entitled, as an appeal Court, to draw inferences from the facts, but the facts themselves come before us, not on a proof, but in the form of findings. When I turn to the case I find that offers to buy goods at a price named are received by the appellants and are submitted to Peltzer et fils for approval, and, if approved, contracts are entered into in this country by the appellants on behalf of Peltzer et fils; and I find also that the goods are consigned to the appellants for delivery to the customers in this country, to whom the goods are invoiced by the appellants. I find further that the appellants receive payment for the goods and discharge accounts on behalf of Peltzer et fils. Now, if all those facts are given to me as true, I am driven to the conclusion that Peltzer et fils are exercising a trade in this country, and if so, they are liable in respect of the profits they make upon that trade. They are properly attacked through their agents, Messrs Macpherson & Company, who, if they do not choose, as they have not chosen, to state an account so that the amount of profits may be strictly determined, cannot complain if a random assessment is made upon them by the Crown.

Upon the whole matter I am of opinion that the determination of the Commissioners is right.

LORD MACKENZIE.—I am of the same opinion. The case, as put to us by Mr Macmillan, was really this: taking the facts as found here, Would any man say, in a popular sense, that Peltzer et fils were exercising a trade within the United Kingdom? Would a person not come to the conclusion that they were trading with the United Kingdom? I think the facts that have been found would lead the ordinary man to the conclusion that they were exercising a trade within the United Kingdom. What leads me to that conclusion is that contracts are made in this country by the appellants on behalf of Peltzer et fils; that apparently the appellants have a system

¹ 1911 S. C. 217.

by which they send account sales to Peltzer et fils monthly, and a quarterly July 16, 1912, statement is rendered for expenses and for the commission paid by Peltzer et fils to Macpherson & Company. Macpherson & Company receive payment for the goods. They discharge the accounts on behalf of Peltzer et fils, and the goods are consigned to Macpherson & Company for delivery to the customers in this country. That seems to me to be sufficient to lead to the reasonable conclusion that Peltzer et fils are carrying on business within the United Kingdom. The argument was used that no branch of Peltzer et fils had been opened in the United Kingdom. Personally, that argument would or would not move me in a case of this kind, according to the description of the article dealt in. One can quite well imagine that it would be very difficult to say that the trade of selling certain goods could be carried on within the United Kingdom without having a branch, in cases where it is necessary for a customer to see, handle, or sample the goods; but when one looks to the nature of the goods disclosed in the documents before us, it does not appear to me that that argument is of very much weight in this case.

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kenzie.

The other points made in regard to there being no exhibition of the name Peltzer et fils, and their having no banking account, must be answered, I think, by applying this test: If anyone desired to get Peltzer et fils' goods in Scotland or in the United Kingdom, would he or would he not be able to get the necessary information to enable him to supply himself with them? I think there is sufficient on the facts before us to enable one to say that such a person would be told, "You can get Peltzer's goods quite well here; go to their agents, Macpherson & Company, in Glasgow."

With regard to the Solicitor-General's answer to the suggested practical difficulty of finding out the amount of the profits upon which the assessment is to be laid, I can only say this, that it is not necessary to arrive at any satisfactory conclusion upon that matter, because it is not one with which the Court have to deal. If the Act of Parliament says the amount of profits is to be ascertained, ascertained they must be whether that can be done in a satisfactory manner or not. Accordingly, I do not think we require to go into that matter in order to arrive at a conclusion in regard to this case. I am of opinion that the determination of the Commissioners is right.

LORD CULLEN concurred.

THE COURT dismissed the appeal.

J. W. & J. MACKENZIE, W.S.—SIR PHILIP J. HAMILTON GRIERSON, Solicitor of
Inland Revenue—Agents.

- No. 182. JAMES FRANCIS SOUTER AND ANOTHER (Alexander Watt's Testamentary Trustees), AND OTHERS, First, Second, and Third Parties.—
 July 19, 1912. *Valentine.*
 Watt's MRS HELEN WATT OR JAMIESON AND OTHERS, Fourth and Fifth
 Trustees v. Parties.—*T. G. Robertson.*
 Jamieson.

Succession—Faculties and powers—Validity of exercise—Unrestricted power of appointment—Gift of liferent—Distinction between unrestricted powers of appointment and powers of apportionment among a prescribed class.

A testatrix by her will, after providing for the payment of certain legacies, bequeathed the "residue" of her estate to her sisters in liferent and to her nieces in fee. The testatrix, in addition to her own estate, had a power of appointment over a portion of her father's estate liferented by her, the power being in the form of a direction in her father's will to his trustees "to pay over her portion to such person or persons, and if more than one, in such proportions as she shall by any writing under her hand direct or appoint."

Held that the testatrix by the bequest of residue in her will had validly exercised the power of appointment conferred on her by her father's testament, notwithstanding that she thereby restricted the right of certain appointees to a liferent.

Observations on the distinction between a power to apportion a fund among the members of a prescribed class, and a power to appoint it among such persons as the donee of the power might direct.

- 2D DIVISION. ALEXANDER WATT, shipowner, Macduff, died in 1874, leaving a trust-disposition and settlement, by which he directed in regard to a certain share of the residue of his estate that his trustees should hold it in trust "for the use and behoof of my daughters, Helen Watt, Eliza Watt, and Jane Watt, equally between them in liferent for their liferent use allenerly, paying to each during her life the annual income or produce of [one-third of the said share], and on the death of each of my said daughters my trustees shall pay over the capital or fee to her children, if any, in such proportions as she by any writing under her hand shall appoint, or failing any such writing, to and among her children equally between them share and share alike: And in the case of any of my daughters dying without leaving issue, my trustees shall pay over her portion to such person or persons, and if more than one, in such proportions as she shall by any writing under her hand direct or appoint, and failing such direction and appointment, my trustees shall pay and divide the portion of any daughter or daughters dying without leaving issue to and among her surviving brothers and sisters, and the issue *per stirpes* of any predeceasing brothers and sisters, equally between them share and share alike."

Mr Watt's daughter Eliza became the wife of Dr John Ferguson. She died on 14th July 1911, predeceased by her husband, and without issue. Dr Ferguson, who had two sons by a previous marriage, left a will by which he bequeathed the residue of his estate to his wife in liferent and his children in fee, but gave his wife an absolute power of disposal over his books and other personal belongings. She left a holograph last will and testament dated 2nd April 1910, which commenced:—"I, Eliza Watt or Ferguson, do hereby state and record my wishes as to the disposal of my property and belongings after my death. As sole executrix of my dear

husband's estate, I desire that it should be dealt with first : . . . July 19, 1912.
 Any part of the estate left to me, or over which I have control, I hereby leave and bequeath to my stepsons . . .” The will then proceeded:—“As regards my own estate I do hereby leave and bequeath . . .” and the testatrix thereupon bequeathed a number of special legacies. She then proceeded to make a bequest of residue in the following terms:—“After any special legacies which I may now or hereafter make, I desire that the residue of estate shall be divided between my sisters, Helen Jamieson and Jane or Jeannie Gardner, in liferent,” and she destined the fee to her nieces, Nora Jamieson, Lena Gardner, and Leila Gardner, in certain proportions. Several codicils were annexed to the will, by which additional legacies were bequeathed, and an executor appointed, but which did not expressly deal with “residue.”

A question having arisen as to whether Mrs Ferguson had validly exercised the power of appointment under her father's will, a special case was presented to the Court.

The only parties to the case who offered contentions were (1) a surviving brother of Mrs Ferguson and three children of a predeceasing brother, *third parties*, and (2) Mrs Ferguson's executor, and the residuary legatees under her will, *fifth parties*.

The third parties contended that the testamentary writings did not, and the fifth parties contended that they did, operate as a valid and effectual exercise of the power of appointment.

The following question was submitted for the opinion and judgment of the Court:—“Has the power of appointment conferred upon the said Mrs Eliza Watt or Ferguson under her father's testamentary writings been validly exercised by her in her said testament and codicils?”

The case was heard before the Second Division on 12th July 1912.

Argued for the third parties;—By a bequest of his moveable estate a testator was admittedly presumed to execute any power of appointment of which he was possessed.¹ But the presumption was easily displaced by proof of a contrary intention,² and it was very slight when, as here, the exercise of the power had to be construed out of a bequest of residue.³ In the present case the testatrix, when making her will, had in view any powers of appointment which she possessed, as appeared from the reference to estate “over which I have control,” in the early part of the settlement when she was dealing with her husband's estate. But when she came to deal with her own estate there was no such reference, and the inference was that she did not intend to exercise a power of appointment by her bequest of residue. Further, the presumption was negatived by the fact that the testatrix's disposition of her estate, if it was to be regarded as an intended exercise of the power, would have been an invalid appointment. The appointment alleged here was invalid inasmuch as it gave the liferent of the appointed funds to one person and the fee to another.⁴ The

¹ *Bray v. Bruce's Executors*, (1906) 8 F. 1078.

² *Mackenzie v. Gillanders*, (1874) 1 R. 1050, *per* Lord Deas, at p. 1054.

³ *Bowie's Trustees v. Paterson*, (1889) 16 R. 983; *Ramsay's Trustees v. Ramsay*, 1909 S. C. 628.

⁴ *Lennox's Trustees v. Lennox*, (1880) 8 R. 14; *Wood v. Cotton*, (1888) 40 Ch. D. 41; *Porter v. De Quetteville*, (1890) 45 Ch. D. 179. (Lord Salvesen referred to *Gillon's Trustees v. Gillon*, (1890) 17 R. 435.)

July 19, 1912. direction to the trustees under the will conferring the power was to "pay over" the funds to the appointees. This could only mean payment of capital, and made it incompetent for the testatrix to restrict the right of any of the appointees to a liferent.

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Argued for the fifth parties;—Not only did the testatrix intend to exercise the power of appointment, but she had done so in a valid manner. Proof of her intention to exercise the power was, according to the general rule, supplied by the bequest of her moveable estate,¹ and there were no indications to the contrary. In considering the further question, namely, whether the power had been validly exercised, it was important to notice the terms in which the power was conferred: it was a power to "appoint" among such persons as the testatrix might direct. This was in effect a general power to test, and was quite different from a mere power to "apportion" the fund among the members of a class.² There was accordingly nothing to prevent the testatrix from restricting the right of the appointees to a liferent, since she had full liberty to deal with the fund by deed in any way she chose.

At advising on 19th July 1912,—

LORD DUNDAS.—[After narrating the facts]—I have no doubt that, upon the terms of Mrs Ferguson's will, her residuary bequest is so conceived as to operate as an exercise of the power conferred upon her by her father's settlement, unless a contrary intention can be justly inferred from the language of her will. A very recent and highly authoritative decision on this branch of the law is *Bray v. Bruce's Executors*.¹ The rubric bears that "a bequest of the moveable estate of a testator is to be construed as including any personal estate which he may have power to appoint in any manner he may think proper, and operates as an execution of such power unless a contrary intention appears by the will." The strength of the presumption is illustrated by the facts of the case and expressed in the opinions of the learned Judges. Mrs Bruce had, under the settlement of her deceased husband, three separate powers by way of appointment. By her will she expressly exercised two out of the three powers; but the will was silent as to her intention in regard to the third. A Court of seven Judges (Lord Stormonth-Darling doubting, but not dissenting) held, adhering to an interlocutor pronounced by me as Lord Ordinary, that the residuary clause of Mrs Bruce's will was a valid exercise of the power with which she had not expressly dealt. In the case before us I can find no ground for an argument to rebut the legal presumption nearly so strong as was available in *Bray's* case¹; and I am accordingly of opinion that the power conferred upon Mrs Ferguson by her father's settlement was validly exercised by her in terms of her will.

The contention urged by Mr Valentine as against the presumption came, as I understood it, to this: that Mr Watt's direction to his trustees, in the event of Mrs Ferguson's decease without leaving issue, to "pay over her portion to such person or persons, and, if more than one, in such propor-

¹ *Bray v. Bruce's Executors*, 8 F. 1078.

² *Paterson's Trustees v. Joy*, 1910 S. C. 1029, *per* Lord Johnston, at p. 1034.

tions as she shall by any writing under her hand direct or appoint," was July 19, 1912. not duly echoed in, or carried out by, Mrs Ferguson's "desire" that the residue of her estate should be divided between her two sisters in liferent, with destination of the fee to her nieces as set forth in her settlement. It was argued, with ingenuity and some plausibility, that Mrs Ferguson's power under her father's settlement was in truth to apportion and divide the fund; and that, in respect she disposed of her residue in favour of beneficiaries in liferent and fee respectively, it could not be held, looking to the legal decisions on this subject, that she intended or professed to exercise that power; or otherwise, that, if she did so intend, the bequest is illegal and invalid as an apportionment.

When one looks fairly and carefully into the matter, I think this contention is fallacious. There is a complete and radical distinction between a power to apportion or divide a fund among the members of a prescribed class, and an unfettered gift of a fund to such person or persons, in such manner, and in such proportions as the donee of the power may direct or appoint. We are here, I think, clearly in the second of these categories, and not in the first. It is true that the word "appoint" is often used as equivalent to "apportion"; but the distinction I have indicated is a real one, and we must look to the substance as well as to the words in any given case. It has, no doubt, been decided that, in proper cases of apportionment or division among members of a class, the person who exercises the power must neither, on the one hand, give any portion of the fund to a stranger to the power, nor, on the other hand, restrict to a bare liferent the right of any member of the class who is admitted to the benefit, because (I apprehend) that does not, in the eye of the law, amount to an apportionment of a share of the fund to be divided. But the latter of these rules, which has, to my thinking, been pressed to an unfortunate extent in some of the cases, cannot, in my judgment, have any place at all where the donee of the power is not fettered by any reference to a prescribed class, but is free to direct or appoint the fund to or among any person or persons he pleases. In such case I see no reason why the donee of the power should not direct or appoint his gift in liferent and fee, just as well as in fee merely. So far as I am aware, the Court has never applied the somewhat artificial rule above indicated to a case where no class of beneficiaries is prescribed amongst whom the fund is to be apportioned or divided, and I do not suppose it is likely to do so. In the case before us, it appears to me that Mrs Ferguson's power under her father's settlement was quite unfettered; no class of beneficiaries was prescribed or suggested; she had right to dispose of the fund, in such manner as she pleased, to any person or persons, by writing under her hand, whether *inter vivos* or *mortis causa*, though, of course, the writing could only take effect in the event of her death without leaving issue. If I am right in this view, there seems to be no substantial force in a subordinate argument presented by Mr Valentine, to the effect that Mr Watt's direction to his trustees to "pay over" the fund must be read as meaning to pay it over once and for all, and therefore as excluding the idea of any interposed liferent rights. I think this would involve an unnecessarily restricted reading of the words "pay over," and I see no reason why the language of Mr Watt's settlement should not be wide

July 19, 1912. enough to include the payment over of the fund in liferent and fee, as Mrs
 Watt's Ferguson desired it should be made.

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 Jamieson.

Lord Dundas. For the reasons stated, I am of opinion that no contrary intention can in this case be shown to rebut the presumption that Mrs Ferguson intended to exercise her power, and that she did validly exercise it by her last will and testament. I am therefore for answering the question put to us in the affirmative.

LORD SALVESEN.—[In his Lordship's absence his opinion was read by Lord Dundas]—In this case I have had more difficulty than Lord Dundas in holding that we should answer the question of law in the affirmative. My difficulty arises from the decision in the case of *Baikie's Trustees v. Oxley*.¹ In that case a power was given by a father to his daughter, then a widow, with reference to a sum of £2000, of which she had the liferent, to divide the fee "among such children, by such proportions as she shall direct." She appointed to one child £5 and the liferent of £1000, and to the other £995 and the fee of the £1000 so to be liferented. It was held by a majority of the First Division, *diss.* Lord Deas, that the above was, in part, a bad appointment, and that the whole deed was thereby vitiated. On a careful perusal of that case I think, however, it must be regarded as special, and not as laying down a rule that a party having a power of division of a fund among a class may not allot a liferent of the fund to one person and the fee to another, where there is no indication of the intention of the donor of the power to the contrary. This was expressly so stated in Lord Curriehill's opinion at the commencement. I do not, therefore, think that it really presents any obstacle to the judgment proposed; more especially as there is, in the present case, no difficulty as to the objects of the power. I cannot at present see any good reason why, if a power is conferred to appoint in such proportions as the donee of the power may direct, that power might not be validly exercised by giving a liferent of the whole or part of the fund to one, and the fee to others. In any event I think there is ground for saying that later decisions have modified and in part overruled the decision in *Baikie's*¹ case; and we were not referred to any direct authority where, in the case of a power to appoint without limitation as to the objects of the power, an appointment was held not to be good because it postponed the division of the fee, in whole or in part, in order to provide for a liferent.

On the other question I think we are bound by the case of *Bray*,² and that there is no sufficient indication of a contrary intention to overcome the strong presumption that a general disposition and settlement is to be construed as including all estate over which the testator had a power of appointment. I concur, therefore, in Lord Dundas's opinion, and very much for the reasons he has assigned.

LORD GUTHRIE.—I concur in the opinion of Lord Dundas.

Lord Dundas stated that his opinion was also concurred in by the LORD JUSTICE-CLERK, who was absent at the advising.

¹ 24 D. 589.

² 8 F. 1078.

LORD HUNTER was present when the case was advised.

July 19, 1912.

THE COURT answered the question of law in the affirmative.

Watt's
Trustees v.
Jamieson.

WINCHESTER & NICHOLSON, S.S.C.—A. STUART WATT, W.S.—Agents.

WILLIAM CAREY, Pursuer.—*Macquisten*.

No. 183.

ROBERT ORR CAREY AND OTHERS (Frederick Charles Carey's Trustees), Defenders.—*Moncrieff, K.C.—J. M. Hunter*.

July 19, 1912.

Process—Jury Trial—Case sent to sittings—Postponement of trial—Grounds for postponement—Act of Sederunt, 19th November 1910, sec. 4. Carey v. Carey.

Where one of the parties to a jury trial has objected to the trial proceeding at the sittings and the Lord Ordinary has repelled the objection and sent the case to the sittings, a postponement of the trial will not be granted unless strong grounds can be shown for interfering with the decision of the Lord Ordinary, or unless there has been a change of circumstances since the date of that decision.

Circumstances in which the Court refused a motion by the pursuer for the postponement of a jury trial which had been sent to the sittings, the grounds on which the motion was made being that one material witness was abroad and the address of another could not be ascertained.

ON 27th January 1912 an action was brought by William Carey ^{1ST DIVISION.} against Robert Orr Carey and others, the testamentary trustees of ^{Lord Dewar.} Frederick Charles Carey, for reduction of the testator's trust-disposition and settlement.

The case was in the Lord Ordinary's adjustment roll on 19th March 1912, when the adjustment was continued until 14th May.

Issues were approved on 22nd May and the Lord Ordinary fixed 21st November 1912 as the date of the trial.

On 27th June the defenders moved that the case be remitted for trial at the sittings. The pursuer objected to this course on the ground that he could not be ready to proceed with the case by that time. The Lord Ordinary (Dewar) repelled the objection and remitted the case for trial at the sittings, and the trial was fixed to take place on 26th July 1912.

On 19th July the case was called in Single Bills of the First Division (without Lord Johnston) on a notice of motion for the pursuer that the trial be postponed on the ground of the absence of material witnesses. He stated that one of his most important witnesses was in Switzerland, and that the address of another material witness was unknown.

Counsel for the defenders objected to postponement of the trial on the ground that their productions had been lodged and their witnesses cited for the date fixed.

LORD PRESIDENT.—This is a motion for the postponement of a trial which has been fixed for the sittings and is set down to be tried next Friday. As your Lordships are aware, the practice in jury trials has been very much modified by a recent Act of Sederunt,¹ which swept away a great deal of the somewhat cumbrous and antiquated procedure which

¹ Act of Sederunt, 19th November 1910.

July 19, 1912. formerly obtained, and under the present Act of Sederunt the general scheme for the disposal of jury trials, a scheme which I may say was conceived entirely in the interest of the public, is that jury trials should, if possible, be tried by the Lord Ordinary. If, however, the Lord Ordinary should be unable to give a day for the trial before the next ensuing sittings, then it is intended that the trial should take place at the sittings in order to avoid delay. In this case the Lord Ordinary was applied to to fix a day for the trial after the adjustment of issues, which took place on 22nd May, but he could not give a day till November. Accordingly, the defenders took advantage of their right to move the Lord Ordinary to remit the case to the sittings for trial. It was in the power of the pursuer to object to this, as he did, and to give any good reason why he could not be ready for trial then ; but the Lord Ordinary did not consider that the reasons then tabled were sufficient, and he sent the case to the sittings. It is still perfectly competent, notwithstanding that, that either party should come to us and ask that the trial should be postponed, but I wish to lay it down for the guidance of the profession that such a motion will not be granted unless very strong grounds can be shown for interfering with the decision of the Lord Ordinary, or unless there has been a change of circumstances since the date of the Lord Ordinary's interlocutor, *e.g.*, the death or illness of one of the parties.

That being the general rule, I come to the application for postponement in this case. I cannot see that we have before us any good grounds for interfering with what the Lord Ordinary has done. There has been no undue haste in the proceedings here. The summons was signeted on 27th January 1912, but the pursuer, who has in his hands the progress of a case in its early stages, did not have the production held satisfied till 19th March, and the adjustment of the record was continued until the beginning of the summer session. Now all along the pursuer must have known that the trial was coming on, but the only thing he can say in moving for postponement is that one witness who is very material is in Switzerland, and that another material witness is a roving gentleman whose present address is unknown to the pursuer. I therefore think this motion should be refused.

LORD KINNEAR and LORD MACKENZIE concurred.

THE COURT refused the motion.

PURVES & SIMPSON, S.S.C.—SIMPSON & MARWICK, W.S.—Agents.

THE MARQUIS OF LINLITHGOW AND YOUNG'S PARAFFIN LIGHT AND No. 184.
MINERAL OIL COMPANY, LIMITED, Pursuers (Reclaimers).—

Rankine, K.C.—Clyde, K.C.—Hon. W. Watson.

June 11, 1912.

THE NORTH BRITISH RAILWAY COMPANY, Defenders (Respondents).—
D.-F. Dickson—Cooper, K.C.—Macmillan.

Marquis of
Linlithgow v.
North British
Railway Co.

Compulsory Powers—Canal—Mines and Minerals—Reservation of minerals—Substance not regarded as a mineral at date of acquisition of lands—Oil shale.

A private Act passed in 1817, authorising the construction of a canal, reserved to the owners of any lands through which the canal should be made "the mines and minerals lying within or under the said lands." A statutory form was also provided by which lands acquired for the purpose of making the canal might be conveyed to the canal company, the registration of which was declared to have the same effect as a formal disposition followed by charter and sasine. The price of certain lands required for the formation of the canal was agreed upon and consigned in 1818, in which year the canal company entered into possession of them, and the canal was constructed and opened for traffic in 1822. The statutory conveyance of these lands, however, was not completed and registered until 1862.

In 1909 the representative of the vendor of the lands brought an action against the proprietors of the canal in which he sought declarator of his right of property in a seam of oil shale subjacent and adjacent to the canal within the lands in question. It was admitted by the defenders that by 1862 oil shale had become recognised as a "mineral" in the sense of the reservation, but they denied that it was recognised as a "mineral" in 1818.

Held (1) that what was denoted by the term "mineral" fell to be ascertained as at 1818, the date when possession of the lands passed to the defenders, and not at 1862, the date of the statutory conveyance; and (2) that in 1818 oil shale was not described as a mineral in the vernacular of the mining world, the commercial world, and landowners; and defenders *assolized*.

Diss. Lord Johnston, who was of opinion (1) that oil shale was *ejusdem generis* with coal, a recognised mineral in 1818, and was therefore included in the reservation, and (2) that, in any case, on a construction of the statute, the terms of the reservation were wide enough to include a substance which first became recognised as a mineral after its date, and that the authority of decided cases did not compel the exclusion of a substance so circumstanced from a reservation in the terms in question.

Compulsory Powers—Canal—Right of support—Mines and Minerals—Notice to "stop working"—Union Canal Act, 1817 (57 Geo. III. cap. lvi.).

Terms of a private Act passed in 1817, authorising the construction of a canal, which were *held* to confer upon the canal company a right of support for their canal, but subject to the qualification that, where in order to support the canal the subjacent and adjacent minerals had to be sacrificed as a commercial subject, the company were bound to make satisfaction for the value of such minerals to the owner thereof.

Opinion that, where a private Act gave a right to a canal company to "stop the working" of minerals under or near their canal if necessary for its safety, an intimation from the canal company to the owner of the minerals that they would hold him liable for any damage done to the canal by working the minerals beneath it was, on the assumption that the minerals could not be worked beneath the canal without endangering it, a notice to "stop the working" in the sense of the Act.

June 11, 1912. ON 27th April 1909 the Marquis of Linlithgow and Young's Paraffin Light and Mineral Oil Company, Limited, his tenants in a seam of oil shale, brought an action against the North British Railway Company, the proprietors of an undertaking known as the Union Canal, in which it was sought to establish certain rights of the pursuers in this seam of oil shale, part of which underlay the defenders' canal.

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1st Division.
Lord Skerrington.

The summons in the action concluded for declarator in these terms:—“(First) that the pursuer the said Victor Alexander John Marquis of Linlithgow is heritable proprietor of the whole minerals, and in particular of the seams of coal and shale or oil shale lying under or near the canal and works thereto belonging known as the Union Canal and belonging to the defenders, so far as the said minerals lie within or under the area in the county of Linlithgow outlined in red on the ordnance survey plan herewith produced, and that the pursuers Young's Paraffin Light and Mineral Oil Company, Limited, by virtue and in terms of the said lease are tenants of the whole coal and oil shale lying under or near the said Union Canal, so far as the said minerals lie within or under the area outlined in red on said plan: (Second) that the pursuers' mines and workings in and of the seam of oil shale belonging to them as aforesaid and known as the Broxburn main seam of oil shale, the present extent of which is delineated on the said plan, cannot be worked or carried (1) any further in the direction of or towards the defenders' said canal and works thereto belonging, or otherwise (2) within 40 feet or thereby on either side of the waterway of the said canal, without endangering the safety of the navigation of the said canal and the works thereto belonging; and that it is necessary for the safety of the said navigation and the works thereto belonging to stop the working of the pursuers' said mines and minerals [further in these directions], and that the pursuers have been and now are stopped within the meaning of the Act 57 George III. cap. lvi., and in particular section 113 of said Act, from working their said mines and minerals [further in these directions]: (Third) [Then followed an alternative declarator that the pursuers' mines had been carried as far towards the canal as they could be without danger to the mines, and that, owing to danger to the mines and to the canal, the pursuers were prevented from carrying them further by reason of the execution of the statutory powers with regard to the construction and maintenance of the canal]: (Fourth) that the defenders are bound under and in terms of the Acts 57 George III. cap. lvi., and 59 George III. cap. xxix., and other Acts relative to their undertaking, to make recompense or satisfaction to the pursuers according to their respective interests (1) for the value of the said mines and minerals the working whereof has been stopped as aforesaid, or otherwise (2) for the damage sustained by them respectively by reason of the execution of the powers conferred by said Acts, and in any event or otherwise (3) for the value of the said mines and minerals the working whereof has been stopped as aforesaid, in so far as said mines and minerals do not lie or are not within or under the lands or grounds belonging to the defenders under and by virtue of a disposition in favour of their predecessors the Edinburgh and Glasgow Railway Company, granted by the Right Honourable John Alexander Earl of Hopetoun, of date 30th May and 7th June, and recorded in the particular Register of Sasines applicable to the county of Linlithgow at Edinburgh 7th July, all in the year 1862.” There was also a conclusion that the defenders should be ordained to

proceed to the ascertainment of the satisfaction falling to be paid to June 11, 1912. the pursuers.

The pursuers averred (Cond. 1) that the Union Canal was constructed by a company incorporated in 1817 by Act of Parliament, 57 Geo. III. cap. lvi.,* and was now vested in the defenders, and that

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* The Union Canal Act, 1817 (57 Geo. III. cap. lvi.), is entitled "An Act for making and maintaining a navigable canal from the Lothian Road, near the city of Edinburgh, to join the Forth and Clyde Navigation Canal near Falkirk, in the county of Stirling, 27th June 1817."

The preamble sets forth the public utility of making and maintaining such a canal, and sec. 1 incorporates a company for that purpose.

Sec. 33 authorises the company to make a canal through certain enumerated parishes and townships between the points above mentioned, and to make and maintain feeders from certain rivers and streams.

Sec. 35 enacts:—"That it shall and may be lawful to and for the said Company, their Deputies, Agents, Officers, and Workmen, and they are hereby authorised and empowered, to enter into and upon the Lands and Grounds of or belonging to the King's Majesty, His Heirs or Successors, or of any other Person or Persons, Bodies Politic, Corporate, or Collegiate whomsoever, and to survey and take Levels of the same, or any part thereof, and to set out and ascertain such parts thereof as they shall think necessary and proper for making the said intended Canal, Reservoirs, Feeders, . . . and also to bore, dig, cut, trench, sough, get, remove, take, and carry away, and lay Earth, Clay, Stone, Soil, Rubbish, Trees, Roots of Trees, Beds of Gravel or Sand, or any other Matters or Things which may be dug or got in making the said intended Canal, Reservoirs, Feeders, and other Works, or in making any Basin or Basins, Feeder or Feeders, Aqueduct or Aqueducts, or out of the Lands or Grounds of any Person or Persons adjoining thereto, which the said Company are hereby empowered to enter for the Purpose of getting and taking away such Materials as may be necessary, requisite, and proper for making, carrying on, continuing, maintaining, or repairing the said intended Canal, Reservoirs, Feeders, and other Works . . . and also to construct, erect, make, and do all Matters and Things which they shall think convenient and necessary for making, effecting, extending, preserving, improving, completing, and using the intended Canal, Reservoirs, Feeders, and other Works, in pursuance of and according to the true intent and Meaning of this Act, they the said Company, their several Deputies, Agents, Officers, and Workmen, doing as little Damage as may be in the execution of the several Powers to them hereby granted, and making Satisfaction in Manner hereinafter mentioned to the Owners and Proprietors of, and other persons interested in any Lands, Tenements, or other Heritages, Waters, Watercourses, Brooks, or Rivers respectively, which shall be taken, used, removed, diverted, or prejudiced, for all Damages to be by them sustained in or by the execution of all or any of the Powers of this Act . . ."

Sec. 50 provides that "the lands and grounds to be taken or used for such canal and towing paths shall not exceed thirty yards in breadth," except at certain specified places.

It is further enacted:—

Sec. 59. "That the Vendor or Vendors, and all other Person or Persons interested in the lands to be sold to the said Company, as Superiors or otherwise, shall be entitled to the same Rights and Privileges from the remaining Parts of these Lands as if such Sale or Sales to the said Company had never been made."

Sec. 60. "That after any Lands, Grounds, Tenements, or Heritages, shall be set out and ascertained for making the said Canal, Reservoirs, and Feeders . . . it shall and may be lawful to and for all Bodies Politic,

June 11, 1912. certain lands necessary for the construction of the canal belonging to Lord Linlithgow's predecessor were conveyed by him to the Company's successors by disposition dated 30th May and 7th June 1862, entry being declared to be at Whitsunday 1818, notwithstanding the date thereof.

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The history of the transactions which terminated in this disposition was narrated by the Lord Ordinary (Skerrington) as follows:—
“The work began in 1818 and the canal was opened for traffic in 1822. The sum of £3000, the agreed-on price of the ground, was consigned by the Canal Company in 1818 under authority of the Court for behoof of the heirs of entail in the lands and barony of Hopetoun, and £1597, the remainder of the compensation money, being damages as assessed by arbitration in 1826, was similarly consigned in 1830. In 1851 the Canal Company and its statutory successor, the Edinburgh and Glasgow Railway Company, sued Lord Hopetoun for declarator that he was bound to execute a conveyance

Corporate, or Collegiate, Corporations aggregate or Sole, Heirs of Entail, Husbands, Trustees, Tutors, and Curators, and all and every Person or Persons whatsoever though under any legal Disability or Incapacity whatsoever, who is, are, or shall be seized, possessed of, or interested in any Lands, Grounds, Tenements, or Heritages, which shall be so set out and ascertained for the Purposes aforesaid, to contract for, sell, and convey the same, and every Part thereof, unto the said Company . . . and all such Contracts, Agreements, Sales, Conveyances, and Assurances, shall be made at the Expence of the said Company; and such of them as shall be made of any Lands, Tenements, or other Heritages to the said Company, may be made in the following Form, or in Words to the same effect; *videlicet*,
‘I, A. B. of . . . in Consideration of the Sum of . . . to me paid by . . . do hereby grant, dispo, and convey to the said Company, all [describing the Premises to be conveyed] and all my Right, Title, and Interest to and in the same, and every Part thereof, to hold to the said Company and their Successors for ever, by virtue and according to the true Intent and Meaning of an Act made in the Fifty-seventh Year of the reign of King George the Third, intituled An Act [here insert the Title of this Act], the said Premises to be holden Blench of and under me, my Heirs and Successors, for payment of a Penny Scots yearly, if asked allenarly. Consenting to the Registration hereof in the Books of Council and Session, or others competent for Preservation; and thereto I constitute my Procurators. In Witness whereof I have subscribed these Presents. Written by C. D. at Edinburgh this . . . day of . . . before these Witnesses . . .’

Which Conveyance being registered in Terms of the Clause of Registration therein contained, and recorded in the Register of Seisins of the County in which the premises conveyed shall be situated, and which the respective keepers of the Registers in such Counties are hereby authorized and required to register, shall have the same Effect and be as valid and effectual to all intents and purposes as if a formal disposition had been executed and followed by Charter and Seisin, according to the Forms of the Law of Scotland, any Law, Statute, or Custom, to the contrary notwithstanding.”

Sec. 61. “Provided always, and be it enacted, That all and every Body or Bodies Politic, Corporate or Collegiate, Trustees, or other Persons hereinbefore enabled to sell and convey Lands, Tenements, and other Heritages, or any other Owner or Owners, and the Occupier or Occupiers of any Lands, Tenements, and other Heritages, through, in, or upon which the said Canal, Towing Paths, Quays, and other Works hereby authorised or intended to be made, or of any Mills or other Works from which any Water to supply the said Canal may or shall be taken or diverted, may and shall accept and

of the lands bought by the Canal Company, and a final decree in June 11, 1912. favour of the pursuers was pronounced on 23rd February 1856.¹ It was not until May and June 1862 that a disposition was granted by Lord Hopetoun, with consent of the Canal Company, in favour of the Railway Company. This disposition was in the statutory form permitted by section 60 of the Canal Act of 1817, and it was recorded in the Register of Sasines on 7th July 1862.”

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It was also averred by the pursuers that the father of the pursuer Lord Linlithgow let to the pursuers Young's Paraffin Light Company for a space of thirty-one years from 1905 the whole coal (including the coal or mineral commonly known as Torbanehill coal or mineral) and oil shale belonging to him within the area referred to in the first conclusion of the summons.

The pursuers' further averments and the defenders' answers thereto, so far as material to this report, were as follows:—(Cond. 4) “In

receive Satisfaction for the Value of such Lands, Grounds, Tenements, Mills or other Works, Water, and Heritages, and for the Value of all Stone, Limestone, Clay, Gravel, Sand, and all other Materials whatsoever, which shall be taken by the said Company for the purposes of this Act, excepting such as are found in digging the Canal, and for the Damages to be sustained by making and completing the said Works herein before directed, in such Manner as shall be agreed upon by and between the said Parties interested respectively, or any of them, and the said Company; . . . and in case” they “cannot agree as to the amount of such Satisfaction, the same shall be ascertained and settled by the Verdict of a Jury of Fifteen substantial disinterested Persons, to be summoned and chosen by the Sheriff-Depute or Substitute of the County. . . .”

Sec. 62. “And be it further enacted That the said Juries respectively shall award all Determinations, Judgments, and Verdicts, which they shall respectively make and give in the Execution of the Powers hereby vested in them concerning the Value of Lands, Grounds, Mills, Tenements, and other Heritages, separately and distinctly from the Consideration of any other Damages sustained or to be sustained by any Person or Persons in consequence of the execution of any of the Powers of this Act, and shall distinguish the Value set upon the Lands, Tenements, and other Heritages, and the Money assessed or adjudged for such Damages as aforesaid, separately and apart from each other.”

Sec. 69. “That upon Payment or Consignation . . . of such Sum or Sums of Money as shall have been contracted or agreed for between the Parties, or ascertained by the Sheriff and a Jury as aforesaid, for the Purchase of any such Lands, Waters, Mills, Tenements, or other Heritages, or as a Recompence for the yearly Produce or Profit thereof, or as a Compensation for Damages as herein mentioned to the Proprietor or Proprietors of such Lands, Waters, Mills, Tenements, or other Heritages, or to such other Person or Persons as shall be interested therein, or entitled to receive such Money, Rent, or Compensation respectively, or upon Investment thereof, in Manner directed by this Act, for the Use of such Person or Persons so interested or entitled as aforesaid, as the Case may be, it shall and may be lawful to and for the said Company, and their Agents, Workmen, and Servants, immediately thereafter to enter upon such Lands, Grounds, Mills, Tenements, and other Heritages respectively, and then and there, such Lands and Grounds, Waters, Mills, Tenements, and other Heritages, together with the yearly profits thereof, and all the Estate, Use, Trust, and Interest of any Person or Persons therein, shall from thenceforth be vested in and

¹ Union Canal Co. v. Earl of Hopetoun, (1856) 18 D. 655.

June 11, 1912. **Marquis of Linlithgow v. North British Railway Co.** terms of the said Canal Act of 1817 and disposition, the ownership of the mines or minerals lying or being within or under the lands so conveyed was reserved to the vendor, and is now vested in the pursuer the Marquis of Linlithgow. The shale presently in question is a mineral within the meaning of said Act. With reference to the explanations in answer, it is admitted that shale was not worked in this district for the extraction of mineral oil until after the date of said Act. *Quoad ultra* said answer is denied. The shale in question is bituminous shale, a substance of the nature of coal, being rich in carbon and hydrogen. By reason of the existence of these elements it has a high commercial value. Shale has been known and worked as a mineral since a period prior to the date of said Canal Acts. It requires blasting, and is worked by stoop and room. This shale has always been treated by the defenders and their predecessors as a mineral within the meaning of said Act, and compensation has

become for ever the sole Property of the said Company, their Successors and Assigns, to and for the Use of the said Canal and other Works, but to or for no other Use or Purpose whatsoever."

Sec. 111. "That if any person shall wilfully and maliciously, and to the prejudice of the said Company, break, throw down, damage, or destroy any banks or other works to be erected and made by virtue of this Act, every such person shall be adjudged guilty of felony. . . ."

Sec. 112. "Provided always, and be it further enacted, That nothing herein contained shall extend to prejudice or affect the Right of any Owner or Owners of any Lands or Grounds in, upon, or through which the said Canal, or any Towing Paths, Wharfs, Quays, Basins, Tunnels, Feeders, Trenches, Sluices, Passages, Watercourses, or other Conveniences aforesaid, shall be made to the Mines and Minerals lying or being within or under the said Lands or Grounds, but all such Mines and Minerals are hereby reserved to such Owner or Owners of such Lands or Grounds respectively; and it shall and may be lawful to and for such Owner or Owners, subject to the Conditions and Restrictions herein contained, to work, get, drain, take, and carry away, to his, her, or their own use, such Mines and Minerals, not thereby injuring, prejudicing, or obstructing the said Canal, or any of the Works or Conveniences belonging thereto."

Sec. 113. "And be it further enacted, That it shall and may be lawful to and for the said Company, or their Agents or Servants, at any Time or Times, upon reasonable Notice, in the Day-time, to enter upon any Lands through or near which the Canal and Works hereby authorized to be made shall be or pass, wherein any Mines shall or may have been dug, opened, or wrought, and likewise to enter into such Mines, and there to view, search, and measure, latch, and use all other Means for discovering the Distance of the said Canal and Towing Paths from the Working Parts of such Mines respectively; and in case it shall appear that any Mine hath been opened or wrought under the said Canal, or any of the Works belonging thereto, or so near thereunto as to endanger or damage the same, and that such endangering and damaging the Canal or other Works has been wilful, it shall and may be lawful to and for the said Company, and their Agents, Servants, or Workmen, at the Expence, Costs, and Charges of the Owners or Proprietors of such Mine and Mines, and from Time to Time, to use all reasonable Ways and Means for repairing, supporting, sustaining, securing, and making safe, the said Canal, Towing Paths, and other Works; and such Expences, Costs, and Charges shall, in case such Mines shall have been so wrought or worked subsequent to the passing of this Act, be recovered by the said Company, in case of non-payment thereof upon Demand, by Action at Law in the Court of Session; and such Expences, Costs, and Charges shall when recovered be paid into the hands of the Clerk of the

been paid by them therefor on that footing, and at the date of the June 11, 1912. disposition mentioned in cond. 1 [the disposition of 1862] it was being extensively worked in the district for the extraction of mineral oil." (Ans. 4.) "The statute and disposition mentioned are referred to for their terms. Admitted that the shale in question is bituminous in character and is now of commercial value. Admitted also that shale is now mined by stoop and room and requires blasting, and that the defenders have paid compensation for shale left unworked. *Quoad ultra* denied. Explained that shale is not a mineral within the meaning of the statutory reservation founded on by the pursuers. At the date of the passing of the said Canal Act of 1817, and for many years thereafter, shale was not known or worked as a mineral, and was not used or regarded as a substance of any commercial value. Its use for the manufacture of oil was not discovered and no shale was ever worked until a comparatively recent date." Conds. 5 and 6 referred to the lease of minerals to Young's Paraffin Light Company above mentioned. (Cond. 7) "Part of the minerals let under said lease consists of an isolated area of Broxburn shale situated under and on the north and south sides of the defenders' said canal. For the purpose of working this isolated area the pursuers Young's Company, soon after the commencement of said lease, and as thereby taken bound to do, opened a mine known as No. 41 Mine, Fawnspark, and constructed a private line of railway to the same, which mine enters the shale at the outcrop on the south side of the canal, the shale dipping northwardly under the canal and the mine following. The said isolated area of shale is shown tinted yellow on the map herewith produced." (Ans. 7) "Admitted that the pursuing Company have opened a mine known as No. 41 Mine, Fawnspark, in the vicinity of the defenders' canal, and that they have constructed a private line of railway to the same. The lease and the map produced are referred to. *Quoad ultra* no admission is made, and reference is made to answer 4." (Cond. 8) "On 20th March 1906, as said mine was near the canal, the pursuers Young's Company wrote to the defenders giving them notice that the workings from said mine were approaching the canal, and that they intended passing underneath it. In reply the defenders wrote, on 13th April 1906, that they would not object to mines passing under the canal for the working of the shale beyond if such mines

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said Company for the Time being, for their Use and Benefit; and in case the said Company shall find it necessary for the safety of the said Navigation, or any of the Works thereto belonging, to stop the working of any Mines and Minerals under or near the said Canal, or any of the Works thereto belonging, the said Company shall and they are hereby required to make Satisfaction for the Value of such Mines and Minerals to the Owners, Occupiers, or other Persons entitled to receive the same, to be ascertained and determined" (in a manner subsequently prescribed by Act, 59 Geo. III. cap. xxix., referred to as The Canal Act, 1819).

Sec. 120. "That if at any Time or Times hereafter any Person or Persons shall sustain any Damage in his, her, or their Lands, Tenements, Heritages, or Property, by reason of the Execution of any of the Powers hereby given, and for which no Remedy is herein before provided, then and in every such Case the Recompence or Satisfaction for such Damage shall from Time to Time be settled and ascertained by a Jury as aforesaid; and the same may be recovered, levied, and applied in Manner herein directed with regard to any other Recompence or Satisfaction."

June 11, 1912. were securely made, kept, and left, so that the canal was not in any way injured or prejudiced thereby. . . .” (Cond. 9) “Thereafter, for the purpose of working the portion of said isolated area of shale lying on the north side of the canal, the said pursuers formed a single mine of narrow width under the canal. In course of forming that mine it was found that the main seam of Broxburn shale, which is about 5 feet 6 inches thick, is only a few feet from the bottom of the canal. This single mine was accordingly lined throughout with brick and converted into a tunnel between the north and south sides of the canal, the greater portion of the shale in said isolated area being on the north side. . . .” (Cond. 10) “The main Broxburn seam of shale in said isolated area has now been worked into pillars by means of said mine No. 41 on both sides of the defenders’ canal up to within the distance shown by the plan herewith produced. This method of working the shale is the ordinary and usual method. Owing to the said position of said seam of shale relatively to the defenders’ canal and the nature of the shallow intervening strata, the further working of said seam under or near the canal is, as the defenders themselves well know, impossible without imminent danger to the safety of the canal and the works thereto belonging and of the navigation thereof. In any event, the further working of said seam of shale within 40 feet or thereby of either the north or the south side of the waterway of the defenders’ canal is, as the defenders well know, impossible as aforesaid. . . .” (Cond. 11) “In these circumstances, the agents of the pursuers, by a letter dated 6th June 1907, wrote to the defenders in the following terms, viz.:—‘On behalf of the Marquis of Linlithgow, as proprietor, and Young’s Paraffin Light and Mineral Oil Company, Limited, as lessees, we have to intimate that the workings from their No. 41 Mine, Fawnspark, in the main Broxburn seam of shale, in the lands and estate of Hopetoun, have now reached so far that further workings under and near the Union Canal property, or at least within 40 feet of either the north or the south side of the waterway of said canal, will endanger the safety of the navigation of the said Union Canal or of works thereto belonging. We have, therefore, to ask you to have the satisfaction ascertained for the value of the said main Broxburn seam of shale so far as under and near the said Union Canal property, or at least within 40 feet of the north and south sides of the said waterway (the working of which seam of shale has been stopped for the safety of the navigation of the said Union Canal and works thereto belonging), and that in terms of section 17 of 59 George III. cap. xxix., and section 61 of 57 George III. cap. lvi. If for any reason you are unwilling to proceed, we shall be obliged by your sending to us an undertaking freeing and relieving the said Marquis of Linlithgow and the said Young’s Paraffin Light and Mineral Oil Company, Limited, of all possible claims of damage which may arise to you the said North British Railway Company, as proprietors of the navigation of the said Union Canal or works thereto belonging, or to any persons or corporations using or being otherwise interested in the said Union Canal or in the said Union Canal undertaking or works thereto belonging, through any further workings by the said Young’s Paraffin Light and Mineral Oil Company, Limited, of the said main Broxburn seam of shale under and near or at least within 40 feet of either the north or south side of the waterway of said Union Canal. In the event of your preferring to have the satisfaction for the said shale

ascertained by arbitration rather than in terms of section 17 of 59 George III. cap. xxix., the Marquis of Linlithgow and Young's Paraffin Light and Mineral Oil Company, Limited, will concur in such method of ascertainment.'” (Cond. 12) “To this letter the defenders' secretary replied as follows, on 8th November 1907:—‘I duly received your letter of 6th June, and subsequent reminders. The Company are not to proceed as you ask, nor will they grant any undertaking. They hold your clients responsible for all injury and damage to the canal or adjoining works from the workings or proposed workings.’ After various meetings between representatives of the parties, the agents of the pursuers wrote to the defenders the following letter, dated 11th December 1908:—‘Referring to the meeting of Mr Cross and Mr Lennox with you on 17th November, it will be obliging if you can now let us hear from you. Lord Linlithgow is going abroad soon for several months, and we are desirous of communicating your views to him and getting his final decision before he leaves.’ To this letter the defenders' secretary replied as follows on 23rd December 1908:—‘Referring to your letter of 11th inst., and meetings with your Mr Lennox and Mr Cross of Glasgow, this matter has been very carefully considered, and in view of the legal opinions we have obtained, the Company cannot admit any right on the part of your client or his tenants to work out shale from under the canal if by so doing the canal or relative works or conveniences will be injured, prejudiced, or obstructed, and this Company will hold him and them responsible for any such injury, prejudice, or obstruction that may be so occasioned. In these circumstances, I regret that no arrangements seem possible.’ . . .” (Cond. 13) “In these circumstances the pursuers have been and now are stopped from working the minerals under and near the canal within the meaning of section 113 of the Canal Act of 1817, or at all events are so stopped from working the minerals within 40 feet or thereby from either side of the waterway, and the value of the mines and minerals, the working of which has been stopped as above-mentioned, falls to be ascertained by a jury under and in terms of said Acts, and in particular of section 11 of the Canal Act of 1819. But the defenders, while they hold the pursuers liable for all damage to the canal or adjoining works from the mineral workings already made and from any future workings, refuse to proceed to the ascertainment of said value in manner foresaid.” (Ans. 13) “Admitted that the defenders refuse to proceed with the ascertainment of the value of the said shale, and that they hold the pursuers liable for any injury, prejudice, or obstruction to their undertaking caused by the working of the said seam. *Quoad ultra* denied. The defenders have not found it necessary for the safety of their canal or any of the works thereto belonging to stop the working of any mines and minerals under or near the said canal or any of the works thereto belonging,” (Cond. 14) “Further, or otherwise, the further working of the pursuers' said seam under or near the canal, or otherwise the working of said seam within a distance of 40 feet or thereby on either side of the waterway of said canal, is prevented not only by the danger involved to the navigation of said canal and to the works thereto belonging, but also by the danger involved to the pursuers' mineral workings from the presence of the defenders' canal and the danger of flooding therefrom. The pursuers are thus prevented by reason of the execution of the powers conferred by the defenders' Canal Acts from working any further their said seam of shale under

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June 11, 1912. or near the said canal and works thereto belonging, or otherwise from working said seam so far as lying within a distance of 40 feet or thereby on either side of the waterway of said canal, and have sustained damage accordingly. With reference to the answer, the Canal Act of 1817 is referred to for its terms. *Quoad ultra* denied. The said lands taken by the defenders' authors were taken compulsorily. Whether the shale in question be a 'mineral' within the meaning of said Act or not, no recompense or satisfaction was made to the first-named pursuer's authors in respect of the restrictions on the working of said shale of which the pursuers now complain, nor did the defenders or their authors by taking said lands acquire the right to prevent the said pursuer or his authors from working the said shale in the ordinary and usual manner, except that conferred on the Canal Company by section 113 to stop the working of minerals on making compensation." (Ans. 14) "Admitted that the lands were taken compulsorily. *Quoad ultra* denied, and reference made to the preceding answer. The area of land outlined in red on the plan produced by the pursuers is part of the lands in, upon, or through which (within the meaning of the Canal Act of 1817, and in particular section 112 thereof) the canal and works were made, and in purchasing from the first-named pursuer or his author a part of his lands for the construction of the canal the defenders or their authors made recompense and satisfaction to the said pursuer or his author in respect of the conditions and restrictions put upon the working of the minerals both in the lands sold by him to the defenders or their authors and in the portion of his lands retained by him, including the said lands outlined in red on the said plan. The said pursuer or his author in selling to the defenders or their authors a portion of his lands was aware that the same was to be utilised for the construction of a canal, and that support for the said canal would require to be given both from the lands and minerals thereunder and from the lands and minerals in the portion of his lands retained by him."

In Cond. 15 the pursuers referred to the terms of section 120 of the Canal Act of 1817, and of section 11 of the Canal Act of 1819, dealing with the method of assessment of damages, and averred that the defenders had refused to proceed to have recompense or satisfaction for damages sustained by the pursuers ascertained in terms of these statutory provisions. In answer the defenders denied the application of these provisions to the present circumstances, and denied that the pursuers had sustained any damage for which they (the defenders) were responsible.

The defenders pleaded, *inter alia*;—(1) The pursuers' averments being irrelevant and insufficient in law to support any of the conclusions of the summons, the action should be dismissed. (3) The defenders are entitled to absolvitor, in respect that shale is not a mineral within the meaning of the statutes founded on by the pursuers. (4) The defenders being entitled under the Canal Act of 1817, and in particular section 112 thereof, or otherwise at common law, to support for the canal and works from the minerals in the lands in, upon, or through which the canal and works were made, including the lands outlined in red on the plan mentioned in the summons, they are entitled to absolvitor. (5) The area of land outlined in red on the plan mentioned in the summons being part of the lands in, upon, or through which the canal and works were made, and recompense and satisfaction having been already made in respect of the

restriction placed by statute on the working of minerals in the said June 11, 1912.
 area, the defenders are entitled to absolvitor. (6) The defenders not
 having found it necessary for the safety of their canal undertaking to Marquis of
 stop the working by the pursuers of the said Broxburn main seam of Linlithgow v.
 shale under or near the said canal, are not liable to make satisfaction North British
 to the pursuers for the value thereof or any part thereof. (8) The Railway Co.
 defenders' lands having been sold to them by the first-named pursuer
 or his author for the purpose of enabling them to construct thereon
 their authorised canal, the defenders are entitled to support for their
 said canal from the adjoining lands which belonged to the pursuer or
 his author and from the minerals therein.

On 30th June 1910 the Lord Ordinary (Skerrington) repelled the
 defenders' first plea in law, and allowed a proof.*

* "OPINION.—The pursuers are Lord Linlithgow and his mineral tenants,
 and the defenders are the North British Railway Company, who are the
 successors of the Edinburgh and Glasgow Union Canal Company. The
 pursuers seek to establish by declarator their right to statutory compen-
 sation in respect of their being compelled to leave unworked a seam
 of oil shale lying under and adjacent to the Union Canal. The pursuers
 must prove (1) that this shale is a mineral within the meaning of a private
 Act of Parliament passed in 1817, and of the conveyance granted in pur-
 suance thereof in 1862; and (2) that it is impossible for them to work it
 without injuring the canal. The defenders' counsel, however, maintained
 that, even if these two points were proved, no compensation would, on a
 sound construction of the statute, be due to the pursuers. He accordingly
 moved to have the action dismissed without further inquiry, and both
 parties concurred in asking at this stage for a decision as to the construction
 of the statute. One would have expected that some light would have been
 thrown upon the question in dispute by the conveyance of 1862, which was
 granted as the result of a long litigation and more than forty years after the
 Canal Company had entered into possession of the ground—See *The Edin-
 burgh and Glasgow Union Canal Company and the Edinburgh and Glasgow
 Railway Company v. Earl of Hopetoun*, (1856) 18 D. 655. The disposition,
 however, makes no reference to minerals, but counsel on both sides agreed
 that as it was in the statutory form and bore that the lands were to be
 held 'by virtue and according to the true intent and meaning of' the Act
 of 1817, it must be construed as reserving the minerals under the subjects
 conveyed, and also as reserving to the granter such rights and imposing
 upon him such restrictions with reference to the working of the minerals,
 both subjacent and adjacent, as were expressed or implied in the Act.
 [His Lordship here summarised the provisions of the Act of 1817, and an
 amending section of the Act of 1819, and continued]—

"Such being the material clauses of the statutes, the general principles of
 construction applicable to such cases are familiar, and have nowhere been
 more clearly stated than by Lord Justice Bowen in the case of *London and
 North-Western Railway Company v. Evans*, [1893] 1 Ch. p. 16. As he
 points out, these principles are not hard and fast canons of construction,
 but are merely rules of good sense which one should follow in the absence
 of some good reason to the contrary. Applying these principles, one would
 expect that the parliamentary authority to make and maintain the canal
 would carry with it a right in favour of the Company to have the necessary
 support from the subjacent and adjacent strata. This implication is
 particularly strong in a case like the present, where the predecessor in title
 of the pursuers came into contractual relations with the Canal Company by
 selling it lands. On the principle of the *Caledonian Railway Company v.
 Sprot*, (1856) 2 Macqueen's Appeals, 449, one would be disposed to hold that
 Lord Hopetoun and his successors in title were debarred by their own con-

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Proof was thereafter led, and on 14th February 1911 the Lord Ordinary pronounced the following interlocutor:—"Assoilzies the

veyance from doing anything to the prejudice of their own grant. The implication is less strong in the case of a stranger who had not sold lands to the Canal Company, but as the statute contains clauses providing compensation for every kind of injury due to the execution of the statutory powers, I see no reason to doubt that the Company acquired a right to support for its canal, which was good not merely against vendors and their successors, but also against owners of subjacent minerals and of adjacent lands and minerals with whom, or with whose predecessors in title, the Company had entered into no contractual relation. Counsel for the pursuers referred to section 59, and maintained that that section rebutted any presumption which might otherwise have arisen that the Company was entitled to have the canal supported. In my opinion that section has nothing to do with the right of support, its object, as I think, being to secure that a vendor through whose lands the canal passed shall be entitled during the remainder of a lease to recover from his tenant the full rent, leaving the tenant to make good his claim for loss of ground and severance and other damages directly against the Company. The clause also mentions superiors, and is intended to secure to them full payment of feu-duties and casualties out of the remaining lands other than those taken for the canal.

"Section 112, which has been already quoted in full, is consistent with the view that I have expressed as to the true meaning and scheme of the Act. It should be observed, however, that its application is very limited. It has nothing to do with the right of support in general, but merely with cases where there are minerals. Further, I read it as applying only to persons who, or whose predecessors, have sold land to the Company, and to minerals which are subjacent to the lands bought by the Company. In every case, however, where the section applies its meaning and effect are unambiguous. The mineowner may work provided he does not thereby injure, prejudice, or obstruct the canal or any of the works or conveniences belonging thereto.

"The pursuers' counsel argued that the concluding words of section 112 must be construed, not according to their natural meaning, but as referring to mineral workings of an unnecessary or extraordinary character. He referred to the case of *Dudley Canal Navigation Company v. Glazebrook*, 1830, 1 B. & Ad. (Q. B.) 59, which was followed in *Stourbridge Canal Company v. Dudley*, 1860, 30 L. J., Q. B. 108, and which was approved of by the Lord Chancellor (Chelmsford) in the *Great Western Railway Company v. Bennett*, L. R., 2 E. and I. App. 27, p. 39. I am of opinion that these authorities have no application to the present case. In the *Dudley Canal Company* case, the private Act enacted that the mineowner should not work the minerals under the canal, or within a distance of 12 yards therefrom, without first giving notice to the company, which was thereupon authorised to stop the work on paying compensation, failing which the mineowner was expressly authorised to work his minerals. The Court held, rightly no doubt, that this express statutory authority to work the minerals was irreconcilable with the proviso that no injury should be done to the canal, and accordingly they found themselves compelled to reconcile the two clauses by holding that the proviso applied only to workings of an unnecessary or extraordinary character. In the statute under construction, I find nothing which compels me to interpret section 112 otherwise than according to its natural meaning. On the contrary, the natural and obvious meaning of the section is in harmony with what I have already stated to be, in my opinion, the meaning and scheme of the statute as a whole. In support of his argument the pursuers' counsel further referred to the fact that section 113 makes special provision for the case where the mineowner 'wilfully' endangers or damages the canal, and he

defenders from the first conclusion of the summons in so far as relating to the seams of shale or oil shale under the canal, and *quoad*

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argued that the inference was that ordinary and proper working was permitted even although the canal was thereby endangered or injured. I do not so construe this part of section 113. That clause was, I think, intended to confer upon the Canal Company a valuable right which would not have belonged to it at common law or under any other section of the Act. Assuming, as I do, that the Company was entitled to have the canal supported, it still remained lawful for the mineowner to remove the adjacent and subjacent strata, and he was not guilty of any legal wrong until damage actually took place, although he might be restrained from working if injury was imminent and certain—See *Darley Main Colliery Company v. Mitchell*, 1886, 11 App. Cas. 127, *per* Lord Bramwell, p. 145. It follows that if the injury to the canal was trifling, the pecuniary damages, *i.e.*, the cost of repair, might be small, though there might be grave reason to fear that in the future a serious subsidence involving much greater injury to the canal might take place. In such a case it might be of importance to the Canal Company to possess the right conferred upon it by section 113 of using all reasonable means for repairing, supporting, and securing the canal at the expense of the mineowner—a right, however, which is given only where the mineowner had acted wilfully. I agree with the defenders' counsel that this part of section 113, and the first part, which confers a power of inspection upon the Canal Company, are conceived entirely in the interests of the Company. The defenders' counsel, founding upon the principle *noscitur a sociis*, argued that the concluding words of section 113 were also conceived solely in the interests of the Canal Company, and were intended to confer upon it a right to stop the working of the minerals under or near the canal in circumstances where it could not prove that the workings would certainly injure the canal, and where it could not, therefore, obtain interdict founding on section 112. He also argued that it would be an advantage to the Canal Company to be able to avoid litigation and ensure absolute safety to the canal by making full compensation to the mineowner if and when the directors in the exercise of an honest discretion 'found' this course 'necessary for the safety of the said navigation.' The objection to this construction is that the defenders read section 113 as if it had enacted that 'it shall and may be lawful to the Company to stop the working' of the minerals in certain circumstances. There is no such enactment in the section. It merely assumes, correctly I think, that the Company possesses the power to stop the working of the minerals where that is necessary for the safety of the navigation, and it enacts that if this power is exercised compensation shall be made to the mineowner. Of course it is possible to construe section 113 as conferring upon the Company a right of stoppage different from and additional to that already conferred upon it, but I do not think it legitimate to resort to implication for the creation of a right when the language used receives full and satisfactory effect without it. I accordingly hold that if the Canal Company enforces the right of support conferred upon it by the statute, and by so doing injures the mineowner, compensation must be paid in terms of section 113—in other words, the language of that section is sufficient to rebut the presumption which would otherwise have arisen that all claims, present or future, at the instance of Lord Hopetoun or his successors in respect of injury to mineral workings had been completely satisfied and paid for when the canal was made in 1818. If section 113 had been silent as to compensation for injury to minerals, any such claims at the instance of a vendor or his successors in title would have fallen to be assessed in terms of sections 61 and 35 before the Canal Company took possession of the ground.

"The defenders' counsel submitted another and an alternative argument. *Esto* that the defenders would have to pay compensation if they interdicted

June 11, 1912. *ultra* dismisses said conclusion: Dismisses the second and third conclusions of the summons, and assoilzies the defenders from the fourth conclusion thereof; and decerns. . . .” *
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the working of the minerals, founding on section 112, or if they in so many words called upon the mineowner to stop working, still they had in point of fact done neither of these things. They had not thought it necessary to consider whether the proposed workings would or would not injure the navigation, and accordingly they could not be said to have ‘found it necessary to stop the working.’ It appears, however, from their secretary’s letter of 23rd December 1908 (quoted in cond. 12) that they intimated that they would hold the pursuers liable in damages for any injury to the canal. The defenders accordingly stand upon their rights under the Act of 1817, and withhold their consent to any working which will injure the canal. If the defenders’ position was that they had no objection to the pursuers working so as to injure the canal, no one could say that the defenders were stopping the working of the minerals. But I can conceive no more effectual way of stopping the working than to call the mineowner’s attention to section 112 and to threaten him with an action of damages.

“The defenders’ counsel founded upon a decision by Lord Kinnear in an unreported action at the instance of the *Clippens Oil Company, Limited, v. Edinburgh and District Water Trustees*, dated 8th January 1887. It was explained to me that in that case the parties had proceeded upon the assumption that their rights were governed by the Waterworks Clauses Act, 1847, and accordingly the judgment is a decision upon the construction of that statute, which is, I think, substantially the same as regards minerals as the Railways Clauses (Scotland) Act, 1845. According to that familiar code, if the undertaker after receiving notice refuses to make compensation, the mineowner’s right and remedy is to go on with the working even if he destroy the pipe or the railway. Parliament no doubt assumed that a municipality or railway company would not allow its undertaking to be destroyed in order to avoid paying compensation. In the peculiar circumstances of the *Clippens* case, the remedy which I have described was really no remedy, because the Water Trustees told the Clippens Company that they were welcome to go on with their workings, even although the result might be to drown the miners, and to create a water famine in Edinburgh. Lord Kinnear’s judgment, as I understand it, came to no more than this, that he could find in the Waterworks Clauses Act no provision compelling the Water Trustees to buy the minerals and make compensation. The question in the present case is an entirely different one, viz., whether the defenders have or have not stopped the mineral workings. I decide that question against the defenders—on the assumption, of course, that the pursuers can prove that it is impossible for them to work without injuring the canal.

“I accordingly repel the first plea in law for the defenders, and allow the parties a proof of their averments, and to the pursuers a conjunct probation.”

* “OPINION.—The question in this case is whether oil shale is to be reckoned a ‘mineral’ as between a canal company and the owners of the estate through which the canal passes. The latest authorities on this branch of the law are the *North British Railway Company v. The Budhill Coal and Sandstone Company*, [1910] A. C., p. 116, and *Great Western Railway Company v. Carpalla United China-Clay Company, Limited*, [1910] A. C., p. 83, in the House of Lords; and the *Caledonian Railway Company v. The Glenboig Union Fireclay Company, Limited*, 1910 S. C. 951, in the Court of Session, but now under appeal. These cases turned upon the construction of the Railways Clauses Consolidation Act, 1845, which refers to ‘coal, ironstone, slate, or other minerals.’ In the Canal Act of 1817 there is no mention of any special kinds of mineral, but only of

The pursuers reclaimed, and the case was heard before the First Division (without Lord Kinneir) on 16th, 17th, 23rd, 24th, and 30th January 1912. During the discussion it was admitted by the defenders that oil shale was regarded as a mineral, in the sense of the reservation, in and after 1862.

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Argued for the reclaimers ;—There was a general presumption that, where land was taken under compulsory powers for such a purpose as the making of a canal, the works were entitled to support. This presumption became a necessary inference where there were provisions for compensation of the landowner for damage to surface or subjacent minerals, unless a contrary intention was expressed or clearly to be inferred from the Act.¹ Further, any presumption that satisfaction had been given in full when the price of the lands was paid was displaced where there were clauses in the Act dealing with satisfaction for minerals. As regarded the progress of legislation on

‘mines and minerals.’ In the opinions delivered in the *Budhill* case, some importance was attached to the enumeration of particular minerals as limiting the general term, and, of course, the clauses of the Act of 1845, which have to be incorporated into a conveyance of land for the purpose of making a railway are different from the corresponding clauses of the Canal Act. Notwithstanding these differences, I am of opinion that no material distinction can be drawn between the two statutes, and that the three decisions cited are binding and conclusive as regards the general principles to be applied in construing the reservation of mines and minerals in the Canal Act.

“ It does not seem to me doubtful that at the present day, and in Scotland, according to the vernacular of the mining world, the commercial world, and of landowners (whom for shortness I shall refer to as business men), oil shale is a mineral of great value and importance. I merely mention in passing that it is obtained by underground mining, the working being either stoop and room or longwall ; and that since 1872 ‘mines of shale’ have been subject to the same inspection and regulation as coal mines. I have, however, come to the conclusion that the rights of the parties must be determined in view of the state of matters which existed in 1818 when the Canal Company bought the ground and entered into possession. The work began in that year and the canal was opened for traffic in 1822.—[His Lordship then narrated the acquisition of the land in question from Lord Hopetoun and referred to the disposition of 1862.]—Although such a disposition when recorded is declared to be equivalent to a disposition followed by charter and seisin, it did not, in the actual circumstances, operate as a transfer of property, but merely expressed in formal shape the transfer which had taken place many years before. Upon consignation of the last instalment of the price in 1830 the property of the ground passed once for all from the heirs of entail, and was from thenceforth vested in the Canal Company and its successors in virtue of the express provisions of section 69. This section is imperative, whereas section 60 is permissive unless one or other of the parties insists upon a conveyance being granted. That happened in the present case, and accordingly the proper evidence of the parliamentary title is the disposition. It seems to me, however, that an informal statutory title under section 69 and a formal statutory title under section 60 are one and the same thing except as to the mode of proof, and that each vests in the Canal Company neither more nor less than what it purchased. It would be unjust and also contrary to the true intent and meaning of the Act that any portion of the

¹ London and North-Western Railway Co. v. Evans, [1893] 1 Ch. 16, per Bowen and A. L. Smith, L.JJ.

June 11, 1912. this subject, there was no progressive policy in the Canal Acts, some of the earlier Acts containing a much fuller code dealing with minerals than others. But, generally speaking, the situation created by these Acts was this, that what was paid for and what was conveyed was the surface, the land as distinct from the subjacent minerals, coupled with a *de facto* right to support until the condition of the mineral field as regarded working, &c., became changed. The settlement of the mineral question was postponed until that time, but the right of the proprietor of the lands to any substance which he might choose to work remained with him unaffected, except in so far as it was limited by the obligation to support. That is to say, he was not entitled so to work as to bring down the undertaking, but the undertaking was bound to compensate him for the loss of his minerals as a commercial subject.¹ In the Act here in question sections 35, 60, and 61 were not to be read as giving any right in

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heritable subjects which the Company had bought and paid for under its statutory powers should be excluded from its title. There is nothing either in the statute or in the disposition which compels me to adopt such an unreasonable construction. I accordingly decide that the seams of oil shale underlying the canal are the property of the defenders, as the successors of the Canal Company and of the original Railway Company, unless the pursuers can show that oil shale was known to business men and regarded as a mineral in 1818. There is a dictum of the Lord Chancellor at the close of his opinion in the *Budhill* case which supports my view that the crucial date is that of the purchase; and there is a dictum of the Lord President in the *Glenboig* case apparently to the opposite effect, but I interpret the latter as meaning merely that the rights of the Company depend upon a construction of their conveyance. What I have said as to the property of the oil shale under the canal, applies equally to the question whether the pursuers are now entitled to compensation in terms of section 113 of the Canal Act for the injury caused by the stoppage of the oil shale workings in the Hopetoun estate on each side of the canal.

"Shale, or as it is called in Scotland 'blaes,' is commonly found immediately above and below seams of coal and ironstone, and quantities of it have to be cut away in forming the underground passages. In longwall workings it is useful for filling the wastes, but in other cases it must be taken to the surface and put into bings. Mineral leases often bind the tenant to pay rent for the ground so occupied, and to restore the surface at the end of his lease. Some blaes heaps will burn if set on fire, and the material, after being burned, becomes hard and can be utilised for metalling roads. This method of disposing of blaes heaps may be challenged as a nuisance—*Hislop v. Fleming*, (1882) 10 R. 426, *aff.* 13 R. (H. L.) 43. Inflammable or bituminous shale was well known in Scotland long before 1818, but there is no evidence that it was generally or commercially used for road making before that date. Within the last thirty years it has been discovered that composition bricks can be made out of blaes, and in some cases a lordship is paid for the contents of what was formerly regarded as a refuse heap. The only kind of shale which is proved to have possessed any commercial value before 1818 is the alum ore or schistus which came before the Courts in *The Hurlet and Campsie Alum Company v. Earl*

¹ *Edinburgh and District Water Trustees v. Clippens Oil Co.*, (1898) 25 R. 504, and (1899) 1 F. 899, *per* Lord President Robertson, at p. 908; *Dudley Canal Navigation Co. v. Glazebrook*, (1830) 1 B. & Ad. 59; *William Dixon, Limited, v. Caledonian and Glasgow and South-Western Railway Companies*, (1880) 7 R. (H. L.) 116; *Great Western Railway Co. v. Bennett*, (1867) L. R., 2 H. L. 27.

the minerals, having regard to the fact that there were clauses else- June 11, 1912.
 where in the statute expressly dealing with minerals. The former
 clauses only provided that what was permanently occupied or taken Marquis of
 as material became the property of the canal. Sections 111, 112, Linlithgow v.
 and 113 contained a complete code dealing with the minerals. Sec- North British
 tion 112 was introduced as a proviso to section 111 dealing with Railway Co.
 malicious damage; it excepted from the operation of that section
 the working of minerals. This pointed to the fact that the statute
 contemplated the working of minerals in the transferred lands by
 the proprietor *ab initio*. The third proviso of section 113 was the
 crucial provision. Its effect was to put upon the Canal Company an
 obligation to pay for minerals as soon as it became necessary, for the
 safety of the canal, that the working should be stopped. There
 could be no doubt that according to the plain meaning of section 113
 the defenders had in fact stopped the working, and the pursuers were

Glasgow, (1850) 12 D. 704, *aff.* 7 Bell's App. 100. This substance forms
 the roof of certain very ancient and extensive coal wastes near Glasgow.
 Through long exposure to the air it decomposes *in situ* and ultimately
 becomes suitable for the manufacture of alum. This shale as a subject of
 commercial value and manufacture was in 1818, and still is, exceptional.
 What is now called oil shale was formerly included within the more general
 description of bituminous shale. Its characteristic feature is the presence
 of volatile hydro-carbons which, by the process of destructive distillation,
 yield crude oil, ammonia water, and gas. The latter is used in the works
 as fuel, but the two former are of great commercial value, and the crude
 oil is the basis of an important manufacturing industry. It is impossible
 to draw a hard and fast line between bituminous shale in general and oil
 shale in particular, either from a scientific or from a commercial standpoint.
 The practical test is distillation. Oil shale was first worked in Scotland
 between 1850 and 1860 by persons who wished either to rival Dr James
 Young, or to evade his well-known patent for obtaining paraffin from
 bituminous coal. This patent was dated in 1850, and the material used
 was the Boghead or Torbanehill mineral, which a jury in 1853 found to be
 a coal and not a shale. The oil shale to which I have referred was found
 associated with coal in the coal districts of Scotland from Bathgate on
 the east to Ayrshire on the west. Distilleries were established in these
 districts both before and after 1860, but they are all now extinct. Oil
 shale is, however, still worked in the coal districts for the manufacture of
 illuminating gas. Chemically there is a considerable resemblance between
 gas coal and oil shale, and in some cases they are practically indistinguish-
 able. As a rule, however, oil shale is easily distinguishable both in appear-
 ance and also chemically. Generally, it is less valuable than gas coal, as it
 contains a larger proportion of ash on the one hand, and a smaller propor-
 tion both of fixed carbon or coke and also of volatile hydro-carbons. The
 Broxburn oil shale cannot be described as a coal except as a matter of
 scientific classification. The present mining and manufacturing oil shale
 industry of the Lothians is in a district which geologically is not part of
 the coal measures, and which does not extend west of Bathgate. Oil works
 were erected at Broxburn in 1860, and at West Calder in 1862. The
 earliest lease of 'oil, mineral, or shale' in the Lothians that has been pro-
 duced was in August 1861, and refers to an estate immediately adjoining
 the part of Hopetoun now in question. There have also been produced
 two leases of 'bituminous shale' commencing at Martinmas 1861 in estates
 a few miles distant from the same locality. From 1866 the Broxburn
 seams of oil shale in the Hopetoun estates have been continuously worked
 and used for distillation.

"An elaborate proof was led, which was interesting both from a scientific

June 11, 1912. therefore entitled to satisfaction, assuming that oil shale was a substance included in the reservation. The first question which arose upon this point was, At what date was the meaning of the term "mines and minerals" to be ascertained? It was as at 1862, the date of the conveyance of the lands to the Canal Company, that the inquiry should proceed. The material date was that of the sale,¹ not of the agreement to sell. The contract under construction here was entered into in 1862, and must be construed according to the meaning of the language of 1862.² It was admitted that at that date oil shale was a mineral according to the test applied in recent cases, *i.e.*, in the ordinary sense in which the term was used by landowners and by those engaged in mining and commerce.³ If, however, the defenders were right in their contention that 1818 was the date at which this question fell to be decided, the onus was upon them to show that this substance, which they admitted to be a mineral in 1862,

and from an historical point of view, but it did not, in my opinion, go any length towards establishing the pursuers' case. It consisted to a large extent of references to the writings of mining surveyors and of scientific men published during the eighteenth and early years of the nineteenth century. For example, in 'A Natural History of the Mineral Kingdom,' by John Williams, mineral surveyor, published at Edinburgh in 1789 (vol. i., p. 82), the author mentions that certain kinds of blaes are called by Scots colliers 'creeshy blaes'—that is greasy blaes. On pages 83 and 235 of the same volume he refers to 'coal blaes' lying in heaps at Pitfirran in Fifeshire which contained such a quantity of natural mineral oil or petroleum that it burned if set on fire, though it was not consumed. He states that this shale, after burning, turned red and hard and formed a good material for making roads. He also observed (pp. 263-4) that shale or schistus 'impregnated with the fossile oil' is a 'false symptom of coal,' and is found at a great distance from coal. Some of the allusions by Williams and the other early writers may refer to strata soaked in mineral oil, naturally distilled by the intrusion of igneous rocks among oil-bearing strata. Again, the Pitfirran blaes heaps probably consisted not of what we call oil shale, but of blaes containing a certain, though commercially unimportant, amount of carbonaceous matter. Still, after making all due allowances, there seems no reason to doubt that the mining men of the eighteenth century in Scotland and elsewhere had come upon oil shale, and that they had supplied to the scientific writers of the period the information and the specimens which the latter utilised in their writings, their mineral collections, and their

¹ Hopetoun v. North British Railway Co., (1893) 20 R. 704.

² North British Railway Co. v. Budhill Coal and Sandstone Co., 1909 S. C. 207, 1910 S. C. (H. L.) 1, *per* Lord Gorrell, at p. 8, [1910] A. C. 116; Caledonian Railway Co. v. Glenboig Union Fireclay Co., 1910 S. C. 951, *per* Lord President Dunedin, at p. 961, and 1911 S. C. (H. L.) 72, [1911] A. C. 290.

³ Counsel gave references to a series of cases in which this question had been under consideration (most of which are referred to in one of the most recent cases, North British Railway Co. v. Budhill Coal and Sandstone Co., 1910 S. C. (H. L.) 1, [1910] A. C. 116), *viz.*:—Magistrates of Glasgow v. Farie, (1887) 14 R. 346, (1888) 15 R. (H. L.) 94; Midland Railway Co. v. Robinson, (1889) 15 App. Cas. 19; Tod, Birleston, & Co. v. North-Eastern Railway, [1903] 1 K. B. 603; Glasgow and South-Western Railway Co. v. Bain, (1893) 21 R. 134; North British Railway Co. v. Turners, Limited, (1904) 6 F. 900; Great Western Railway Co. v. Blades, [1901] 2 Ch. 624; Hext v. Gill, (1872) L. R., 7 Ch. 699; Caledonian Railway Co. v. Symington, 1912 S. C. (H. L.) 9.

was not a mineral at the earlier date. This onus they had failed to discharge. It was proved that at the earlier date it was known to have a potential if not an actual commercial value as a mineral. In the circumstances it was not fatal to the pursuers' case that an actual commercial value at that date had not been proved.

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Argued for the respondents;—It was for the pursuers to show, upon construction of the statute, that they were entitled to call upon the defenders for compensation. A right of support was implied in the circumstances of the grant, subject to the statutory relation, and except in so far as it was varied or adjusted by the statute.¹ The only provisions in this statute dealing with minerals, and modifying the common law right of support, were contained in sections 112 and 113. The former section permitted the mineral owner to work his minerals provided he could do so without injury to the canal. According to the latter the Canal Company might stop such working

chemical analyses. Mr Jameson, Regius Professor of Natural History and Lecturer on Mineralogy in Edinburgh, in his 'System of Mineralogy,' of which a second edition was published at Edinburgh in 1816, describes (vol. i., p. 434) 'Bituminous Shale' in words which may apply to oil shale, and cites a number of foreign authors who mention it. He also prints an analysis by a German chemist of a fairly rich specimen which contained carbonated hydrogen gas, empyreumatic oil, thick pitchy oil, ammoniacal water, carbon, &c. Long before the publications referred to, viz., in 1681, a patent had been granted for the manufacture of pitch and tar from coal. In 1694 there was a patent for the extraction of 'pitch, tar, and oil out of a sort of stone of which there is sufficient plenty within our dominions of England and Wales.' At that date no one would have described coal as a 'stone,' but it may be that the inventor thought to make a fortune out of a material which was then and is still sent to the rubbish heap. In 1742 there was a patent for a medicinal oil to be extracted from a black pitchy flinty rock 'which is commonly found lying next and immediately over the coal in coal mines.' Such an oil is stated in an eighteenth century book of materia medica to have been actually distilled—in the laboratory no doubt, but still as a commercial product. The value of 'Virtue-wells' had been known of old, and the artificial imitation of natural mineral oil was inevitable. There were patents in 1779 and 1781 for making tar pitch, oils, &c., from coal. There were also patents in 1837, 1845, and 1853 for the distillation of bituminous schistus. In England there is an oil shale called 'Kimmeridge Coal' from the village of that name in Dorsetshire, which has been used locally for centuries as a fuel. The same seam extends to Derbyshire and Yorkshire, where it has been used to some extent as fuel. Oil shale was commercially distilled in France and also at Kimmeridge before 1850. At the London Exhibition of 1851 medals were awarded for the distillation of oil from shale and also from bitumen. The evidence as a whole shows that long before 1818 the potential value for industrial purposes of bituminous shale had become apparent to many practical men, and that the only obstacle to its use in manufacture was the want of a process

¹ Caledonian Railway Co. v. Sprot, (1856) 2 Macq. 449; Eliot v. North-Eastern Railway, (1863) 10 Clark (H. L.) 333; London and North-Western Railway Co. v. Evans, [1893] 1 Ch. 16; Aitken's Trustees v. Rawyards Colliery Co., Limited, (1894) 22 R. 201; North British Railway Co. v. Turners, Limited, 6 F. 900; London and North-Western Railway v. Howley Park Coal Co., [1911] 2 Ch. 97; Hext v. Gill, L. R., 7 Ch. 699; Midland Railway Co. v. Checkly, (1867) L. R., 4 Eq. 19; Dudley Canal Navigation Co. v. Glazebrook, 1 B. & Ad. 59. The Lord President referred to *In re Dudley Corporation*, (1881) 8 Q. B. D. 86.

June 11, 1912. if they apprehended danger to their undertaking. If they took advantage of this clause an obligation to compensate arose, but there was no obligation to purchase put upon them. The provision of section 113 conferred an option on them; they were entitled to consider the condition of the workings¹ and to decide whether they would stop them or not. The fallacy of the pursuers' argument consisted in converting this option into an obligation. As Lord Kinnear said in the Outer House on 8th January 1887, in the unreported case of *Clippens Oil Company, Limited, v. Edinburgh and District Water Trustees*, in reference to sections 22 and 25 of the Waterworks Clauses Act, 1847: "The Act of Parliament appears to commit the duty of protecting the works of the undertaking to the undertakers themselves, by giving them the right to stop workings which they may apprehend to be dangerous. But it is for them in their discretion to determine whether they shall exercise that right.

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that was commercially practicable. Destructive distillation in the laboratory had proved that bitumen, a well known and valuable mineral substance, was contained in many shales, and accordingly I agree with the pursuers' counsel that bituminous shales during the eighteenth and early years of the nineteenth centuries bore a certain resemblance to some of the auriferous rocks of South Africa and copper ores of Arizona which, till recently were commercially worthless because their valuable contents could not be extracted otherwise than in the laboratory. Why oil shale was not used before 1818 for making illuminating gas is not explained, but probably in a comparatively new industry practical men preferred not to make further and unnecessary experiments. The pursuers have, in my judgment, failed to prove that oil shale was known and regarded by business men in Scotland as a mineral until many years after 1818. If necessary, I should go further, and hold that it is a legitimate inference from the proved facts that prior to 1818 bituminous shale, if and in so far as it was known to business men in Scotland, was regarded by them as a form of rubbish which increased the cost of production of coal and iron, and which no sane man would bring to the surface if he could avoid doing so. If the year 1862 is of any importance as regards the present question, my verdict would be that shale was regarded as a mineral at that date, even in the practically undeveloped district of the Lothians.

"Incidentally, and in the course of the proof, the defenders were allowed to lodge a horizontal and also a vertical section of the canal at the place in question. These sections, if correct, demonstrate that the canal has been cut through the seams of Broxburn oil shale, and that its puddle lining is bedded in and rests upon either the main seam or on one or other of the upper seams of the same shale. Assuming for the moment that oil shale has always been recognised in Scotland as a mineral, and that it would have been generally included within a reservation of minerals, it could not have been so reserved in the present case, because that interpretation of the reservation would deprive the Canal Company of the ownership of the land upon which their canal is built and would leave them with nothing more than a wayleave. Such a result would defeat the intention of the statute as expressed in sections 35, 60, 61, 66, and 69. I refer also to sections 112 and 113, which show that if oil shale is held to be a reserved mineral at this place the Canal Company could never buy, and the heirs of entail could never sell, the site on which the canal was built. The present case is *a fortiori* of one under the Act of 1845, seeing that a railway company may expressly purchase minerals before the expiry of its compulsory powers. As at present advised, I see no answer to this argument, but the defenders

¹ MacSwinney on Mines and Minerals, 4th ed., p. 422.

The responsibility rests upon them to decide whether their pipes are in danger, and the Court cannot substitute its discretion for theirs, or relieve them of their responsibility. They cannot be compelled to entertain apprehensions which they do not in fact entertain. And if they think there is no such danger as to make it prudent or necessary for them to interrupt the operations of a mineral owner, they are not required to compensate him for minerals which they have not rendered inaccessible, and which they leave him at liberty to obtain in the exercise of his ordinary rights." The canal proprietors were not bound to stop the workings even if they actually had suffered injury therefrom. A proprietor in such circumstances was entitled to work his minerals even to the effect of bringing down the canal.¹ The payment by the Canal Company to the pursuer's author, on consideration of which the conveyance was granted, must be held to have included compensation for the right of support as well as for the lands occupied. Provisions of other similar Acts had been the subject of judicial interpretation,² but these Acts showed no continuity

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have of set purpose precluded themselves from urging it. They thought to gain a tactical advantage by refusing to admit that the shale workings must be stopped for the safety of the canal. In their anxiety to grasp at a shadow they have dropped the substance. Their counsel did not move to be allowed to amend the record; and in the circumstances an amendment could not have been allowed except on stringent conditions, including permission to the pursuers to lead further evidence. As regards the defence, which I have described as shadowy, the proved facts are (1) that the oil shale under and near the canal cannot be further worked without destroying the canal, and (2) that the pursuers, being neither law-breakers nor lunatics, are not likely to work so as to injure the canal, even although the defenders have astutely refrained from calling upon them to 'stop the working.'

"My decision as to the ownership of the shale under the canal does not affect the pursuers' right to use a mine running under the canal which was constructed with the consent of the defenders as an access to the workings on the north of the canal.

"The result is, that the defenders are entitled to absolvitor from the first conclusion of the summons in so far as relating to the seams of shale or oil shale under the canal; and that, *quoad ultra*, this conclusion should be dismissed, as it raises questions which are not controversial. The second and third conclusions fall to be dismissed, and the defenders are entitled to be assolizied from the fourth conclusion."

¹ Ruabon Brick and Terra-Cotta Co., Limited, v. Great Western Railway Co., [1893] 1 Ch. 427; The Queen v. Great Western Railway Co., [1893] 62 L. J., Q. B. 572; Scottish North-Eastern Railway v. Stewart, (1859) 3 Macq. 382.

² Counsel referred to Dudley Canal Co. v. Glazebrook, 1 B. & Ad. 59; The Queen v. Manchester and Leeds Railway Co., (1842) 3 A. & E. 528; Cromford Canal Co. v. Cutts, (1848) 5 Railway Cas. 442; The Queen v. Aire and Calder Navigation Co., (1861) 30 L. J., Q. B. 337; Dunn v. Birmingham Navigation, (1872) L. R., 7 Q. B. 244, *aff.* 8 Q. B. 42; *In re* Corporation of Dudley, 8 Q. B. D. 86; Lancashire and Yorkshire Railway Co. v. Knowles, (1887) 20 Q. B. D. 391, 14 App. Cas. 248; London and North-Western Railway Co. v. Evans, [1893] 1 Ch. 16; Glamorganshire Canal Navigation Co. v. Nixon's Navigation Co., Limited, (1901) 8 L. T., 53; Rex v. Leeds and Selby Railway Co., (1835) 3 A. & E. 683; Edinburgh and District Water Trustees v. Clippens Oil Co., (1900) 3 F. 156, *per* Lord Pearson, at p. 163, (1903) 6 F. (H. L.) 7.

June 11, 1912. of policy, and no rule of universal application could be drawn from them. Each Act must be construed according to its own terms. As Marquis of Linlithgow v. North British Railway Co. regarded the question whether oil shale was included in the reservation, the date at which it fell to be answered was at 1817, the date of the Act, or 1818 the date when the lands were handed over. At neither date was oil shale a mineral in the sense of the reservation. The bargain by which the lands were acquired was completed *vi statuti*, by consignation and entry in 1818.¹ The pursuers could at anytime thereafter have been compelled to grant a formal conveyance, and the fact that they had avoided this duty until it was enforced by the defenders by process of law could not have the effect of modifying in their favour the original contract.² It was a pure question of fact³ whether in the vernacular, *i.e.*, the ordinary language of the commercial man or of the lawyer drafting a conveyance in 1818, oil shale, or blaes as it was then called, was spoken of as a mineral. The evidence answered this question in the negative. All that the evidence amounted to was that the ingredients and properties of this substance had been the subject of investigation in the laboratory, and were treated of in scientific works, and such evidence was clearly insufficient.

At advising on 11th June 1912,—

LORD PRESIDENT.—I do not think I need to give an account of the circumstances of this case, because they are set forth with great precision in the opinions of the Lord Ordinary which are under review.

The Railway Company, as proprietors of the canal, although under the Lord Ordinary's decision they have won their case, yet take advantage of the reclaiming note to raise the question which I think logically comes first. They asked us, as the case, they said, would go further, to pronounce a judgment upon the statute in question here to the effect that the provisions of the statute were such that under a transference or sale effected in accordance with its provisions an absolute right of support was given, which would make it unnecessary to consider whether this particular substance is a mineral or not.

I think they are entitled to our opinion upon that matter. The case is, perhaps, on this branch not altogether easy, and for this reason, that the statute with which we have here to deal is one of the comparatively early instances of this class of legislation, indeed I may say a very early instance so far as Scotland is concerned, although in England, with a very much larger canal system, there are a larger number of instances, and it is possible to find decisions, as was done in the very able argument that we had presented to us by counsel, and to abstract from these decisions dicta which raise formidable arguments upon the one side and upon the other. I do not think, although it was proper that these decisions should have been brought to our notice and that we should have had the advantage of being

¹ *Kelvinside Estate Co. v. Donaldson's Trustees*, (1879) 6 R. 995; *Commissioners of Caledonian Canal v. Smith*, (1900) 8 S. L. T. 124.

² *Union Canal Co. v. Earl of Hopetoun*, (1856) 18 D. 655.

³ *Menzies v. Earl of Breadalbane*, (1822) 1 Sh. App. 225; *Gillespie v. Russell*, (1854) 17 D. 1; *Great Western Railway Co. v. Carpalla United China Clay Co., Limited*, [1910] A. C. 83.

referred to them, it would be to any good purpose that I should examine June 11, 1912.
those older cases, because after all is said and done, each case comes to be a
decision upon its own statute and its own statute alone, and the phrase- Marquis of
ology of these statutes undoubtedly does vary, and some small expression Linlithgow v.
in one which you do not find in another may give a turn to the interpreta- North British
tion. I therefore go straight to the statute with which we have here to Railway Co.
deal. It is not out of place to remember that, although we are now dealing Ld. President.
with the large corporation of the North British Railway Company, that
Company is merely the successor of a very small company which got power
to make a canal from the Lothian Road in Edinburgh to Falkirk. It was
not a work of extraordinary magnitude, and it was not a work that could
have gone on at all if a very extravagant price was to be paid to the
landowner for the facilities. The Act is what I may call of doubtful expres-
sion even upon the question of acquiring. The Legislature had not at its
date settled down into the forms with which we are now so familiar after
the long train of decisions under the Railways Clauses Acts and the Lands
Clauses Act. It had not settled down to allowing people to take lands
according to the provisions of these Acts, and the original expression here
rather reminds one of the older effort of the Legislature in connection with
the making of the Caledonian Canal and afterwards of the Crinan Canal,
where the power given is not one first of all to take lands and then to con-
struct works, but a power to make and maintain a canal. A power is also
given to take various things in connection with the canal, that is to say,
there are powers given to take water, and there are powers given to take
materials, and there are various phrases about compensating for damage so
done. But without the precision of expression which one afterwards
finds I do not think one can read the Act without seeing that it was
intended that the lands upon which the canal itself actually is set should
be taken ; in particular, you have in section 60 a provision for a statutory
conveyance. Such a provision was at that date something entirely novel ;
it was, in fact, a sort of precursor of the system which did not come into
general use for very many years afterwards, I mean the system which was
first introduced by the legislation of 1847, under which the registration of
a conveyance was given an effect equivalent to the seisin of the lands con-
veyed. Section 60 provides for this sort of conveyance, and says that its
registration shall have the same effect as if a formal disposition had been
executed and followed by charter and seisin ; there is a general damages
clause in section 61, and there are provisions for vesting of the property,
which I shall deal with hereafter.

I confess that if the statute had stopped there I do not think there would
be any doubt. One would then have been within the law of the *Caledonian
Railway Company v. Glenboig Union Fireclay Company*,¹ namely, that
as there is an intention to allow land to be taken for the purpose of a
canal, and as the land is to be devoted to that purpose, it must be assumed
that there was given with the land an obligation for support, without which
the grant of the lands would be really useless. But the statute does not
stop there, and we come to sections 112 and 113. There was a good deal

¹ 1910 S. C. 951.

June 11, 1912. of argument upon the way this section 112 came in. I do not think that in a statute of this date any weight can be put upon the fact that the phraseology introduces it as if it were a proviso. I think it is immaterial whether it is so conceived or not. The enactment is in these words:—

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 —
 Ld. President. “Nothing herein contained shall extend to prejudice or affect the right of any owner or owners of any lands or grounds in, upon, or through which the said canal . . . shall be made, to the mines and minerals lying or being within or under the said lands or grounds, but all such mines and minerals are hereby reserved to such owner or owners of such lands or grounds respectively; and it shall and may be lawful to and for such owner or owners, subject to the conditions and restrictions herein contained, to work, get, drain, take and carry away, to his, her, or their own use, such mines and minerals, not thereby injuring, prejudicing, or obstructing the said canal, or any of the works or conveniences belonging thereto.” Now, if that section had stood alone, I confess I should not have been dislodged from my opinion, but it is to be observed that the reservation of minerals is “subject to the conditions herein contained,” and I also observe this, that that section obviously treats mines and minerals as known things, that is to say, either known in the most extensive sense of the word by being worked at the present moment, or being ready for anybody to work. It does not treat the terms as scientific terms, leaving it to the future to find out whether particular substances were minerals or not. Coming next to section 113, this section allows the Canal Company at any time to enter into any mines—that must obviously mean mines that are open—and there to make such investigations as seem to them proper for finding out whether there is any damage likely to come to the canal, and if they find that danger has been created to the canal, and that that danger has been wilfully created, they are entitled to put things right at their own expense and charge the mining company the cost of so doing. The section concludes with these words:—“And in case the said Company shall find it necessary for the safety of the said navigation or any of the works thereto belonging, to stop the working of any mines and minerals under or near the said canal, or any of the workings thereto belonging, the said Company shall, and they are hereby required to make satisfaction for the value of such mines and minerals to the owners, occupiers, or other persons entitled to receive the same,” and that is to be determined by arbitration. There is also a general clause of damage in section 120.

Now, the general result of section 113, to my mind, is that it does mean to make the Canal Company pay for the mineral which cannot be obtained otherwise than by endangering the safety of the canal, and that the obligation of support, which, but for the words of the section, is given, is taken away to this extent that a payment must be made where it is necessary, in order to support the canal, to sacrifice the working of minerals. Accordingly, upon that point I am against the contention of the Railway Company, or, in other words, I agree with the Lord Ordinary. I quite agree with the Lord Ordinary that you cannot put stress upon the words “stop the working” by reading them as only meaning physically stopped or stopped by interdict. I think the North British Railway Company effectually did stop the working of the mineral when they said they maintained all rights

and held the mining company liable for all damage that might ensue from any June 11, 1912. destruction of the canal by the water being drawn off. In other words, I think the words I have already used are really substantially accurate, that when minerals have to be sacrificed as a commercial subject, then the payment comes in.

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That makes it necessary to decide whether the particular material which is being worked here is a mine or mineral. When we come to this question it seems to me we now come directly into the track of authority which has recently been worked out by the House of Lords in cases under the Railways Clauses and Lands Clauses Acts, and here I think one is bound to take the criterion laid down by Lord Halsbury in *Magistrates of Glasgow v. Farie*,¹ and accepted by the Lord Chancellor in the *Budhill* case,² and to determine what was the meaning of these words in the vernacular of the mining world, the commercial world, and landowners, "at the time when the purchase was effected." The Lord Ordinary has said that there is an expression of mine which seemed to go against that in the *Caledonian Railway Company v. Glenboig Fireclay Company*,³ in which I say that the question whether a particular substance was a mineral or not must be considered in the light of whether at the date of the conveyance that substance was described as a mineral. There was no question in that case as between the date of the acquisition and that of the formal conveyance, and if it were necessary to do so, I should explain that I was using the words "at the date of the conveyance" in an absolutely general sense, and not trying to draw a distinction between the question of a written conveyance and the time the transfer takes place. I think that the matter must obviously be judged of at the time when the lands passed, because when the lands passed, then was the time when something was given and something was reserved. If it had been matter of ordinary bargain, the terms of the bargain would have had to express what was given and what was reserved; as it is, the statute expresses the reservation, and says minerals must be reserved. You must take the application of that at the time when the bargain was made. This matter, I think, is quite settled by the 69th section, which provides that when the money is ascertained and consigned then the heritages are to be vested in and to become for ever the sole property of the said Company, their successors and assigns. That happened in 1818 in this case, and the mere fact that the actual written conveyance was not executed for many years thereafter is neither here nor there. Taking it as 1818 then, I come to the same conclusion as the Lord Ordinary. I do not think that in the view of the mining world, the commercial world, and landowners at that date shale, as it is now known, was a mineral. I look upon the matter in exactly the same way as the Lord Ordinary, that if the shale was removed at all at that time it was removed in order to open up a way to more valuable material. It is true that chemists and geologists of the period knew that there were certain properties in the stuff, but it was not as matter of fact commercially worked, and I do not think, if you come to it, that there is any better proof of that than the ordinary use of language. If you talk

¹ 15 R. (H. L.) 94, at p. 95.

² 1910 S. C. (H. L.) 1, at p. 4.

³ 1910 S. C. 951.

June 11, 1912. nowadays, ever since the oil industry has been extant, about shale, you mean oil shale, oil-bearing shale. Nobody at that time would have talked about shale in that sense, and "blaes," which was what they called it, was not at all a synonym, although this oil-bearing shale was included in what was then called blaes. Nowadays, if you talk to a miner about "blaes," he would understand any blaes, and not necessarily that blaes only which is composed of oil-bearing shale. In other words, I think the use of the word "shale" as equivalent to oil-bearing shale in ordinary parlance really is the best proof that shale has assumed its place among the commercial minerals. In those days nobody knew it could be worked to produce oil, and it was only when the Torbanehill mineral was worked that it assumed the practical character it now has. On that matter I need not say more, because I entirely agree with the result at which his Lordship has arrived.

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Id. President.

There is one further question in the case which I have not found it necessary to determine ; but on which, if I had to give a judgment, it would also be in favour of the Railway Company. It has been settled, as I expressed it in the *Glenboig* case,¹ that "inasmuch as the words to be interpreted are those which define the exception to a grant, they must not, whatever their meaning in such a vernacular, be so applied as to make the exception swallow up the grant, which would be the case if the substance in question, forming the ordinary subsoil of the district, were held to be a mineral and within the exception." I think practically this case comes within that observation, not that I can say that the whole subsoil of the district is shale, but rather on the ground that this canal is really located in a seam of shale, and to hold that by their conveyance the Canal Company got nothing, would, I think, be driving the whole matter too far ; and therefore I think on this ground also it is necessary that the Railway Company should succeed.

I say also that I think if it had been the case that the value of shale was recognised as it now is, no canal would ever have been made here, because I do not think the small company could have afforded to pay the price that they would have required to pay. I think that probably throws a light on what people thought at that time, when they were talking about minerals. Accordingly, my view is that the judgment of the Lord Ordinary should be affirmed and the reclaiming note refused.

LORD JOHNSTON.—This case involves the now familiar question of the rights in minerals where land is compulsorily taken. But the Union Canal was made under Acts of 1817 and 1819, which long preceded the Lands Clauses Act of 1845 and the relative legislation, and the terms of its special Acts are peculiar, and differ from those of the general Acts, under which most of the cases on this subject have arisen. Moreover, it is the fact that the commercial importance of oil shale was wholly unknown at the time when the Canal Acts were passed and the canal made, and in fact only came to be known about the year 1860 ; and as no case of the kind has yet arisen regarding oil shale, the present case becomes of great importance, not merely

¹ 1910 S. C. 951.

to the parties, but to those engaged in the paraffin industry of Scotland June 11, 1912. generally.

It is first necessary from my point of view to ascertain from the proof certain facts of a general nature. As these depend on scientific evidence, and there is difference of opinion in detail, it is not easy to be quite sure of one's ground. But I think that the following is satisfactorily substantiated.

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Id. Johnston.

There was much controversy on the evidence as to the relation between coal and shale, the pursuers seeking to bring oil shale under the general category of coal, and the defenders disputing this proposition. I have no hesitation on the evidence in concluding that, though oil shale comes in a sense under the term coal, and though coal proper shades off into shale in such a way that it is difficult, if not impossible, to draw a boundary line between coal and shale, broadly speaking shale and its peculiar species oil shale are not coal, as that term is ordinarily understood both scientifically and practically. It is true that some coals might as well be classed as shales and some shales as coals, and that there is as much difference between some descriptions of coal and other descriptions of coal as between the former and some descriptions of shale. But notwithstanding, it is impossible to arrive at the conclusion that the same generic term coal covers them all.

Both coal and shale are deposits which have been subjected to pressure. But it appears to be generally accepted that coal is a deposit of organic matter of vegetable growth, deposited *in situ*, where it has grown, and subsequently overlaid by other strata and compressed thereby, and that shale is a sedimentary deposit, transported in suspension by water, and gradually settling, the substance in suspension being of the nature of the mud that forms clay beds, but sometimes carrying with it, also in suspension, organic matter, probably derived from aquatic vegetation, and, in the same way as coal, being subsequently overlaid by other strata, and subjected to compression. Coal may therefore be said to have mainly an organic origin and shale an inorganic, though in the former there may be a mixture of the inorganic element in varying degree, and though in the latter there may be a mixture of the organic in equally varying degree. The latter fact is of essential importance in the present case, for upon it depends the distinguishing characteristic of oil shale.

The word "coal" signifies something which, when kindled, will glow as it is consumed, and its root idea is something which can be used for fuel. "The fire of coals on the hearth" of the Authorised Version was doubtless a fire of wood. The word "shale" signifies something which is laminated or scaly, and its root idea is not derived from its use or its properties, but from its formation. The word "shale" is therefore *per se*, in mining parlance, a word of more indefinite application than the word "coal."

What is commonly regarded as coal varies on the one side from the best anthracite, which is almost entirely fixed carbon with little or no ash or inorganic matter, through household which contains little, and manufacturing, which contains more, to stuff containing so much ash as to be of little or no value; and on the other side from the commonest gas coal to the Torbaneites, at which stage one is reaching substances which are so much

June 11, 1912. on the borderland, that it is difficult to determine whether to account them coals or shales.

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But shale varies in an equal degree. It has been fairly described as indurated clay. It is most frequently found in connection with coal in the pavement or roof of the coal seams. But it is also found apart from the coal measures altogether. It is a miner's term for what is, to all appearance, a laminated rock met with in coal mining, some of which, when it overlies the coal, comes away with the coal, and has to be dealt with. In the ordinary case it is useless and a hindrance in coal mining—in fact what the working miner terms “dirt.”

But when shale is oil bearing or oil shale it ceases to be “dirt,” and on the contrary becomes very valuable, and is worked for its own sake. It is only some shales that contain the substance productive of oil to a profitable degree. These are the oil shales. It has been ascertained that in these shales there is embedded a quantity of microscopic corpuscles of a yellowish colour, and that the richness of the shale in oil depends upon the proportion of these corpuscles present. They are, as I have said, supposed to be of aquatic vegetable origin, and to have floated down in suspension with the mud, and so to have become embedded in the mud, which on settling and coming under pressure formed the shale bed. That is only a scientific assumption. What is certain is that the richness of the shale in oil corresponds with the proportion of these corpuscles present. This oil does not permeate the shale, and cannot be expressed. It can only be obtained by destructive distillation.

But much difficulty in determining the true position of oil shale is introduced by the fact that, chemically, some substances classed as coal vary so little in their composition from oil shale that it is difficult to account for their being classed as coal, without admitting the oil shales along with them into that category. These are the various forms of what is known as gas coal, and the still more doubtful substances known as Boghead coal, Torbanehill mineral, and its congeners, the Torbaneites. These cannot be used, any more than shale, directly as fuel. But they may all be used indiscriminately for the production of gas or oil, and, equally, oil shale may be used, and sometimes is used, for the production of gas instead of oil. At the same time, for some recondite reason, the so-called gas coals are more profitably and economically used for production of gas, and oil shale for the production of oil, and hence their industrial and commercial application.

To illustrate the difficulty of the problem, where does coal end and oil shale begin, the case of *Gillespie v. Russel*¹ may be referred to. The question was there raised whether the Torbanehill mineral was included in a lease of the coal in the estate of Torbanehill. The case, as it involved directly a question of damages, was sent to a jury, who returned as the result of their verdict an affirmative answer to the above question. While the verdict could not be set aside as against evidence, it is, I think, open to doubt on the evidence whether the Torbanehill mineral was included in the term coal within the meaning and intention of the parties to the lease, or even whether it was a coal in any proper sense, and whether a Court would so

¹ 17 D. 1.

have found. And it is remarkable that the substance never has been called coal, but always Torbanehill mineral, as if it was something unique. It cannot escape remark that if the Torbanehill mineral was a coal, it must have been covered by the statutory reservation of the Acts with which we are concerned, yet it had never been heard of, and its properties were unknown until after Mr Russel began to work it as a coal in Torbanehill under his lease. The closer bearing of the case on the present arises from this, that Torbanehill mineral is the substance which was first used for the distillation of oil. Dr Young, in the fifties of last century, had discovered the possibility of commercially producing oil from substances of the gas coal nature, and in the application of his patent he selected Torbanehill mineral as the best medium. This was the start of the paraffin oil industry as a commercial undertaking. In the next decade, however, it was found by Bell that the same oil could be distilled in the same way from shale, and that by the use of shale he could circumnavigate Young's patent. Hence, while the paraffin industry in general dates from about 1850, the paraffin industry using shale as its raw material, or the shale oil industry, dates from about 1860.

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It is thus from the close analogy of the oil-bearing shales to the gas coals, headed by the Boghead coal and the Torbanehill mineral and the Torbaneites, that there is difficulty in determining that, though these have been classed among coals, oil-bearing shales are to be excluded from that category. The identity of their chemical composition (for it must be borne in mind that Dr Tatlock's tables refer to gas coals and not to household coals) gives strong indications that the higher grade gas coals have had the same origin as shale rather than as coal proper. And the fact that, in the Torbanehill mineral, there is found present an excess over any shale yet found of the yellow corpuscles already referred to confirms the impression that there is no real generic distinction between, at any rate, the higher grade gas coals and oil shale.

I have gone into this matter at some length, because I regard the question whether oil shale should be classed as a coal in a case of compulsory purchase to be a very narrow one, and its determination to be very difficult. Nor do I think that it has received the attention which it deserves. If the question were to be regarded scientifically, and independently of the statutes, and all that has come and gone regarding them, my own conclusion would be that if oil shale is a mineral, it is so because it is a mineral *per se*, and not because it is a coal and coal a mineral. But the fact that other substances have been classed as coals, and therefore minerals, which are very doubtfully coals, and equally possibly shales, while it does not compel to the scientific classification of oil shales as coal, does appear to me to have a material bearing upon the question whether oil shale, though its distinguishing properties were not known, or at least appreciated, at their date, is not to be deemed a mineral within the conception of the Union Canal statutes of 1817 and 1819. For after all it is the term mineral, not the term coal, which occurs in them.

That question depends, in the first place, upon whether oil shale is to be regarded, in the sense of the railway and other statutes, as a mineral in the present day. If it is not, it must be by reason that the shale formation

June 11, 1912. is merely a common rock of the district, and that oil shale is just an indistinguishable part of the general shale formation. Shale, where not of oil-producing quality, but merely indurated clay, may possibly be classed as ordinary rock of the district, part of the support of the surface. But where a band or bed of shale is oil producing, it ceases to be common rock. It is as distinct from common shale as china-clay is from common clay. And it must be kept in mind that while ordinary shale is commonly found over large areas of the country, and particularly in those both in England and Scotland which are carboniferous, oil shale is only found in a few places, chiefly, though not entirely, in Scotland, and that, where it is found, the superficial extent of the strata is very limited, even in Linlithgowshire, the district in question, which is by far the most important of these. I cannot conceive any reason for classing it as common rock of the district, or for now excluding it from the term "mineral" in the sense of the statutes, or, in that connection, distinguishing between it and the many descriptions of natural deposits, also of very limited area, which, practically identical with it in chemical composition and not impossibly in origin, have been classed as coals, and therefore accepted as statutory minerals. It must, I think, be at all hands admitted that if common shale is one of the ordinary rocks of the country underlying the subsoil, there is something exceptional in oil shale, both in the point of higher value and of rarity, to apply the expression used by Lord Loreburn, L.C., in the *Budhill* case.¹ To discuss the question further, would, I think, be a waste of your Lordships' time.

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It must then be accepted that oil shale is shale with a difference, and so apart from common shale as to require, in relation to compulsory purchase, to be regarded as a separate substance, and a substance which, though scientifically it may be distinguished from coal, is hard to distinguish, on any intelligible basis, from many substances which have in practice been classed as coal. But it has to be admitted that though oil shale may be a mineral in the sense of the statute in question, it was not so regarded in 1817, when the first Union Canal statute was passed, and it is maintained that that only is in each case a statutory mineral which was so regarded at the time the statute was passed, or at least at the time the parties came to transact by virtue of the statute. But to say that in 1817 oil shale was not regarded as a mineral means simply that it was not regarded separately at all. It certainly was not regarded as not a mineral; its uses were not known, and it therefore received no consideration practically or commercially in relation to mining. It was neither considered as a mineral, nor was it considered as not a mineral; it had received no practical or commercial consideration whatever. But, for all that, it was in 1817 known to geologists and mining engineers—then, no doubt, very few in number—that certain substances of a rocky nature, chiefly found in connection with coal, but also separate, sometimes unnamed and sometimes called shale or schistus, which is the foreign equivalent, were, as they said, impregnated with oil. Their attention had been drawn to this fact because, in some cases, oil was found oozing from the rock, and in others because the substances had a greasy appearance and could be kindled, though they would not consume. From

¹ 1910 S. C. (H. L.) at p. 3, [1910] A. C., at p. 126.

the descriptions the oil could be nothing but petroleum, and the rock oil shale. The explanation of the oil being sometimes found to ooze from the rock must be that intrusive igneous rock had caused naturally to a small extent the destructive distillation which, for commercial purposes, is now effected artificially, for oil shale is not impregnated with oil, though it will produce it.

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I do not think that it is possible to read the excerpts from the various works adduced by the pursuer without being satisfied that, though scientific mining, mineralogy, and geology had not made great advances by the end of the eighteenth century, it was known to those who were engaged in the study of mining, and from a practical, and not merely a scientific, point of view, that the substance now commonly called shale was occasionally oil-bearing. At the same time it is equally clear that prior to the Union Canal Company acquiring its rights under the Acts of 1817 and 1819 these persons were not aware that the fact could be turned to a commercial use, and had not even directed their attention to that question, though certain experiments made with different classes of coal certainly showed that things were tending in that direction.

I think, therefore, that the question starts at 1817 in this position, that the qualities of oil shale were, though its potentialities were not, known to scientific enquirers in relation to mining, and that they, if asked, would have classed the substance as a mineral; but that neither its qualities nor its potentialities were known to, or considered by, the ordinary miner, or by commercial men, or by landowners. This, however, is not, I venture to think, in the present case conclusive. For, accepting for the sake of the argument the hypothesis that that only is a statutory mineral which was so regarded at the date of the acquisition of rights under the statute, I think that it is to take too narrow a view of the question to exclude a mineral generically so nearly akin to recognised minerals, merely because it was not known, at the time the statute passed, that it had to a high degree properties which such recognised minerals also had—though that also was not at the time known—in lesser and varying degree. In fact I am unable to draw such a distinction between coal, gas coal, and oil shale, as would, on the hypothesis in question, admit all classes of coal because they are coal, among, and exclude oil shale, because it is a shale, from, the statutory minerals of 1817. It is too nearly *ejusdem generis*. And on this ground I should be prepared to give judgment.

But in view of your Lordship's opinion, it is necessary to look at the case on the assumption that oil shale is a distinctive and newly discovered mineral. But in doing so I must take leave to look with some care at the particular statute in question, for what it means by a reference to "minerals" depends not so much upon *a priori* considerations, as upon its purview and scope. I have, therefore, given to the statute a careful perusal as a whole, and not merely to excerpted clauses. I know that it is impossible, where the land itself is conveyed, to describe in strict conveyancing language the right of the disponee as a combined right of aqueduct and of way. But the Union Canal statute of 1817 does not go very strictly to work from the conveyancing point of view, and rather makes the theoretical and technical bend to the practical. And so I think, notwithstanding the wider terms

June 11, 1912. used, that the statute really contemplates rather the grant of a combined right of aqueduct and of way, than of property, in the full sense, in the Marquis of Linlithgow v. land.

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Having been passed at a date long prior to the reduction of the law of compulsory purchase to a code, this Act does not follow quite the same logical sequence as do the general statutes of 1845-1847. After constituting the subscribers a company, it proceeds (section 33) to authorise them to make a canal, to be called the Edinburgh and Glasgow Union Canal, within certain enumerated parishes, and to supply it with water from certain streams. At first sight this would appear to be a roving commission to make the canal according to the Company's discretion, but subsequent sections (sections 50 and 51) contain limitations upon the power, restricting the breadth of land to be taken and used for the canal and towing paths to thirty yards in breadth, and on the line set out on a deposited plan, with relative book of reference, though (section 53) with a limited power of deviation. The important feature, however, of section 33 is that the authorisation is limited to the making and maintaining a canal of five feet depth of water, except (section 114) at one particular spot. This limitation favours the view that in the mind of the Legislature it was in reality a right of aqueduct with a right of way for the towing path which was being conferred on the Company. It is further noticeable that the powers conferred by section 33 are not preceded or accompanied by any express power to take. The power to take land is entirely inferential, and continues so through the whole course of the statute.

Passing to section 35, the Act authorises the Company to enter upon lands in order to set out and ascertain such parts as they may consider necessary for making the intended canal. Though it is not expressly said so, this power must be read as controlled by the parliamentary plan and book of reference of sections 50 and 51 already referred to. But then the section goes on to empower the Company to dig, cut, trench, get, remove, take, and carry away earth, clay, stone, soil, beds of gravel or sand, or other matters or things "which may be dug or got in making the said intended canal." This is a somewhat remarkable special power and quite unnecessary to be conferred if the property in the land is really given and taken in the ordinary sense; and again, as it seems to me, this confirms the impression that, notwithstanding the implied compulsory power to take land, the contemplation of the Legislature was merely to confer a surface right.

There follows, however, an important clause (section 59) enacting that the vendors and all persons interested in the lands to be sold to the Company "shall be entitled to the same rights and privileges from the remaining parts of these lands as if such sale or sales to the said Company had never been made." This expressly leaves the proprietor free to exercise his proprietary right, so far, at any rate, as adjacent minerals are concerned, and effectually disposes of any claim on behalf of the Company, at any rate for lateral support—*cf. Bennett v. Great Western Railway Company.*¹

The compulsory power to take is, as I have said, entirely inferential. Section 60 empowers all persons whatsoever, even though under disability,

¹ L. R., 2 H. L. 27.

interested in the lands, &c., which should be set out and ascertained as June 11, 1912. above mentioned, for the purposes of the canal, to contract for, sell, and convey the same to the Company; and section 61 provides that all such persons may and shall accept and receive satisfaction for the value of such lands, &c., and for the value of all stone and other minerals (there being a prior power to take such for construction purposes from adjoining lands) which shall be taken by the Company for the purposes of the Act, "excepting such as are found in digging the canal," and for damages to be sustained by making and completing the works, as such satisfaction and damages should be agreed upon or ascertained by a jury, it being (section 62) a special direction that the value of lands, and the damages sustained in consequence of the execution of the powers of the Act, should be separately and distinctly ascertained. In the "excepting such as are found in digging the canal," there is the return to the idea of aqueduct merely.

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That the Legislature had in view nothing but a surface right is again made clear by section 69, which provides for the right of entry and possession on payment or tender of the purchase money. In the first place, it speaks of the sum or sums agreed on or ascertained for the purchase of such lands, &c., as a "recompense for the yearly produce or profit thereof"; and in the second place, it vests the estate and interest of the vendor in the Company "to and for the use of the said canal and other works, but to or for no other use or purpose whatever." That the compensation was expressly to be for the yearly produce or profit of the land is, I think, most material; and entirely consistently with this, as spoken to by Mr Watson, the solicitor for the Company, in his evidence, the satisfaction actually paid for the lands, at the time they were taken, was by agreement thirty years' purchase of an accepted agricultural or surface rental.

At a subsequent point in the Act there are special clauses dealing with minerals. Sections 112 and 113 enact, reading them shortly, that nothing contained in the Act should prejudice the right of the owner of any lands or grounds "in, upon, or through which" the canal should be made "to the mines and minerals lying or being within or under the said lands or grounds," that is, to the subjacent as well as to the adjacent mines and minerals, but reserving such mines and minerals to the owner, with power to work such mines and minerals subject to the conditions and restrictions contained in the Act, "not thereby injuring, prejudicing, or obstructing any of the works or conveniences belonging thereto." I pause here to note that, by the expression "in, upon, or through which," adjacent and subjacent minerals are placed in the same category and treated alike, and it is difficult to assume that the statute contemplated a restriction, by reason of the acquisition of the land, regarding the working of an after-discovered mineral subjacent, which was not (section 59) imposed regarding its working adjacent to the land taken. The restrictions referred to are to the effect that, should it appear from time to time on examination that the workings under or in the neighbourhood of the canal, either in a mine open at the date of the Act, or in one opened afterwards, are such as to endanger or damage the same, and that such endangering and damaging has been wilful, a statutory liability shall attach to the mineowner; but that otherwise, should the Company find it necessary for the safety of their navigation to stop the

June 11, 1912. working of any mines and minerals under or near the canal, they may do so on making satisfaction for the value of such mines and minerals to the owners.

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In the interpretation of its provisions the case of the *Dudley Canal Navigation Company*¹ appears to me directly in point, and I refer to the opinion of Bayley, J. The scheme of the Act unquestionably is to give the Company a surface right sufficient for its purpose of aqueduct and of towing path, and to confer upon it no power to acquire, and to impose upon it no obligation to pay for, either subjacent or adjacent mineral support, but to give the Company right, as and when mineral workings approach the line of its canal, to acquire such support whenever it should find it necessary to do so, leaving the owner free to work, unless the Company elect to stop his workings and to compensate him, provided that in working he does no unnecessary damage to the navigation, or no extraordinary damage by working the mines out of the usual mode ; for the latter is all which I think is meant, either by "not thereby injuring, prejudicing, or obstructing the said canal," or "wilfully endangering or damaging the same"—*Dudley Canal Navigation Company*.¹

The distinctive position in which this Company is put in regard to minerals as compared with companies whose powers are derived from the legislation of 1845-47, or from Acts drawn on the same lines is, I think, this : The latter are not entitled (commencing with an enumeration) to any mines of coal, ironstone, slate, or other minerals under any land purchased by them, except such as may be got in the construction of their works, unless the same shall have been expressly purchased ; but they may acquire them with their land if they elect to do so ; and all such mines shall be deemed to be excepted out of the conveyance of such lands unless they have been expressly named therein and conveyed thereby (*e.g.*, Railways Clauses Act, 1845, section 70). But, on the other hand, if the minerals are not so acquired, the onus is put on the mineowner, when his workings come within a prescribed distance of the line of the promoters' undertaking, to give notice to the promoters, when, if they think necessary, they may stop the workings on paying compensation. Whereas this Canal Company under its Acts has no power to acquire any minerals, and is not entitled to notice. On the contrary, nothing contained in the Act is to prejudice the right of the owner of land "in, upon, or through which" the canal shall be made, to the mines and minerals (no specification being attempted) within or under the said land. This, as it seems to me, not only emphasises, as in comparison with the general case, the surface nature of the right acquired by the promoters, but places the reserved right of the landowner to his minerals at its very highest, as one to minerals in general in the widest sense in which that word can be used relatively to the subject-matter of the statute.

Such being the scope of the Act, I should, if I were left to myself, have concluded that, when it provided (section 112) that nothing in it contained should prejudice or affect the right of the landowner, from whom a right of aqueduct and of way was acquired, to the mines and minerals in the lands

¹ 1 B. & Ad. 59.

in, upon, or through which the canal was to be made, and reserved these June 11, 1912.
 mines and minerals to him in the terms which I have endeavoured to
 analyse, the statute intended to reserve to the landowner the mineral wealth
 in his lands in the most liberal and comprehensive sense, whether known
 to be present or yet to be found, whether exploited or not yet exploited,
 recognised or not yet recognised, and whether the potentialities were known
 or yet to be discovered.

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But I cannot proceed upon such conclusion if it be contrary to authority. Now, while it is admittedly impossible to give or to find, in the multitude of previously decided cases, a comprehensive definition of the statutory term "mineral" which has met with general acceptance, and while Judges of the greatest eminence have differed in their views, it is contended that the last word on the subject is contained in the cases of *Hext v. Gill*,¹ *Magistrates of Glasgow v. Farie*,² and the *Budhill Company's* case.³ If by the last word is meant that these are the latest authoritative decisions on the subject, I assent. But if by "last" is meant "final," I hardly think that the noble and learned Lords who took part in these decisions were themselves so sanguine. I think that every decision has to be read in relation to its own circumstances, and, in particular, to the Act on which it proceeds, and every definition attempted as a guide in the same or similar circumstances and under similar Acts only, and not as an inflexible rule to be applied irrespective of circumstances and of the Act in question. The present case presents a new set of circumstances under which the question has never yet, I think, come up for judgment or even for consideration. These circumstances were not in contemplation of the Lords who pronounced in favour of the new criterion, and if I venture to examine its applicability to these new circumstances, I trust I may be assumed to do so with entire and respectful acceptance of the judgments in the cases in which it was announced. I need hardly repeat that the peculiar and novel circumstances of this case are that we have here an undoubted mineral, the properties of which were *ex hypothesi* unknown and even unsuspected at the date the Act was passed and the land taken, but which was none the less in the land, and is now known to be of considerable value.

The criterion assumed to have been adopted in these cases, or, rather, suggested by the first two of them and adopted in the last, is thus stated by the defenders, viz., that what is meant by "mines and minerals," where lands are taken compulsorily, is a question of fact, viz., what these words meant in the vernacular of the mining world, the commercial world, and landowners at the time when the lands were so taken. The question which I venture to consider is, Was the rule so stated really adopted, and was it intended to be a universal and absolute rule to displace all other considerations?

I take first *Hext v. Gill*,¹ and it is important to notice that this, the first case in which the criterion is suggested, was not a case of compulsory taking, but of voluntary acquisition of the freehold of a copyhold tenement, reserving all mines and minerals. The substance was china clay, which at

¹ L. R., 7 Ch. 699.

² 15 R. (H. L.) 94.

³ 1910 S. C. (H. L.) 1.

⁴ R

June 11, 1912. the time of the conveyance, 1799, was not known to exist in the tenement or in the district. But the case was complicated by the fact that the china clay could not be got by underground mining, but only by a system of open-cast working destructive of the surface. Mellish, L.J., held that on the authorities the right to everything under the surface and to all profit to be got from extracting anything from under it was intended to be reserved, but, the transaction in question being a voluntary one, that it was subject to an implied obligation of support, which in the circumstances rendered the reservation nugatory. James, L.J., agreed, holding that the authorities established a very convenient and consistent system, giving the mineral owner every reasonable profit out of the mineral treasures, and at the same time giving the landowner that protection without which the grant to him would be illusory. But he added *obiter*:—"But for these authorities, I should have thought that what was meant by 'mines and minerals' in such a grant was a question of fact, what these words meant in the vernacular of the mining world, and commercial world, and landowners at the end of the last century, upon which I am satisfied that no one at that time would have thought of classing clay of any kind as a mineral." Applying his new criterion his Lordship would thus have excepted china clay from the reservation. As I have said, these words were spoken with reference to 'such a grant'—that is, a conveyance proceeding on a voluntary contract of sale and purchase. And that James, L.J., in suggesting such criterion, was regarding it solely in its applicability to a voluntary sale his language makes perfectly clear.

Had there not been at different times a decided difference of opinion as to whether the same considerations applied in interpreting a grant of minerals in a voluntary and in a compulsory sale, I should hesitate to advance the contention that they do not do so. Where parties are transacting voluntarily, they may not know whether any minerals exist in the ground which is the subject of sale, and they cannot know their value. But they may fairly be regarded as insisting on and admitting respectively the reservation of the then known and recognised minerals, exactly as if they were enumerated, and basing the price agreed to be taken upon the chance of their existing in the subject and on a speculative estimate of their value. And the price agreed to be given may reasonably be supposed to be based on the complete property *quoad ultra* passing with all its chances. But under statutory reservation, the question is, I think, different. I should be prepared so to hold were the statutory reservation that of the general legislation of 1845-7, viz., a reservation of the whole coal, ironstone, or other minerals in terms of the clauses relating to mines in the general Acts, for I must read such reservation in the light of the provisions of those clauses. But it would be impertinent in me to enlarge upon that general question. I am concerned with a special Act whose provisions are different. Where then the sale is compulsory and under reservation by statute couched as the statute in question, it is not a grant under reservation of minerals, either particular or general, but it is a grant of the subject "according to the true intent and meaning of" an Act intituled, &c. I quote both from the Act, section 60, and from the actual conveyance. The grantee is sent to the Act, and every clause of the Act, for the extent and

qualifications of the right acquired. The Act makes it clear that the June 11, 1912. Legislature intended no limited reservation of minerals, but a reservation *per aversionem*, and there is no pretext for saying that when parties come to transact under the Act and to fix the compensation for the rights compulsorily acquired, they either did or were entitled to base that compensation on a limited reservation of certain known minerals only, and on the chance of their existing and of their value, and of nothing else. Such would, I venture to think, be contrary to the scope and purview of such a statute.

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In *Farie's* case¹ the purchase was apparently by agreement, but under compulsory powers, and therefore truly compulsory. But the grant was not such as we have here, but contained an express reservation of "the whole coal and other minerals in said lands in terms of the clauses relating to mines in the Waterworks Clauses Act, 1847." The question in that case was whether a bed of ordinary clay, though of unusual thickness, fell under the reservation. It was under the soil certainly, but formed the subsoil, and could not be worked except open-cast, and to the destruction of the surface. In that case Lord Halsbury, L.C., while expressly guarding himself at the outset as wishing to decide nothing but what was necessarily involved in the particular case before the House, and finding simple grounds for rejecting the attempted extension of the reservation to common clay—at the same time expressed regret that the test which James, L.J., suggested, and which his Lordship thought would have been the true one and would have satisfied all difficulties, was not adhered to in *Hext v. Gill*.² Lords Watson, Herschell, and Macnaghten, on the other hand, found the case one of great difficulty, and each entered elaborately on its discussion, which would have been avoided had they been prepared to adopt the suggestion of James, L.J.

But in the *Budhill* case³ lands had been acquired by the North British Railway Company under compulsory powers and by statutory conveyances in terms of the Railways Clauses Act, 1845, and the controversy regarded the working of sandstone which underlay the clay subsoil. In this case the House of Lords certainly adopted the interpretation of the term "minerals" suggested by James, L.J., in *Hext v. Gill*.² I do not for one moment propose to criticise their Lordships' judgments, but I think I am bound to consider the length to which this adoption of the criterion of James, L.J., was intended to be carried before I apply it to the present case. The House were engaged in construing the term "minerals" occurring in section 70 of the Railways Clauses Act, 1845. They were engaged in determining whether the common substance termed in Scotland sandstone, in England freestone, (for the attempt to prove it exceptional of its class failed) was included under such term, just as the Court in *Farie's* case¹ were engaged in determining whether common clay was included under the same term occurring in the Waterworks Clauses Act, 1847. The difficulty which I experience in concluding how far the adoption by the House of the definition of James, L.J., is intended to be carried, arises from the fact

¹ 14 R. 346, 15 R. (H. L.) 94.

² L. R., 7 Ch. 699.

³ 1909 S. C. 277, 1910 S. C. (H. L.) 1.

June 11, 1912. that there was another and patent ground of judgment which rendered its application unnecessary. The Lord Chancellor expresses the ground of his judgment thus:—"If it [sandstone] be a mineral, then what the railway company bought was not a section of the crust of the earth subject to a reservation of minerals, but a few feet of turf and mould, with a right to lay rails upon it, and liable to be destroyed altogether, unless the company choose on notice to buy the ordinary rock lying beneath it. . . . It was agreed at the bar that this was the ordinary freestone or sandstone. If the respondents are entitled to work this substance under this railway, the same must be true of chalk, or clay, or granite, or any other rock which forms the crust of the earth. . . . Speaking for myself, I will not adopt so startling a conclusion unless I am compelled by a decision of this House from which there is no escape. There is no such decision. . . . I cannot believe Parliament ever intended that the common rock of the district should be included in these words of reservation. If that were intended I can see no need for inserting such words as 'mines of coal, ironstone, slate, or other minerals.' The Act is therefore consistent with the view which, with all respect, appears the obvious and common-sense view, that the railway company is by the conveyance to acquire the land in general, and the reservation is only of what is exceptional, as Lord Ardwall clearly says." Having thus expressed his grounds of judgment in the particular case, his Lordship adds:—"It is impossible to give an exhaustive definition of the meaning of the much-debated words that are to be found in section 70. But I hope your Lordships may assist in their interpretation," and proceeds to re-state the canon of James, L.J., to this effect:—in order to include a substance in the term mineral under the Act of 1845, these two questions must be answered in the affirmative: (1) Was the substance exceptional, and (2) being exceptional was it regarded as a mineral in the vernacular, &c., at the time when the purchase was effected? This is undoubtedly more than an *obiter dictum*, yet it is not the ground of judgment. And I venture to think that it is expressed in terms which show that his Lordship meant it as a guide, and not as an absolute rule to be followed in all subsequent cases regardless of all other considerations.

Lord Gorell, again, after stating at the outset what is, I think, generally admitted, that it is reasonably clear that the word "minerals" in section 70 of the Act of 1845 must receive some limitation, considers six different definitions which had been suggested in previous judgments, and, *inter alia*, (6) that these words are used in the ordinary sense in which they are understood and used by landowners and those engaged in mining and commerce, and then expresses the opinion that "the true test of what the section means by 'mines of minerals' is there indicated." His Lordship does not in any part of his opinion confine the test to the date of the conveyance, and even in the conclusion adds "or are now," but it would seem, I think, that he really intended to do so. And though his Lordship states another and in this case sufficient ground of judgment, viz., that the clause of reservation was not meant "to include in its scope those matters which are to be found everywhere in the construction of railways such as clay, sand, gravel, and ordinary stone," he undoubtedly does make the applica-

tion of James, L.J., cover the main ground of his judgment. The judgment June 11, 1912. of Lord Shaw of Dunfermline is in accordance with these opinions.

I acknowledge the cumulative weight of these three decisions. Yet I am unable to conclude that the last of them was intended to foreclose all future consideration of the question where a case arose which was clearly not before the minds of the noble and learned Lords concerned in the judgment, and where the rigid application of the canon adopted would in different circumstances and under a different Act work the injustice which it would here.

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It is certainly in favour of this view that in the *Carpalla* case,¹ decided by the House of Lords a month after, though accidentally reported before, the *Budhill* case,² in determining whether china clay was a mineral in the sense of the statute, the test so recently approved was not resorted to, but the case was decided on a review of very detailed evidence which led to "the conclusion that china clay was not part of the ordinary composition of the soil of the district; its presence was rare and exceptional." Nor can I omit to notice that, applying his own canon, James, L.J., would have excluded china clay from the reservation, while the House of Lords in the *Carpalla* case¹ affirmed a judgment which, on scientific and other evidence as to its genesis and composition, included the same substance in the reservation.

I do not, then, think that the question in the present case is foreclosed by the judgment in the *Budhill* case,² but that it is open to this Court to take a wider view, and to determine it on the other considerations which present themselves, and indeed force themselves on attention. These are:—

The relations between oil shale, gas coal, and coal, to which I adverted at the outset.

The fact that the landowner's rights do not depend upon the terms of the general Acts, 1845-47, but on the exceptional terms of a very special Act, which place the landowner and the Company in very special relations as regards minerals. To those I need not again refer in detail, except to add that these relations precluded the question of what were to be considered minerals, and what not, from being considered solely at the date the land was taken and compensation adjusted. The landowner could then secure, and *de facto* did secure, nothing more than the surface value of the soil of the area required. Hence it appears to me impossible, in justice to the situation created by the Act, that any distinction should be drawn between minerals recognised as minerals at the date of the Company acquiring their rights and other substances, equally undoubtedly minerals, whose properties and value remained yet to be discovered. If anything were necessary to emphasise this result it would be found in the conflict which the adoption of the contrary view would create between section 59 and section 112 of the Act of 1817. Section 59 conserves untouched the landowner's rights in adjacent lands absolutely and without any qualification. There is no discrimination between minerals and other rights, and no possible discrimination between minerals then known and minerals still to be discovered. Section 112 places adjacent and subjacent minerals in the same category

¹ [1910] A. C. 83.

² [1910] A. C. 116, 1910 S. C. (H. L.) 1.

June 11, 1912. and again reserves them to the owner, subject to a special right to stop working on making compensation. The Company seek to limit this reservation to minerals known and recognised at the date of their acquiring their rights. In the face of section 59 that contention is untenable as regards adjacent minerals, and I think it follows that it is equally untenable as regards subjacent minerals, for the term "minerals" must have the same meaning in both sections.

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The further fact that in laying down in the *Budhill* case¹ the canon referred to, the House of Lords were not only dealing solely with a case under section 70 of the Railways Clauses Act, 1845, but had not before them the effect to which these words "at the date of the grant" might be pressed, and are being pressed in this case. They were dealing with well-known substances, whose composition, qualities, and uses were equally well known when the Acts were passed, the lands taken, and the question arose. Clay and sandstone and their respective uses had been known from the days of the Pharaohs, and they had never, except by scientists, been regarded as minerals. In this knowledge the Legislature spoke and the promoters in any particular case took. But in the vernacular these substances were not only not regarded as minerals, but they were regarded as not minerals. For the exclusion of these substances from the statutory minerals I see good reason. But I am unable to see such reason for making the effect of such a general reservation as we have here depend upon the state of knowledge and of practical use at the date when the statute passed or the land was taken. I cannot accept the words used by the noble and learned Lords who decided the *Budhill* case¹ as expressing the deliberate opinion that no substance can fall under the statutory reservation of minerals under any Act, and in any circumstances, which was not at the time the land was taken in the vernacular regarded as a mineral. It could not be so regarded among miners, commercial men, and landowners, unless, in point of fact, it was already in use to be worked at least in some place or district, and was an article of commerce. The result of such a limitation would go to exclude every substance, however truly a mineral and however exceptional and however important, the properties of which, at the date the land was taken, had not yet been discerned or even investigated, and which was not then regarded in the vernacular as a mineral, simply because it was not regarded at all. Such was not the case to which their Lordships' attention was directed, and I am unable to accept their suggested rule of construction as decisive where a case has occurred in circumstances to which their attention was not directed.

Were it attempted to maintain that shale in general was reserved, I should agree that both the grounds of judgment advanced in the *Budhill* case¹ would properly negative the contention. Shale is ordinarily not an exceptional substance, but a common rock of many districts. And shale has, like clay and sandstone, not only never been recognised in the vernacular as a mineral, but has always been recognised as not a mineral. But oil shale cannot be disposed of as merely common shale. It is a species exceptional in rarity, in the uses to which it can be put, or rather the

¹ 1910 S. C. (H. L.) 1.

products which can be obtained from it, and consequently in its value. June 11, 1912.
 There is some analogy between it and china clay. It is shale containing that from which oil may be distilled. China clay is clay formed by the disintegration of a particular rock, but it contains, as its specialty, the minute particles of felspar which, when separated from its other elements, is the substance from which china is produced. Hence their respective distinctions from ordinary shale and common clay and their corresponding values. If china clay can be regarded as a statutory mineral, though clay is not, equally may oil shale, though shale be not.

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For these reasons, while in respect for your Lordship's opinion I must say so with due hesitation, I am unable to accept the Lord Ordinary's judgment.

I have only one other incidental point to touch on, viz., that which is raised by the defenders' sixth plea in law, which is intimately connected with the competency and relevancy of the action as laid. Concisely stated, it amounts to this: We, the Railway Company, are not concerned with the damage you may by your workings do to our canal; you may breach the bottom of our canal, but the result will only be to drown your mine, and probably neighbouring mines; when they are full, the water will again rise in our canal, and the damage to us will only be temporary inconvenience. Inconsistently, however, with this somewhat chauvinist plea, the defenders dare the mineowner to injure, prejudice, or obstruct their undertaking at his peril. The defenders cannot take up both attitudes. They misinterpret the last proviso of the 112th section of their Act, and they ignore the 120th. I cannot read their secretary's letters of 8th November 1907 and 23rd December 1908 as anything but a notice to stop working, such as they are entitled to give under section 113. Accordingly, they are bound to accept the consequences of having given such notice.

LORD MACKENZIE.—The theory of the action is that the pursuers are compelled to leave unworked a seam known as the Broxburn main seam of oil shale subjacent and adjacent to the Union Canal.

The first question which arises is whether, assuming the pursuers to be right on the facts, this would entitle them to be paid compensation by the defenders, having regard to the provisions of their private Act of Parliament. In the construction of this statute the principle to be applied is the same as that laid down in *London and North-Western Railway Company v. Evans*.¹ Where an express statutory right is given to make and maintain a thing necessarily requiring support, the statute, in the absence of a context implying the contrary, must be taken to mean that the right to necessary support of the thing constructed shall accompany the right to make and to maintain it—(*per* Bowen, L.J., quoted in *North British Railway Company v. Turners, Limited*²; *Elliot v. North-Eastern Railway Company*³; *Caledonian Railway Company v. Sprout*⁴). The title of the Canal Company to what they were permanently to occupy depends upon sections 35, 60, and 61 of the Act of 1817.⁵ They were bound to pay at the start for this, and also to

¹ [1893] 1 Ch. 16.

² 6 F. 900, at pp. 903-4, footnote.

³ 10 Clark (H. L.) 333.

⁴ 2 Macq. 449.

⁵ 57 Geo. III. cap. lvi.

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pay damages in respect of anything temporarily interfered with. If there had been nothing but sections 35, 60, and 61 the position of the defenders would have been unanswerable, but there are sections later on which specially deal with minerals. These are sections 112 and 113. Although an argument was founded upon section 111, this may be disregarded. The effect of section 112 is to reserve to the owner the subjacent minerals, and it provides that he may work them "not thereby injuring, prejudicing, or obstructing the said canal or any of the works or conveniences belonging thereto." It does not apply to adjacent minerals, for as these could not be held to be embraced in the lands taken so they could not be excepted therefrom. The restriction upon the mode of working has been held by the Lord Ordinary not to be limited to wilful injury, and in this view I agree.

Section 113 deals with both subjacent and adjacent minerals, and its terms are such as to render it impossible for the defenders successfully to maintain that any claims by Lord Hopetoun or his successors in respect of injury to mineral workings had been assessed and paid at the time the canal was made. The difficulty in construing this section arises from the fact that its framers evidently thought the only risk of damage incurred was by the canal owners. The possibility that there would be even greater damage if valuable mineral workings were drowned out owing to a breakage in the canal does not seem to have occurred to them, or, at all events, is not provided against in unambiguous language. The section is divided into three parts. The first gives a right to the Canal Company to inspect the mines. The second provides for the repair of wilful damage at the expense of the mineowner. The third is in these terms :—"In case the said company (*i.e.*, the Canal Company) shall find it necessary for the safety of the said navigation, or any of the works thereto belonging, to stop the working of any mines and minerals under or near the said canal, or any of the works thereto belonging, the said company shall and they are hereby required to make satisfaction for the value of such mines and minerals to the owners, occupiers, or other persons entitled to receive the same." The defenders argued that this gave an option to the Canal Company alone; that there was no obligation on them to inspect; and that, even if they did inspect, it was left entirely to them to say whether they would stop the working. Upon a reasonable construction of the section it appears to me that if the Canal Company do inspect, as has been done here, if it is proved as a fact in the case, as the evidence here shows, that it is necessary for the safety of the navigation to stop the working of the mines and minerals under and near the canal, and if the Canal Company intimate to the mineowners that they will hold them liable in damages for any injury to the canal, this in effect is stopping the working of the minerals. In that event the Canal Company is liable to pay compensation to the owner for the value of what may be held to be minerals. I therefore agree with the Lord Ordinary on this branch of the case.

The next point is whether the shale in question is a mineral which has to be paid for. The test to be applied is that laid down by Lord Halsbury in *Magistrates of Glasgow v. Farie*¹ and the Lord Chancellor in the *Budhill*

¹ 15 R. (H. L.) 94.

case.¹ The Court has to determine what these words mean in the vernacular of the mining world, the commercial world, and landowners. The Lord Chancellor says this is to be determined at the time when the purchase was effected. In the present case three dates have been suggested as the crucial period, viz., 1817, the date of the Act, 1818, the date when possession was obtained, and 1862, the date of the conveyance. As between 1817 and 1818 there would be no difference in result. If, however, 1862 be taken there would be a difference. At the later date it is conceded that the shale in question was according to the vernacular or in common parlance a mineral. The dispute is whether it can be so regarded at either of the earlier dates. Reference was made to observations by the Lord President in the *Glenboig* case² as supporting the view that the date of the conveyance should be taken. It is evident, however, that the point which is now of importance was not present in that case. For the reasons stated by the Lord Ordinary I am of opinion that the question must be determined with reference to the year 1818, when the Canal Company bought the ground and entered into possession. This was the date of the purchase. The protracted delay in obtaining a conveyance was due to the position taken up by Lord Hopetoun. The question of fact therefore is whether oil shale was regarded as a mineral in 1818. The expression in the Act is "mines and minerals," and an argument was used that the term "mines" covered anything that could be got by mining. This would be to give much too wide a meaning to the reservation, which, in my opinion, does not include more than would be covered by the word "minerals" alone. The evidence of some of the skilled witnesses, *e.g.*, Mr Rankine and Mr Gemmell, is to the effect that, in their view, everything from the roots of the grass downwards is included in the term "minerals." This view cannot be taken since the decision in the case of *Farie*.³

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The question is whether in the year 1818 oil shale was according to the vernacular of that period or in common parlance a mineral. In my opinion it was not. The term "oil shale" was not known previous to 1860; what was known before that as a scientific fact was that oil could be distilled from certain shales, but until or shortly before 1860 there was no distillation of shale for oil for commercial purposes. In 1818, although the substance may have been known to exist, and though the fact may have been known to men of science that it had a potential value, the power of realising that value had not been ascertained, and it was not ascertained until Dr Young's discoveries in the middle of the century. In 1818 it was not, in the opinion of the mining or commercial world, a mineral. Mention is made by Williams, who, according to the pursuers' argument, was not purely a scientist, of strata of blaes or shale which are very common and exceedingly numerous in coal countries. This is in the second edition of his work published in 1810, in which he refers to what the Scotch colliers call "creashy" (greasy) blaes, and says that some of these glossy greasy blaes will actually burn when fire is set to them though they will not consume. Further on he describes the appear-

¹ 1910 S. C. (H. L.) 1.

² 1910 S. C., at p. 961.

³ 15 R. (H. L.) 94.

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ance and composition of schistus in language that the pursuers' counsel maintained was exactly appropriate to oil shale. There is evidence of the use of blaes or shale for fuel, and in Dorsetshire the Kimmeridge shale was put to this purpose two hundred years ago. As regards what Mr Rankine calls "mineral uses," this was confined at the date in question to its use as waste material for putting on footpaths and carriage-drives. Several patents were referred to, the earliest being Becher's in 1681, then Eele's in 1694, and Betton's in 1742. This last was for the invention of "An Oyl Extracted from a flinty rock, for the cure of rheumatick and scorbutick and other cases," the rock being described as "Black pitchy, flinty rock," which, it was suggested in argument here, was shale, not coal. The other patents were for coal. The defenders' witness, Professor Marshall, admits that Betton's patent might refer to bituminous shale, but points out that it was merely a laboratory experiment. In 1781 a patent was taken out by Lord Dundonald for extracting oil from coal, and in Mr Galletly's Treatise, published in 1876, the statement is made that works were established at Muirkirk in Ayrshire, which were in operation for fifty years (from 1781 to 1831) for the working of this patent, by which a tar yielding brown oil, naphtha, and ammonia was obtained. Mollerat's patent followed in 1837, for an improvement in the manufacture of gas, in which mention is made of the oil obtained by the distillation of pit coal and of bituminous schistus, "the use of which has yet been overlooked." The claim in it is for the apparatus therein described for the continuous distillation of bituminous schistus. There is, however, no evidence of any apparatus being worked at or prior to 1818 for the extraction of tar or pitch or oil from shale. Professor Tatlock refers to the earlier patents in his evidence, and says he does not think any of those earlier than Dr Young's ever came into practical use. He also refers to Kirkton's Elements of Mineralogy, published in 1794, which describes bituminous shale as looking like bad coal, and Jameson's System of Mineralogy, published in 1816, which includes in the extracts from bituminous shale empyreumatic oil and thick pitchy oil.

Shale in its chemical constitution is indurated clay. There are infinite gradations between coal, on the one hand, and clay on the other. Chemically, coal and shale contain the same ingredients, and for this reason Professor Tatlock says he has always regarded shale as a mineral as much as coal. This shows that for the purposes of the present case evidence based on analysis is not of much assistance in determining whether oil shale was a mineral according to the vernacular in 1818. As was pointed out by the Lord President in the *Torbanehill* case,¹ the fact that Torbanehill mineral consisted of certain component parts, which are the component parts of coal, would not necessarily make it coal. It depends on the proportions. Coal and shale are distinct and different substances, and, as the pursuers' leading witness says, "I don't think any mining engineer would designate shale by the term coal." Cannel coal, which is described in the Statistical Account of Scotland (Lesmahagow part) for 1793, as having some resemblance to jet, contains a much larger percentage of fixed carbon than shale does. The description given by Professor Gregory is that Fawnsparke shale (the

¹ 17 D. 1.

shale in question here) stands between the clay on the one hand and the coal on the other, and that it is nearer the coal than the clay on account of its economic value. As regards commercial use, he says that, though Torbanehill mineral was used from about 1850, it was 1860 before the other shales were recognised as having a commercial value. Probably the nearest approach to a commercial use before 1818 is that described in Lewis's *Materia Medica* (London, 1761), which, according to the preface, includes the substances commonly prepared as articles of commerce. It is there stated that on submitting mineral bitumens to a degree of heat in closed vessels an acidulous liquor, an oil approaching to the nature of petroleum, is obtained. Reference is also made to the genuine sort of mineral oil which is extracted by distillation from a hard bitumen or kind of stone coal found in Shropshire and other parts of England, and the statement is made that an oil obtained by distillation from a particular bitumen is directed by the London College to be kept in shops. The pursuers' evidence comes to this, that the commercial use of oil shale was not known in 1818, though it was known that oil could be extracted from certain coal measures, amongst which shale might have been contained. Except in the case of Lord Dundonald's patent, and the use for medicinal purposes, distillation had not been resorted to for practical purposes at that time. It was not until the geological survey of Scotland in 1892 that the out-crops of oil shale were shown. In the survey of 1859 there are no shale out-crops indicated, though the coal and limestone are. Shale is included in the Coal Mines Regulation Act of 1872, but not in the Act of 1860.

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For these reasons I am of opinion that oil shale was not regarded as a mineral in 1818, and that the judgment of the Lord Ordinary ought to be affirmed.

THE COURT adhered.

HOPE, SIMSON, & LENNOX, W.S.—JAMES WATSON, S.S.C.—Agents.

JOSEPH CONSTANT, Pursuer.—*Sandeman, K.C.—C. H. Brown.*
ALFRED CHRISTENSEN, Compearing Defender.—*D.-F. Dickson—*
Armit.

No. 185.
June 20, 1912.

Ship—Maritime lien—Necessaries—Necessaries supplied in foreign port.

Constant v.
Christensen.

Held (by the Lord Ordinary, Dewar) that the law of Scotland, like the law of England, does not recognise a maritime lien for necessaries even when they have been supplied to a ship in a foreign port.

ON 14th June 1911 Joseph Constant, London, brought an action in the Court of Session for declarator and sale of the steamship "Baltic," at that time lying in the harbour of Bo'ness.

The action was directed against the owner of the ship and certain other defenders, but only one of the defenders, viz., Alfred Christensen, coal merchant, Copenhagen, compeared and lodged defences in the action.

The facts of the case were thus narrated by the Lord Ordinary (Dewar):—

June 20, 1912. "This is a competition upon the price of a ship sold by judicial warrant, and the question for decision is whether the pursuer, a mortgagee, has a preferable claim to the proceeds in virtue of his mortgage, or whether the compearing defender is to be preferred in virtue of an alleged maritime lien.

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"The 'Baltic' belonged to Herz Klompus, a Russian subject, and was registered at the port of Libau, Russia. By account current mortgage, dated 1st November 1910, executed in London, Klompus mortgaged the vessel to the pursuer, Joseph Constant, a London ship-owner, in security of the sum of £2400 due on account current, conform to memorandum of agreement, also executed in London on the same date. By this memorandum of agreement the owner agreed to pay the £2400 in thirty equal instalments of £80 each, and further agreed that if any of the instalments should not be paid on their due date all the money should become immediately due and payable. The owner failed to pay the instalments, and the whole £2400, with interest, thereupon became due. On 26th April 1911 the pursuer raised an action in the Sheriff Court at Linlithgow for payment of this sum and arrested the 'Baltic,' which was then lying at Bo'ness harbour, on the dependence of the action. On 12th May the Sheriff decerned against the owner for payment, with interest, and granted warrant to the pursuer to enter into possession of the 'Baltic' and sell her and apply the proceeds in satisfying his claim.

"On the 8th May 1911 the compearing defender, Alfred Christensen, coal merchant, Copenhagen, raised an action in the Court of Session against the owner Klompus for £150 for coals supplied and cash advanced to the master of the 'Baltic' for the purchase of necessaries on 10th April 1911 when she was lying at the port of Copenhagen. He also arrested on the dependence of the action, and obtained decree on 30th May.

"On the 14th of June 1911 the pursuer raised the present action [of declarator and sale], and the 'Baltic' has now been sold and has realised £1255, and this sum has been consigned. The pursuer claims to be ranked and preferred *primo loco* to the fund *in medio* to the extent of £2400, with £13, 13s. of expenses, in virtue of his mortgage and in respect of his arrestment; while the compearing defender maintains that his claim for £150 falls to be ranked preferably, on the ground that he has by the laws of Scotland and of Denmark a maritime lien in respect of the coals supplied and the advance made to the master of the 'Baltic,' and he further pleads that the mortgage upon which the pursuer's claim is based is invalid according to the law of Russia, by which law, he maintains, the rights of parties fall to be determined."

The case was heard on 29th May 1912.

The contentions of the parties and the authorities cited are stated in the opinion of the Lord Ordinary.

On 20th June 1912 the Lord Ordinary sustained the claim of the pursuer as mortgagee, and repelled the claim of the claimant Christensen.

"OPINION.—[After the narrative of facts given *supra*]—I do not think that either the law of Denmark or the law of Russia has application to a case of this kind. It was decided in the case of *Clark v. Bowring & Company*, 1908 S. C. 1168, that the law of Scotland only can be applied in determining the ranking of claims on a British ship locally situated in Scotland; and in the '*Tagus*,' [1903] P. 44, where a foreign vessel was within

English jurisdiction, the same rule was applied—(See also the '*Mecca*,' June 20, 1912. [1895] P. 95). I think, therefore, the only question is whether, according to the law of Scotland, the compearing defender has a maritime lien for the necessities he supplied and the cash he advanced to the master of the '*Baltic*.' I am of opinion that he has not.

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"By the law of some foreign countries a person who supplies necessities has a lien upon the ship, and at one time he could maintain such a suit in England; but in 1835 it was decided in the case of the '*Neptune*,' (1835) 3 Kn. P. C. 94, that the Admiralty Court had no jurisdiction to try such a case, and that the material or necessities man could only bring an action against the owner and not against the ship. Then when the Act of 1840 gave the Court jurisdiction over necessities supplied to a foreign ship (which by the Act of 1861 was extended to all ships, including British ships), it was contended that this extension of jurisdiction created a lien for necessities, but in the '*Pacific*,' (1864) 33 L. J., P. M. A. 120, and again in the '*Heinrich Bjorn*,' (1885) 10 P. D. 44, and (1886) 11 App. Cas. 270, where all the authorities are reviewed, it was held that the 'material man,' by the mere fact of his supplying necessities in no case obtains the ship as a security until he institutes his suit in Court, and any security he may thus obtain is subject to any existing claims. It is therefore quite settled by the Admiralty law as administered in England, that the 'material man' has no maritime lien for necessities—(Abbott, Law of Merchant Ships and Seamen, 14th ed., p. 184).

"But it was maintained on behalf of the compearing defender that this was not in accordance with the law of Scotland. He admitted that in Scots law there was no lien for necessities supplied in a home port, but argued that Scotland always had recognised a maritime lien for necessities supplied in a foreign port; and I was referred to the cases of *Maxwell v. Wardroper*, (1726) M. 6266; *Ropework Company of Port-Glasgow v. Crosses*, (1761) M. 6268, and *Hamilton v. Wood*, (1788) M. 6269. But these decisions do not appear to support the defenders' contention. In *Maxwell's* case, which was decided in 1726, a claim was made for a hypothec in respect of material furnished for building a ship which was sold before completion. It was pled for the other creditors that 'time and experience, the great reformers of laws, have taught us that most part of the conventional and tacit hypothecs introduced by the common law were a burdensome nuisance, of great hindrance to commerce.' This plea received effect, and the claim to establish a hypothec was rejected. In the *Ropework Company* case, decided in 1761, ropes had been supplied at Port-Glasgow to a ship going to Virginia, and it was held that the claim of the company which supplied the ropes was preferable. But this decision was not followed in the later case of *Hamilton v. Wood*, decided in 1788. Wood repaired a ship belonging to a bankrupt at Port-Glasgow, and claimed a right of hypothec, and the trustees for other creditors objected. The Lord Ordinary decided in favour of Wood; but, on a reclaiming note being presented the Court transmitted the case for the opinion of English counsel on the law and practice of England, and after obtaining an opinion, recalled the Lord Ordinary's judgment, and decided that the furnishers had no hypothec or right of bottomry on the ship. And on 15th June 1789 the House of Lords approved the decision and dismissed the appeal. Those cases appear only to decide that there is no maritime lien for necessities or repairs supplied to a vessel in a home port. I cannot find anything in them or in the text-writers to which I was referred (viz., Stair, i. 12, 18; Erskine, iii. 1, 34; Bell's Com., i. 573) to suggest that there is any peculiarity in the law of Scotland which distinguishes it from the Admiralty law of England. On the contrary, the case of *Hamilton v. Wood*, followed later by *Hay v. Le Neve*, (1824) 2 Sh. App. 395, and *Boettcher v. Carron Company*, (1861) 23 D. 322, shows that there is no distinction between English and Scottish law in this branch of jurisprudence. The maritime

June 20, 1912. code is neither English nor Scottish, but British law. This was very clearly set forth in the case of *Currie v. Macknight*, [1897] A. C. 97, where Lord Watson said, at p. 103,—‘From the earliest times the Courts of Scotland exercising jurisdiction in Admiralty causes have disregarded the municipal rules of Scottish law, and have invariably professed to administer the law and customs of the sea generally prevailing among maritime states. In later times, with the growth of British shipping, the Admiralty law of England has gradually acquired predominance, and resort has seldom been had to the laws of other states for the guidance of the Courts.’

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“I am accordingly of opinion that the claim of the pursuer falls to be sustained.”

J. & J. Ross, W.S.—BEVERIDGE, SUTHERLAND, & SMITH, W.S.—Agents.

No. 186. A. V. BROWER (Mrs J. V. Brower's Executor), Pursuer and Complainer (Reclaimer).—*Macmillan, K.C.—Lord Kinross.*

July 12, 1912. H. CHEYNE AND ANOTHER (Hon. Mrs Ramsay's Trustees), Defenders and Respondents (Respondents).—*Macphail, K.C.—G. C. Stewart.*

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Trust—Administration—Investments—Foreign investments—Deposit of security writs in foreign country—Duty of trustees to creditor attaching beneficiary's interest.

By her trust-disposition and settlement a testatrix directed her trustees, on the death of a liferenter, to convey her whole estate to A, an American citizen, and gave them special powers of investment in American securities, desiring them to act in this matter under the advice of a New York trust company. The trust funds were invested by the trustees in American securities, and the security writs were deposited with this company.

During the subsistence of the liferent an American creditor of A, by means of an arrestment and furthcoming, obtained a decree of the Scottish Courts adjudging to her A's whole interest in the trust-estate. Thereafter the creditor brought an action against the trustees in which she averred that the form in which the securities stood would, by American law, entitle A to demand delivery of them from the custodiers thereof on the liferenter's death, and maintained that the defenders were bound to invest the funds in such form as would prevent her right under the Scottish decree being thus defeated; and she also sought to interdict the defenders from returning the security writs to America, whence they had been brought for the purpose of the actions.

The Court *assolized* the defenders, holding that their administration could not be interfered with, as the acts complained of were not in breach of the trust in respect (1) that the trustees were entitled under the trust-deed to deposit the securities in New York, and (2) with regard to the investments, that they were under no duty to do anything for the purpose of fortifying the pursuer's position which would not have been required in the ordinary course of the administration of the trust.

1ST DIVISION. THESE were actions of accounting and payment and of suspension and interdict at the instance of Mrs Jenny V. Brower, Utica, U.S.A., against Harry Cheyne, W.S., Edinburgh, and the Honourable Charles Maule Ramsay, as trustees acting under the trust-disposition and settlement of Mr Ramsay's deceased wife. During the dependance of the actions the pursuer died, and her executor, A. Vedder Brower, Utica, U.S.A., was sisted as pursuer in the actions.

Lord Hunter.

By her trust-disposition and settlement Mrs Ramsay bequeathed July 12, 1912. the whole free income of her estate to her husband, and directed that, on his death, her whole estate should be paid to her brother, William R. Garrison, a citizen of, and resident in, the United States, as his absolute property. The deed also contained the following clause:—

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"I give special power to my said trustees and executors to retain the whole or any part of my means and estate in the securities in which the same may be at the time of my death, or to alter and vary these securities and to invest any part of my means and estate in securities of a similar kind to those held by me at the time of my death, hereby declaring that as regards any American securities which I may hold at the time of my death, it is my wish and desire that my trustees and executors should be guided by the advice of the Metropolitan Trust Company of the city of New York, and that my trustees and executors shall have full power to invest in any American security approved by the said Metropolitan Trust Company, and shall also have power to lend out the trust funds on the debentures or deposit-receipts or other securities of any company incorporated by Act of Parliament or charter, whether of Great Britain or any of its Colonies."

Mrs Brower, who had certain claims against Mr Garrison, arrested his reversionary interest in Mrs Ramsay's estate in the hands of the trustees so as to found jurisdiction against him in the Scots Courts, and proceeded with an action against him. Her action was undefended, and she obtained decree against Mr Garrison on 19th August 1908 for sums amounting in all to £11,226, 12s. 1d. In her action Mrs Brower, on 20th July 1908, had arrested Mr Garrison's interest in Mrs Ramsay's trust on the dependence of the action and in security of the sums sued for. Having obtained her decree, Mrs Brower then raised an action of furthcoming against Mr Garrison as principal debtor and Mrs Ramsay's trustees as arrestees. This action was also undefended. In the course of proceedings therein the Court, by decree dated 16th July 1909, found that the arrestment validly attached Mr Garrison's reversionary right in the trust-estate, that the trustees held the estate subject to the arrestment and the attachment thereby created, and that the pursuer was entitled to have Mr Garrison's reversionary right and interest made available and furthcoming in the process to the extent and effect of satisfying her debt. On 31st May 1910 the Court remitted to an actuary to value the reversion, and, a report having been obtained that the present value of the reversion was £9664 or thereby, the Court appointed the reversion to be exposed to public roup at the upset price of £10,000. This was done; but no offer of the upset price was made, and, thereafter, by decree dated 8th July 1910, the reversionary right of Mr Garrison was in the action of furthcoming adjudged to belong to Mrs Brower.

Thereafter on 29th November 1910 Mrs Brower brought the present action of count, reckoning, and payment against Mrs Ramsay's trustees. The conclusions of the summons were for (1) declarator that the defenders were bound to pay to the pursuer the whole of the trust-estate upon the termination of Mr Ramsay's life interest, or, otherwise, to render to the pursuer or her assignees just count and reckoning for their intromissions as trustees with the trust-estate; (2) an order on the defenders to produce to the Court Mrs Ramsay's trust-disposition and settlement; (3) an order on the defenders to

July 12, 1912. produce an account of their intromissions with the trust-estate whereby the amount of the residue thereof might be ascertained; and (4) an order on the defenders to produce in each year an account of their intromissions for the preceding twelve months. There was also a conclusion for the sequestration of the estate, which was ultimately not insisted in.

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In this action the defenders on 2nd March 1911 were ordained to lodge in process accounts of their intromissions with the capital of the trust-estate. These accounts having been lodged, objections thereto and answers were lodged, and after a hearing in the Procedure-roll, the Lord Ordinary (Guthrie) on 7th December 1911 pronounced an interlocutor appointing the defenders within one month to lodge in process the security writs constituting the investments representing the capital of the trust-estate. These writs, which for the most part were deposited in New York, were thereupon brought to Scotland, and lodged in process. The pursuer then submitted further objections to the defenders' accounts, which the Lord Ordinary (Hunter) allowed to be received in process. In these objections the pursuer set forth:—(Obj. 2) "With reference to the following mortgages, viz., A. C. Woodruff (balance), \$10,000; S. B. Mahan (balance), \$17,500; Isaac Freidenheit, \$10,000; Selma C. Johnson (balance), \$2000, the pursuer objects to the form in which the title to these securities stands. According to American law, where notice of a trust in the person of the mortgagee is given to the mortgagor on the face of the mortgage, the mortgagor is bound to see to the application of the sum contained in the mortgage in terms of the trust, and is entitled to make payment direct to the beneficiary entitled to the same in terms of the trust disclosed. In the case of the Woodruff mortgage the present title, as appears from the abstract lodged, stands in name of the defenders as trustees under Mrs Ramsay's last will and testament, conform to assignation in their favour by the defender Mr Ramsay as the deceased's executor, dated 11th November, and filed 14th December 1909. On 25th October 1904 there was filed the said last will and testament of Mrs Ramsay and certificate of probate, and the abstract of the said last will and testament sets forth that on the death of the defender Mr Ramsay the deceased's whole estate is to go to Mr Garrison as his absolute property. The mortgagor has thus notice of the trust, and, on the death of the defender Mr Ramsay, would be entitled to pay over the sum of \$10,000 remaining due on this mortgage to Mr Garrison direct, notwithstanding the acquisition by the pursuer of Mr Garrison's whole rights in the trust-estate. The defenders, notwithstanding the decrees obtained by the pursuer on 16th July 1909 and 8th July 1910, have thus failed to take any steps to protect the interests of the pursuer in the said mortgage; and, since 16th July 1909, the whole sum therein contained has been, and continues to be, exposed to the risk of being carried off by Mr Garrison or his creditors." The same objection was also stated with regard to other mortgages on which the capital of the trust-estate was invested. (Obj. 5) "As regards the security writs, which until recently have been in the hands of the North-Western Trust Company of St Paul and the Metropolitan Trust Company of New York, which comprise all the securities of any realisable value except the Freidenheit mortgage, which has been in the hands of the defenders' law-agents in Scotland, the pursuer refers to the terms of the receipts granted by these Trust Companies, Nos 45 and

46 of process.* The pursuer believes and avers that according to July 12, 1912. American law the custodiers of security writs, if notified of a trust affecting the same, would be entitled and bound to deliver the same to the beneficiary entitled absolutely thereto. On the death of the defender Mr Ramsay the pursuer believes and avers that Mr Garrison would accordingly be entitled to demand delivery of the security writs if deposited with the said Trust Companies on receipts in the terms of those produced, and thus to defeat the rights of the pursuer." (Obj. 6) "The pursuer respectfully submits that in the circumstances she is entitled to call upon the defenders to take steps to have the trust-estate invested in such form and in such securities deposited in such custody in this country as will not expose the rights which she holds under the decrees of the Court of Session in her favour to defeat by Mr Garrison or his creditors."

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Parties were heard in the Procedure-roll on the objections, and thereafter the Lord Ordinary (Hunter), on 16th March 1912, pronounced the following interlocutor:—" . . . (1) Repels the objections for the pursuer to the accounts lodged by the defenders contained in the closed record on these and answers thereto, No. 55 of process, and also in the further objections, No. 151 of process; and (2) in respect the pursuer does not now insist upon any of the conclusions of the summons other than accounting, assoilzies the defenders from the whole conclusions of the summons, and decerns. . . ."†

* No. 45 bore that the securities were held "for account of the estate of Martha E. Ramsay." No. 46 bore that the securities were held by the North-Western Trust Company "as agent for Charles Maule Ramsay and Harry Cheyne, as trustees under the last will and testament of Martha Estelle Ramsay."

† "OPINION.—[After narrating the circumstances in which the action was raised and the procedure in the case]—The pursuer's counsel asked me to allow them a proof of two averments of American law made by them in objections 2 and 5 of their further objections. The first of these averments is to the effect that 'According to American law, where notice of a trust in the person of the mortgagee is given to the mortgagor on the face of the mortgage, the mortgagor is bound to see to the application of the sum contained in the mortgage in terms of the trust, and is entitled to make payment direct to the beneficiary entitled to the same in terms of the trust disclosed.' She says that, in the case of certain of the American investments on mortgage, the mortgagor has notice of the trust in Mr Garrison's favour, but not of the decree in her favour. The second averment is—'The pursuer believes and avers that according to American law the custodiers of security writs, if notified of a trust affecting same, would be entitled and bound to deliver the same to the beneficiary entitled absolutely thereto. On the death of the defender Mr Ramsay the pursuer believes and avers that Mr Garrison would accordingly be entitled to demand delivery of the security writs if deposited with the said trust companies on receipts in the terms of those produced, and thus to defeat the rights of the pursuer.' The trust companies referred to have until recently held in their hands securities of the trust under receipts granted to the trustees, Nos. 45 and 46 of process.

"The pursuer supports her objections to the account, and in particular her application for a proof upon the points referred to, upon the ground that the vouchers do not properly instruct the capital of the estate unless they show that the securities are taken in such form as to protect her rights under the decree which she has obtained.

"It has to be kept in view that the pursuer does not maintain that the

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On 12th January 1912 Mrs Brower brought the note of suspension and interdict in which she craved the Court "to interdict, prohibit, and discharge the said respondents as trustees foresaid, and all others acting under their authority, from withdrawing or removing furth of Scotland any of the documents of title of the securities which constitute the trust-estate in their hands or under their administration, except for such temporary purposes as may be necessary in the ordinary and proper course of administration of the said trust-estate; and further and in particular, from transmitting to the United States of America, or elsewhere furth of the jurisdiction of the Court of Session, for the purpose of deposit and retention there, the documents of title forming Nos. 57 to 150 inclusive of the process in the action at the instance of the complainer against the respondents as trustees foresaid, the summons in which was signeted on 29th November 1910, and which is presently in dependence before Lord Hunter (Ordinary)." She averred:—"The complainer is advised that if the said securities are permanently retained abroad, the Courts of the United States will claim jurisdiction over the same on the death of the liferenter, and that she will be occasioned serious difficulty and expense in making effectual the decree which she holds from the Court of Session. The respondents are aware that the result of the deposit of the securities in America may be to defeat the decree of the Court of Session." In their answers the respondents averred that the trust-estate was at Mrs Ramsay's death, and still was, invested almost entirely in American securities, and that, in accordance with her instructions in her settlement, they had acted in all questions as to the investments on the advice and under the guidance of the Metropolitan Trust Company of New York. They also averred (Article 6):—"In consequence of the nature of the trust and the character of the investments, the respondents have from time to time found it necessary

investments are not such as the defenders are entitled to hold in terms of the trust which they are administering. She could hardly successfully do so, as Mrs Ramsay in her will provided:—[His Lordship narrated the clause regarding the trustees' powers of investment, which is quoted above].

"A creditor who has attached by decree of furthcoming the interest of a beneficiary is, or may be, entitled to know that the trustees have made proper investments within their power under the trust, and to see that payment or conveyance is not made to the beneficiary in defiance of his decree. I know of no authority, however, in legal decision or principle to justify the proposition that he is entitled to impose new and additional positive obligations upon the trustees, necessitating an inquiry into foreign laws as to a possible competition between that creditor and the beneficiary or his other creditors as to foreign investments lawfully held by them, and necessitating, it may even be, an entire re-arrangement of the trust securities. I am not, therefore, prepared to allow the pursuer a proof of American law on the points referred to, and, as no other objection except the one I have dealt with was argued, I repel the whole of the pursuer's objections to the defenders' accounts, both those contained in the record on the objections and answers and those contained in the further objections.

"As I have already indicated, there are other than accounting conclusions in the summons. Lord Guthrie in the opinion expressed by him when ordering accounts reserved consideration thereof; but, as I invited argument thereon and as I understand the pursuer does not desire to insist upon any of them if I am against her upon the question in the accounting with which I have dealt, I am prepared to assoilzie the defenders from the whole conclusions of the first action raised against them."

and expedient for the proper administration of the trust to deposit for July 12, 1912. safe custody most of the security writs with either the said Metropolitan Trust Company or with the North-Western Trust Company of St Paul, Minnesota. The security writs were held by both companies to the order of the respondents, and could only be uplifted by the defenders or the survivor of them. Since 9th January 1912 the respondents have uplifted the security writs deposited in America (with the exception of the writs applicable to two investments, which were required in America), and with these exceptions have lodged the whole security writs in process in terms of the Lord Ordinary's interlocutor of 7th December 1911."

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The complainer pleaded ;—(1) The rights and interests of the complainer as sole fiar of the said trust-estate being endangered by the threatened transmission and retention abroad of the said securities, the complainer is entitled to interdict as craved. (2) The respondents being bound in accordance with proper and prudent trust administration to retain the securities of the said trust-estate under their own control and custody in Scotland, interdict should be granted in terms of the prayer of the note.

On 16th March 1912 the Lord Ordinary (Hunter) refused the prayer of the note.*

* " OPINION.—[After stating the terms of the prayer of the note]—From her averments it would appear that the complainer is apprehensive lest, if the securities are retained abroad, the American Courts might claim jurisdiction over them on the death of the liferenter. Although an American, she has obtained against another American a decree in absence in Scotland. She does not, however, desire that either this decree or the decree of forthcoming which followed thereon should be submitted to challenge in the Courts of her own country.

" The respondents explain in their answers that the trust-estate was at Mrs Ramsay's death, and still is, invested almost entirely in American securities. They further explain that in accordance with express directions of the truster, they have acted in all questions connected with the trust investments on the advice and under the guidance of the Metropolitan Trust Company of the city of New York. In article 6 of their statement of facts they say :—[His Lordship quoted the averment printed above].

" In support of the complainer's application I was referred to two cases, *Maclachlan v. Meiklam*, (1857) 19 D. 960, and the well-known case of *Orr Ewing*, 11 R. 600, rev. 13 R. (H. of L.) 1. In the former of these cases the trustee, in whose favour a bond and disposition in security had been granted, was found 'entitled to interdict against the deeds constituting the provision and his trust and security, and the title-deeds of the estate, being removed beyond the jurisdiction of the Court of Session.' That case, however, affords no warrant for a beneficiary intervening in a trust and asking that trustees should be restrained by the Court from exercising their discretion as to the place for depositing the security writs. The question did arise in the *Orr Ewing* case, where, in an action by beneficiaries against trustees, there were conclusions, *inter alia*, for declarator that the trustees were not entitled to deposit the title-deeds, writs, or evidents of the estate in the custody of any Court furth of Scotland, and for interdict against their removing the title-deeds beyond the jurisdiction of the Scottish Courts, or, alternatively to the conclusion for interdict, for sequestration of the trust-estate and appointment of a judicial factor. In the Inner House decree was pronounced in terms of the declaratory conclusion of the summons, and a judicial factor was appointed. The House of Lords, although adhering to the judgment of the First Division so far as

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The pursuer reclaimed in both actions, and the cases were heard before the First Division (consisting of the Lord President, Lord Johnston, and Lord Skerrington) on 21st and 22nd May 1912. At the hearing *Orr Ewing's Trustees v. Orr Ewing*¹ was referred to by the respondents.

At advising on 12th July 1912,—

LORD PRESIDENT.—The deceased Mrs Charles Ramsay left a will by which she gave her whole property to trustees consisting of her husband, the Hon. Charles Ramsay, and Mr Cheyne, a domiciled Scotsman. The trustees were to hold her property in order to give the liferent of the property to her husband if he survived her, and, upon the expiration of that liferent, the fee was to go to her brother, Mr Garrison, an American subject. She gave, in her settlement, particular directions that the trustees might continue all her American investments. There was an investment clause

the appointment of a judicial factor was concerned, reversed the judgment so far as finding in terms of the declaratory conclusions of the summons. At the foot of page 4 of 13 R. (H. L.) the Lord Chancellor said,—‘The first declaration seems to assume that there is something in the terms of the trust created by John Orr Ewing’s will prohibitory of, or repugnant to, any administration of the trust-estate elsewhere than in Scotland; and the Lord President has treated the pursuers’ demand as, for that reason, *ex debito justitiæ*; saying, “If the defenders, as trustees and executors, had voluntarily proposed to remove the estate out of Scotland, for the purpose of carrying on the administration elsewhere, it will hardly be disputed that the pursuers would have been entitled by interdict to prevent this being done.” For that view I am unable to discover any foundation in the terms of the trust-disposition and settlement. It is true that the trust is created by a Scottish deed, and is technically a Scottish trust. But there are no words requiring the administration of the funds belonging to the residuary estate, when realised by the trustees, to be in Scotland only; on the contrary, the trustees are authorised to invest the whole or any part of those funds in real securities (not restrained to Scotland), or in personal securities of certain specified kinds, in any part of Great Britain or Ireland or of the British colonies or dominions. If, in the honest exercise of those powers, they had invested those funds in English securities, they would have been acting in accordance with their trust; and I do not understand on what principle they could have been interdicted from so doing. The fact that they have not done so cannot alter the terms of the trust or justify a declaration not warranted thereby.’ Lord Blackburn, at the foot of page 20 of the same report, says:—‘If the majority of the trustees at any time came to reside in England, and *bona fide* thought it best for the interest of the estate that the whole funds should be vested in English securities and managed in England, there is nothing expressed in the deed to prevent their doing so. I cannot, notwithstanding what is said by the Lord President, think that there would have been any ground for an interdict to prevent them from doing so.’

“A case may be made by a beneficiary of so exceptional a character as to justify the Court in interfering with trustees in the exercise of the discretion which I think they possess of selecting such place as they think most suitable for the custody of the security writs of the trust. But I am of opinion that no relevant averments have been made by the complainer to support the present application. I shall, therefore, refuse interdict and dismiss the note.”

¹ (1884) 11 R. 600, *rev.* (1885) 13 R. (H. L.) 1, 10 App. Cas. 453.

which gave a power to invest the trust funds in American investments—I July 12, 1912. mean a clause with power to invest in other than what are called trust investments in this country—and, in particular, there was a special direction that she hoped her trustees in the management of her estate would be guided by the advice of a certain financial company in New York. Mrs Ramsay died and the trustees entered into possession, and have since administered the fund up to the present time, and—Mr Ramsay still being alive—have paid the proceeds of the funds year by year to him.

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—
Ld. President.

Now, it seems that Mr Garrison, the fiar, had incurred debts in America, and Mrs Brower, one of his American creditors, came over to this country, founded jurisdiction against him by an arrestment in the hands of the trustees *ad fundandam jurisdictionem*, and obtained in absence a decree for the debt due to her. Having obtained that decree, she then raised an action of furthcoming against the trustees. That action also was not defended, and in that action, after unsuccessfully exposing for sale the fee—the enjoyment of which, of course, cannot be had until after the death of Mr Ramsay, which may not occur for many years yet—she obtained a decree adjudging the fee to belong to her. In following out that decree she raised an action of count and reckoning against the trustees. She could not raise one of payment, because there is no present debt due to her; but she maintained, and maintained successfully, before the Court that she was entitled to see the accounts of the trustees and the security writs in order to satisfy herself that the trustees were not paying away the trust-estate. The trustees acceded to that. They lodged their accounts and replied to such objections as were made to them; and they also, upon a special crave, got up all the security writs and produced them in process—I say got up, because, as a matter of fact, the trustees, for their own convenience, kept the security writs to a great extent in America, the investments being largely American.

The question that has now arisen, and the only question that was argued before your Lordships upon this reclaiming note, is this: the pursuer in the action, the holder of this decree of furthcoming, who is now Mrs Brower's executor—she having died while the action was pending before the Lord Ordinary—first of all objects to the security writs going back to America. His objection is founded really upon two grounds. He objects to their being in America at all, and he makes averments to this effect. He says that “if the security writs are left in America, I offer to prove—if I am allowed a proof—that by American law Mr Garrison, the fiar, on the death of Mr Ramsay, the liferenter, will be himself entitled without help from the trustees, and indeed in spite of them, to demand and obtain delivery of the security writs from the trust companies with whom they are deposited, if they have been notified of the trust; and in any case, that the American Courts will not respect the decree that has been obtained in the Scottish Courts as excluding all other and competing claims, but will allow any other creditors of Mr Garrison, of whom I believe there are plenty, to come in; and accordingly the advantageous position that I have at present secured will be defeated; and, as this is a Scottish trust, and I am in possession of a decree obtained in the Scottish Courts, the order that I ask is one that I am entitled to obtain from the Court.” The Lord Ordinary has not given

July 12, 1912. effect to that. I am of opinion that the Lord Ordinary's judgment is right.
 Brower's
 Executor v. In the first place, I think that, quite apart from the general law laid down
 Ramsay's in *Orr Ewing's* case,¹ it would be impossible to say of this trust, looking to
 Trustees. the particular injunction that I have already mentioned, that it was, in any
 sense, a breach of trust to keep the security writs in America. On the
 Ld. President. contrary, I think the testatrix obviously contemplated that the security
 writs might be kept there.

I next come to the more formidable objection as to the alleged possibility of Mr Garrison obtaining delivery of the security writs, and as to the effect which the fact of the writs being in America may have upon the action of future creditors. The solution of that question lies in this : we are only here, and our jurisdiction can only be invoked in this count and reckoning, to prevent anything of the nature of breach of trust. There is no question of asking for payment, because the trustees are not due any money ; they are paying that regularly to the liferenter. It is only if there is a breach of trust that they can be restrained. Now, I cannot see that they are guilty of breach of trust because, through an action of theirs which is otherwise legal, there is danger, not truly to the interests of the beneficiary, but to the particular way in which Mrs Brower obtained her assignment of the right of a beneficiary. She only came here, of course, as the assignee of the beneficiary. She was not here a free assignee, but a forcible assignee, if I may coin a phrase. She forced herself, through process, into Mr Garrison's shoes ; but the objection which she stated and which her executor now insists in does not disclose any danger to the right which Mr Garrison would have claimed if he had been left in, but is an objection which has to do with the way in which she forced herself into Mr Garrison's shoes. Now, of course, I quite agree that it is not in the mouth of our Court to say that the way in which she forced herself in was wrongful, for it was done under the processes of this Court ; but none the less, it does not seem to me that it is the duty of the trustees, in order to fortify the position to which this forcible assignee has attained, to do something which they would not have done in the ordinary course of the administration of the trust, for this is not a matter of protecting the trust-estate against the depredations of what I may call outsiders.

Accordingly, upon the whole matter, I am of opinion that the Lord Ordinary's judgment is right, and that the reclaiming note should be refused.

LORD JOHNSTON.—I agree with your Lordship that the judgment reclaimed against should be affirmed, and for the reasons so lucidly expressed by the Lord Ordinary who pronounced it.

Mrs Brower, who is an American, by the use of a method of constituting jurisdiction intended to enable a native of this country to obtain justice against a foreigner without the necessity of following him to the Courts of his own country, obtained a decree in absence in this Court against another American. Even when used for the purpose for which it was introduced, this mode of founding jurisdiction is liable to result in injustice. But its

¹ 11 R. 600, rev. 13 R. (H. L.) 1.

use by one foreigner against another foreigner is not unlikely to be an abuse July 12, 1912.
 which does not warrant any peculiar consideration being accorded to the user. By following out the process so commenced, and availing herself of the forms of our procedure, Mrs Brower, still in absence, has succeeded in vesting herself with an ostensible title to her alleged American debtor's interest in this trust-estate, and that trust-estate by no means clearly a Scots one. Until she has a contradictor, this Court must recognise the title she has so acquired. But it is a title to a reversion. She has no present exigible interest, as the trust-estate is held for another in liferent. Under the procedure she has followed Mrs Brower assumes the place of the fiar, and is entitled to require that the trust be administered precisely as he might have required, that is as the truster directed, but no more. The trustees owe their powers to the truster, and their duty is to carry out the trust as imposed on them by her. But Mrs Brower takes higher ground. She maintains that they have new and different duties imposed upon them by her having acquired the rights of the fiar, and demands that they shall so conduct the trust as to protect, not the interest of the fiar or her interest as in his right, but her title to that interest. Being evidently apprehensive that her title is not beyond challenge, she demands that the trustees shall take steps not required by their duty to the truster or to the fiar, which may obviate certain risks to her title. With that the trustees have no concern, and they are not so to be drawn away from the administration of their trust according to its terms.

**Brower's
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 Trustees.**
 —
Ld. Johnston.

I would add that I think that Mrs Brower has received from the trustees and from the Court an amount of consideration beyond what she was entitled to. The form of her action is virtually an attempt to throw this estate into Chancery, quite unprecedented in our practice, and I desire to reserve my opinion as to the competency of her proceeding and as to whether she was entitled even to the rope she has had. She has, in my opinion, received more than courtesy from the trustees, and more than consideration from the Lord Ordinary who had the earlier conduct of the cause.

LORD SKERRINGTON.—I agree with your Lordship in the chair.

THE COURT adhered to both interlocutors of the Lord Ordinary, of date 16th March 1912, and refused the reclaiming notes.

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A. S., 11th July 1828, pp. 171, 208 972.

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ADMINISTRATION OF JUSTICE. *Application to restrain publication of statements tending to prejudice course of justice—Contempt of Court.*

During a strike at Glasgow acts of violence were committed, in connection with which certain persons were apprehended and charged with having been part of a riotous mob which forced the Allan Line shed at Princes Dock. Prior to their trial the *Glasgow Herald* newspaper published a letter commenting on the occurrences, and calling on the magistrates to take steps to prevent their repetition. The letter contained this passage :—"Instances have occurred which clearly demonstrate the determination of the men to carry out their leaders' advice, notably that in which the Allan Line sheds at Princes Docks were rushed and the 'Sicilian' boarded, when a number of men were arrested, and subsequently remitted to the Sheriff." The accused persons presented a petition to the High Court, setting forth the letter, and craving the Court to prohibit the newspaper from publishing any statement relative to the acts with which the petitioners were charged, or anything prejudicial to their case. *Held* that, there being nothing in the letter complained of but a statement of facts already known to the public, it was not prejudicial to the petitioners' case, and petition *refused*. *Cowie v. George Outram & Co., Limited*, (J.) p. 14.

AGENT AND CLIENT. *Trustee acting as law-agent to trust—Appointment—Remuneration.*

1. *Circumstances* in which a law-agent was *held* to have been validly employed by a body of testamentary trustees, and to be entitled to remuneration for his services. *Observed* that when trustees intend to exercise a power to appoint one of their number to be law-agent to the trust, the only proper procedure is to make the appointment and to record it in the minutes of the trust, although, as matter of law, the appointment may competently be proved in other ways. *Lewis's Trustees v. Pirie*, p. 574.

AGENT AND CLIENT—*Continued.*

Agent-disburser—Action settled by parties pending appeal—Right of agent to be sisted in order to obtain decree for expenses.

2. In an action in the Sheriff Court the Sheriff pronounced decree against the defender and found him liable to the pursuer in expenses. While an appeal was pending in the Court of Session the parties, without the knowledge of the pursuer's agents, came to a compromise, in terms of which the pursuer accepted a sum in full settlement of all his claims of principal and expenses in the action. The defender having moved the Court, in respect of this settlement, to assoilzie him from the conclusions of the action and to find no expenses due to or by either party, the pursuer's agents lodged a minute in which they craved to be sisted as parties to the action in order that decree might be pronounced against the defender in their favour as agents-disbursers for the expenses of the action. *Held* that the agents were entitled to be sisted in terms of their minute. *Ammon v. Tod*, p. 306.

See *Expenses*, 16, 17—*Partnership*, 2.

AGENT AND PRINCIPAL. *Disclosed principal—Order from brokers for ship's stores—Liability for price.*

- A ship chandler received an order from a firm of "steamship owners and brokers" in these terms:—"Please supply the s.s. 'Silvia' with the following stores." He delivered the goods under the erroneous belief that the firm were the owners of the vessel, and sought to hold them liable for the price. *Held* that the firm were not liable, in respect that they were acting as agents for the owners, and—since the latter could be discovered by reference to the Register of Shipping—as agents for a disclosed principal. *Armour v. Duff & Co.*, p. 120.

ALIMENTARY PROVISION. *Liability to diligence—Alimentary liferent to beneficiary under trust—Debt due by beneficiary to trust-estate—Retention of liferent in satisfaction of debt—Excess over reasonable alimentary provision.*

- A person entitled under a will to the liferent of a share of residue was also a debtor to the trust in respect of money which had been advanced to him by the testator. The liferent was declared to be strictly alimentary and not attachable for debt. After paying all creditors on the trust-estate, a balance, without including the debt due by the liferenter, remained for division among the residuary legatees. In an action by the beneficiary for payment of his liferent provision, *held* that the judicial factor on the trust-estate was not entitled to retain the whole of the beneficiary's share of income in satisfaction of the debt, but that he was entitled to retain so much thereof as exceeded a reasonable aliment. *Hardie v. Macfarlan's Judicial Factor*, p. 502.

ARBITRATION. *Construction of arbitration clause—Proviso as to notice of dispute.*

1. A contract for the supply of certain machinery to a company by the manufacturers contained a clause referring disputes and differences to arbitration, with a proviso that no dispute or difference should be deemed to have arisen or be referred to arbitration "unless one party has given notice in writing to the other of the existence of such dispute or difference within seven days after it arises." By a letter to the manufacturers the company's engineer gave notice of rejection of part of the machinery supplied. After more than seven days' interval the manufacturers wrote that they could not accept the rejection. No formal notice was given by either party of the existence of

ARBITRATION—Continued.

a dispute. Objection having been taken to the application of the arbitration clause, in respect that no notice of the existence of a dispute had been timeously given, *held* that the proviso with regard to notice had been duly complied with and that the arbitration clause was applicable, in respect that no dispute had arisen until the manufacturers wrote refusing to accept the rejection, and that their letter of refusal itself constituted notice of the existence of a dispute. *James Howden & Co., Limited, v. Powell Duffryn Steam Coal Co., Limited*, p. 920.

Arbiters not named.—Reference to "arbitration in Glasgow"—Application to appoint arbiter—Averment of custom of trade as to appointment—Arbitration (Scotland) Act, 1894, secs. 1, 2, and 3.

2. One of the parties to a contract for the sale of oil, under which disputes were referred to "arbitration in Glasgow," presented a petition in the Sheriff Court, under the Arbitration (Scotland) Act, 1894, for the appointment of an arbiter, and averred that the expression quoted imported into the reference clause a custom of the oil trade in Glasgow, by which each party nominated an arbiter, and the arbiters an oversman. The Sheriff allowed a proof of the alleged custom. The other party to the contract maintained that the reference to arbitration was not sufficiently specific to come within the scope of the Arbitration Act, 1894. *Held* that there was a relevant averment of a custom which would, if proved, make the reference clause sufficiently specific to fall within the scope of the Arbitration Act, and that proof of the custom had been properly allowed. *United Creameries Co., Limited, v. Boyd & Co.*, p. 617.

Jurisdiction—Forum conveniens.

3. A Scottish company entered into a contract with an English company to be executed in Wales, which contained an arbitration clause providing for the settlement of disputes by arbitration within the meaning of the English Arbitration Act. The Scottish company, having used arrestments *ad fundandam jurisdictionem*, brought an action in Scotland against the English company, in which the question was raised whether the matters in dispute were covered by the arbitration clause. The defenders pleaded *forum non conveniens*, in respect that the contract was an English one to be implemented furth of Scotland, and that the arbitration clause demanded construction according to the law of England. *Circumstances* in which the Court *repelled* this plea, found that the matters in dispute fell to be determined by arbitration in terms of the contract, and *sisted* process *in hoc statu* until the matters should be so determined. *James Howden & Co., Limited, v. Powell Duffryn Steam Coal Co., Limited*, p. 920.

See *Lease*, 3—*Limitation of Actions*, 2—*Local Government*, 3—*Process*, 31, 34.

ARRESTMENT. *Jurisdictionis fundandæ causa—Subjects arrestable—Sum consigned in hands of Clerk of Court.*

- A foreigner brought an action in the Sheriff Court of Lanarkshire against a Scotsman for payment of certain sums alleged to be due for limestone and sand. The defender admitted liability for the sum claimed for the limestone, but denied that he was due anything for the sand in respect of a counter claim with regard to it which he stated in the action. With his defences he consigned in the hands of the Sheriff-clerk the amount claimed for the limestone, taking a simple receipt which did not specify the purpose of the consignment. The action was afterwards settled on terms which involved the return to the defender of the sum he had consigned. Before the action was settled a creditor of the foreigner arrested in the hands of the Sheriff-

ARRESTMENT—Continued.

clerk the consigned money *jurisdictionis fundandæ causa*, and on the strength of this arrestment brought an action in the Sheriff Court of Lanarkshire against the foreigner. *Held* that the arrestment was bad in respect that, at the time it was laid on, the Sheriff-clerk was under no obligation either to pay or to account for the consigned sum to the foreigner; and plea of no jurisdiction *sustained*. *Shankland & Co. v. M'Gildowny*, p. 857.

ASSESSMENT. See *Rates and Assessments*.

ASSOCIATION. Voluntary association—Unregistered trade union—Alteration of rules—Power to change.

In an action to determine the validity of certain proposed alterations in the rules of an unregistered trade union possessing a written constitution which did not expressly provide for the alteration of the rules, *observations* on the power of the members of a voluntary association to alter the constitution by a vote of the majority or by the votes of delegates. *Wilson v. Scottish Typographical Association*, p. 534.

BANKRUPTCY. Sequestration—Claims—Delay in lodging claim—Interdict of payment of dividend—Bankruptcy (Scotland) Act, 1856, sec. 125.

A husband, who was executor on his wife's estate, having become bankrupt, a judicial factor was appointed on the executry estate. The judicial factor lodged a claim in the husband's sequestration, but not until after a meeting of the commissioners, held as provided for in sec. 125 of the Bankruptcy Act, 1856, at which they had declared a first and final dividend. The judicial factor (although he was aware of the progress of the sequestration from other sources) had received no notices from the trustee, as the bankrupt (who denied that he was due any debt to himself as his wife's executor) had not inserted any such debt in his state of affairs, and the trustee was unaware that such a claim was to be made. *Held* that, as there was no fault on the part of the bankrupt or his trustee, and as the delay in lodging the claim was due to the judicial factor's own remissness, the latter was not entitled to interdict the trustee from paying away the estate. *Hodge v. Wishart*, p. 1012.

BETTING. See *Justiciary Cases*, 3, 5, 6.

BILL OF EXCHANGE. Liability of endorser—Waiver of statutory requirement as to presentment and notice of dishonour—Onus of proof—Bills of Exchange Act, 1882, secs. 46 (2) (e), 50 (2) (b).

A bill, which had been endorsed, was not presented for payment at maturity nor was notice of dishonour given to the endorser, as required by statute to avoid discharge of the endorser's liability. After the bill was due a payment to account was made by the endorser, under the erroneous belief, as she alleged, that she was not an endorser, but a joint acceptor and so liable in payment. In an action for payment of the balance due under the bill, *held* that the presumption, arising from the payment to account, that the endorser had waived the statutory requirements had been rebutted by proof that that payment had been made in error; and that, in consequence of the failure of the holder to observe these requirements, the endorser was freed from liability. *Observations* as to the presumptions and the onus of proof with regard to waiver of the statutory requirements. *Mactavish's Judicial Factor v. Michael's Trustees*, p. 425.

BOUNDARY. See *Burgh*, 12.

BUILDING REGULATIONS AND RESTRICTIONS. See *Burgh*, 7-9—*Crown—Property*, 1-4.

BURGH. Powers of magistrates—Right of magistrates to levy rates to pay expenses of provisional order.

1. *Held* that the magistrates of a burgh had no right at common law or under statute to levy rates in the burgh to be applied towards the payment of expenses incurred by them in the unsuccessful promotion of a provisional order for, *inter alia*, the extension of the burgh boundaries. *Stirling County Council v. Magistrates of Falkirk*, p. 1281.

Powers of magistrates—Right of magistrates to levy rates to pay expenses of provisional order and private bill—Aberdeen Police and Waterworks Act, 1862—Aberdeen Corporation Water Act, 1885.

2. *Held* that the magistrates of Aberdeen were not entitled, under their private water Acts or otherwise, to impose any assessment upon, or levy or exact any rates or charges from, ratepayers to be applied towards the payment of expenses incurred by the magistrates in the unsuccessful promotion of a provisional order and private bill for a new water supply. *Farquhar & Gill v. Magistrates of Aberdeen*, p. 1294.

Duties and Liabilities of Magistrates—Accident caused by defective footway—Disused railway embankment in burgh area frequented by public—Burgh Police (Scotland) Act, 1892, sec. 4 (31)—Burgh Police (Scotland) Act, 1903, sec. 104 (2) (c).

3. *Held* that the magistrates of a burgh were under no obligation to keep in a safe condition an embankment in the burgh, situated between a public railway and the seashore, belonging to a private owner, and frequented by the public with his tacit consent, on which the magistrates had provided seats, the place in question being neither a street in the ordinary sense of the term, nor a public street or public footpath within the meaning of the Burgh Police Acts. *Taylor v. Magistrates of Saltcoats*, p. 880.

Orders and requisitions of Magistrates—Formation of private streets—Cost of formation—Subjects assessable—Subjects not in burgh valuation-roll—Burgh Police (Scotland) Act, 1892, secs. 137, 365.

4. *Opinion per curiam* that notices given by the Magistrates of a burgh under the Burgh Police (Scotland) Act, 1892, requiring the formation of a private street in the burgh, were valid, although the lands in respect of which the notices had been served were not entered in the burgh Valuation-roll. *Christie v. Magistrates of Leven*, p. 678.

Orders and requisitions of Magistrates—Appeal against order for formation of streets—Appeal on ground that appellant's property not in burgh—Competency—Burgh Police (Scotland) Act, 1892, sec. 339.

5. *Held* that the right of appeal, given by sec. 339 of the Burgh Police (Scotland) Act, 1892, to any person aggrieved by any order of the Magistrates made under the Act, is given upon the hypothesis that the property in respect of which the order is made is situated within the burgh, and accordingly that an appeal against an order to form a footway by a person whose ground of objection was that his property was not situated within the burgh was incompetent. *Christie v. Magistrates of Leven*, p. 678.

Responsibility of drainage and road authority—Discharge of surface water—Flooding of agricultural land in burgh—Edinburgh Corporation Act, 1900, sec. 28.

6. The tenant of a market garden on the estate of Craigentinny, which was annexed to the Burgh of Edinburgh by the Edinburgh Corporation Act, 1900, brought an action against the Magistrates of Edinburgh (a) as the drainage authority, (b) as the road authority, for damages caused to his garden by the overflowing of the Craigentinny Burn due to the rapid discharge of surface water from the higher

BURGH—Continued.

levels of the drainage area after heavy rainfalls. The water reached the garden in part directly from the burn which formed the garden's southern boundary, in part from a road which crossed and drained into the burn, and formed the eastern boundary of the garden. *Circumstances* in which the Court *assolized* the defenders, having regard, *inter alia*, to section 28 of the Act of 1900, which prohibited the defenders from interfering with the watercourse of the burn. *Hanley v. Magistrates of Edinburgh*, p. 1199.

Building regulations—Statutory prohibition of certain class of buildings—Title of individual objector to plead statutory prohibition—Glasgow Building Regulations Act, 1900, sec. 38.

7. In a petition for lining presented to the Dean of Guild in Glasgow, objection was taken by the proprietors of adjoining subjects on the ground that the buildings would be in contravention of the statutory restrictions contained in section 38 of the Glasgow Building Regulations Act, 1900. The Dean of Guild found that the objectors' property would not be injuriously affected in any way by the proposed buildings, repelled the objection, and granted the lining. In an appeal, the Court, accepting this finding as a finding in fact, *held* that, as the objectors had no interest, they had no title, to enforce the restrictions of the Glasgow Building Regulations Act; and *refused* the appeal. *Opinion* that the decision of the Dean of Guild as to the effect of the proposed buildings on the adjacent property was not necessarily final, but might, in certain circumstances, be open to review by the Court. *Maguire v. Smith's Trustees*, p. 410.

Building regulations—Glasgow Building Regulations Act, 1900, secs. 4 and 38—"Enclosed space of back ground" in "hollow square."

8. The Glasgow Building Regulations Act, 1900, sec. 38, prohibits the erection of buildings other than those of a specified class "within the enclosed space of back ground in any hollow square," and by sec. 4 defines a hollow square as including certain geometrical figures enclosed by buildings and streets. *Circumstances* in which the site of proposed buildings was *held* to be within the enclosed space of back ground in a hollow square. *Porter v. Nisbet*, p. 400.

Building regulations—Discretion of Dean of Guild to sanction erection of buildings within enclosed space of back ground in hollow square—Glasgow Building Regulations Act, 1900, sec. 38.

9. *Held* that the effect of section 38 of the Glasgow Building Regulations Act, 1900, which prohibits the erection of buildings within the enclosed space of back ground in a hollow square, but which contains a proviso that, where certain requirements are satisfied, the Dean of Guild may grant decree for the erection, was to put it entirely within the discretion of the Dean of Guild, in the case of buildings which satisfied these requirements, to grant or to refuse the lining. *Porter v. Nisbet*, p. 400.

Street—Private Street—Railway—Road "forming part of any railway"—Railway lines forming "obstructions" in a street—Burgh Police (Scotland) Act, 1892, sec. 4 (31)—Burgh Police (Scotland) Act, 1903, sec. 104 (2) (d).

10. In 1889 a railway company, under section 38 of the Railways Clauses Consolidation (Scotland) Act, 1845, which provides for the purchase by a railway company by a voluntary agreement of land for extraordinary purposes, acquired a strip of ground in a burgh. The strip consisted of an unformed road which had been used by the public as a right of way for traffic of every description since 1841, and continued to be so used after its acquisition by the railway company, who did not utilise it for any purpose connected with the railway until 1908, when they laid a double line of rails along it. *Held*, in a question between the magi-

BURGH—Continued.

strates of the burgh and the railway company, that the strip did not form "part of any railway," and was therefore "a street" within the meaning of sec. 4 (31) of the Burgh Police (Scotland) Act, 1892. Glasgow and South-Western Railway Co. v. Magistrates of Ayr, (H. L.) p. 87.

Street—Private street—Railway lines forming "obstructions" in a street—Burgh Police (Scotland) Act, 1903, sec. 104 (2) (d).

11. *Rails laid by a railway company in a private street held to be "obstructions" within the meaning of sec. 104 (2) (d) of the Burgh Police (Scotland) Act, 1903. Glasgow and South-Western Railway Co. v. Magistrates of Ayr, (H. L.) p. 87.*

Boundary of administrative area—Sea boundary—High-water mark.

12. *Opinion per curiam that the boundary of the administrative area of a burgh fixed as "the line of high-water mark" was a fluctuating boundary, and accordingly that land from which the sea had receded was within the administrative area. Christie v. Magistrates of Leven, p. 678.*

Trade Incorporation—Alteration of bye-laws—Incorporation nearly extinct—Transference of funds to new governing body—Application of benefits to an educational charity—Burgh Trading Act, 1846, sec. 3.

13. *The Incorporation of Maltmen of the burgh of Stirling, an ancient trading corporation whose membership had become reduced to that of a single member, presented a petition under the Burgh Trading Act, 1846, for the sanction of the Court to certain proposed alterations on the bye-laws of the Incorporation. There had been no applications for admission to the Incorporation for fifty years, and it appeared to be improbable that there would ever again be anyone qualified for admission. The purposes of the proposed alterations were to associate the provost and magistrates of the burgh with the members of the Incorporation, if any, as a governing body, and to apply the funds, so far as not required for the existing purposes of the Incorporation, for the benefit of an educational trust in the burgh. The Court, in respect that no objections had been stated by any party interested or by the Lord Advocate, *granted* the prayer of the petition. Incorporation of Maltmen of Stirling, p. 887.*

Trade Incorporation—Alteration of bye-laws—Application by sole surviving member of incorporation—Proposed alterations for benefit only of sole member's relations—Sanction of the Court—Power of Court to make alternative scheme—Burgh Trading Act, 1846, sec. 3.

14. *The Incorporation of Tailors of Edinburgh, an ancient trading corporation whose membership had become reduced to that of a single member, presented a petition under the Burgh Trading Act, 1846, for the sanction of the Court to certain proposed alterations on their bye-laws. The practical effect of the proposed alterations would have been to relax the conditions of entry in favour only of relations of the sole member, and to admit his widow to benefits which she would not otherwise have been entitled to enjoy. The petition was opposed, *inter alios*, by representatives of the tailoring trade in Edinburgh, who moved for a remit that a scheme might be prepared and submitted to the Court for the amendment of the existing regulations, and for the future administration of the Incorporation and its funds. The Court *dismissed* the petition, holding that the alterations on the bye-laws proposed by the Incorporation, being in effect a scheme for the endowment of the family of one member only, were not such as the Court ought to sanction, and *refused* the respondents' motion for a remit to prepare a scheme, in respect that the Court was not entitled to impose a scheme upon an unwilling corporation: the Lord President *observing* that such a petition was*

BURGH—*Continued.*

not an appeal to the *nobile officium* of the Court, but only to the exercise of its statutory jurisdiction. *Incorporation of Tailors of Edinburgh v. Muir's Trustee*, p. 603.

See *Justiciary Cases*, 1, 2—*Loan—Local Government*, 3, 4—*Police Offences—Public Health*, 3, 4, 8, 9—*Reparation*, 12—*Title to Sue and Defend*, 6, 7.

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CHARITABLE AND EDUCATIONAL BEQUESTS AND TRUSTS. *Uncertainty—*

“Religious and charitable institutions in Glasgow and neighbourhood.”

1. A testator directed his trustees to “pay and divide” a sum of £250 “among such religious and charitable institutions in Glasgow and neighbourhood as they may select, and in such proportions as they may think proper.” *Held* that the bequest was not void from uncertainty. *M'Phee's Trustees v. M'Phee*, p. 75.

Failure of charitable object—Cy près.

2. A testator directed his trustees to apply the residue of his estate “in founding, erecting, and endowing in Paisley an industrial school for females.” At the date of the testator's death it was open to a private individual to found or to contribute to an industrial school, but when the residue became available the effect of supervening legislation (which established industrial schools chargeable on the rates) had been to make such individual foundation or contribution impossible. *Held* that, as the terms of the bequest did not disclose any general charitable intention but only the favouring of the particular object that had failed, there was no room for the application of the doctrine of *cy près*; and that the bequest had accordingly lapsed. *Burgess's Trustees v. Crawford*, p. 387.

See *Burgh*, 13—*Revenue*, 7.

COMPANY. *Members—Register of shareholders—“Holder” of shares—Company's lien over shares for debts due by “holder”—Person owning radical right in shares, but not on register.*

1. The articles of association of a limited company bore that the company should have a lien on shares for debts due to it by “the holder” of the shares. A shareholder, in security for debts due by him to two banks, transferred to nominees of the banks certain shares of which he was the registered holder and they were registered in the names of the banks' nominees; and he also purchased certain other shares and registered them in the names of the same nominees. After the shareholder's death his estates were sequestrated. The banks, having recovered payment of the debts due to them from other securities, were prepared to transfer the shares in question to the trustee in the sequestration, whereupon the company claimed a lien over the shares in respect of a debt due to it by the deceased. *Held* that “holder” in the articles of association meant “registered holder”; and, as the deceased was not the registered holder of the shares, that the company had no lien over them for his debt. *Paul's Trustee v. Thomas Justice & Sons, Limited*, p. 1303.

Reduction of capital—Objecting creditor—Security for creditor's debt—Debt due to landlord for future rent—Whether debt contingent—Companies (Consolidation) Act, 1908, sec. 49.

2. A company, occupying premises under a lease of which four years had still to run, presented a petition for confirmation of a resolution to reduce its capital. The landlords of the premises objected to the

COMPANY—Continued.

reduction of capital unless provision was made to secure the payment of their rent during the remainder of the lease. The company offered to appropriate in security a sum less than the full amount of the rents to become due, and maintained that, the landlords' debt being contingent, the Court should approve of the offer as sufficient. *Held* that, as the company admitted the full amount of the debt, and as that amount was neither contingent nor unascertained, the case fell under subsec. (3) (i.) of sec. 49 of the Companies (Consolidation) Act, 1908, and the company was bound to provide security for the full amount of the debt. *Palace Billiard Rooms, Limited, v. City Property Investment Trust Corporation, Limited*, p. 5.

Winding-up—Voluntary winding-up—Petition for the appointment of committee of inspection—Consent of liquidator—Procedure—Companies (Consolidation) Act, 1908, sec. 188.

3. A petition having been presented in terms of section 188 of the Companies (Consolidation) Act, 1908, for the appointment of a committee of inspection in the voluntary winding-up of a limited company, the Court, on the production of a letter from the liquidator consenting to the application, *granted* the prayer of the petition *de plano* without ordering intimation or service. *Marlow*, p. 625.

COMPENSATION. *Action for two separate sums—Decree for one—Right to set off against expenses awarded to defender.*

In an action, concluding for payment of two sums on different grounds of liability, the pursuers obtained decree for one of the sums only, and the defender was awarded modified expenses. A motion was thereafter made for decree for the defender's expenses in name of the agent-disburser, which was opposed by the pursuers on the ground that they would thereby be deprived of their right to set off the sum for which they had obtained decree against the expenses found due to the defender. The Court *refused* the motion. *Masco Cabinet Co., Limited, v. Martin*, p. 896.

COMPULSORY POWERS. *Railway—Mines and Minerals—"Freestone"—Whether freestone a mineral a question of fact—Railways Clauses Consolidation (Scotland) Act, 1845, sec. 70.*

1. *Whether "freestone" is or is not a mineral within the meaning of sec. 70 of the Railways Clauses Consolidation (Scotland) Act, 1845, is always a question of fact to be determined in view of the particular circumstances of each case. Averments that certain "freestone" was a mineral which were held relevant to go to proof. Caledonian Railway Co. v. Symington, (H. L.) p. 9.*

Canal—Mines and Minerals—Reservation of minerals—Substance not regarded as a mineral at date of acquisition of lands—Oil shale.

2. A private Act passed in 1817, authorising the construction of a canal, reserved to the owners of any lands through which the canal should be made "the mines and minerals lying within or under the said lands." A statutory form was also provided by which lands acquired for the purpose of making the canal might be conveyed to the canal company, the registration of which was declared to have the same effect as a formal disposition followed by charter and sasine. The price of certain lands required for the formation of the canal was agreed upon and consigned in 1818, in which year the canal company entered into possession of them, and the canal was constructed and opened for traffic in 1822. The statutory conveyance of these lands, however, was not completed and registered until 1862. In 1909 the representative of the vendor of the lands brought an action against the proprietors of the canal in which he sought declarator of his right of property in a seam of oil shale subjacent and adjacent to

COMPULSORY POWERS—Continued.

the canal within the lands in question. It was admitted by the defenders that by 1862 oil shale had become recognised as a "mineral" in the sense of the reservation, but they denied that it was recognised as a "mineral" in 1818. *Held* (1) that what was denoted by the term "mineral" fell to be ascertained as at 1818, the date when possession of the lands passed to the defenders, and not at 1862, the date of the statutory conveyance; and (2) that in 1818 oil shale was not described as a mineral in the vernacular of the mining world, the commercial world, and landowners; and defenders assoilzied. *Marquis of Linlithgow and Young's Paraffin Light and Mineral Oil Co., Limited, v. North British Railway Co.*, p. 1327.

Canal—Right of support—Mines and Minerals—Notice to "stop working"—Union Canal Act, 1817.

3. Terms of a private Act passed in 1817, authorising the construction of a canal, which were held to confer upon the canal company a right of support for their canal, but subject to the qualification that, where it was necessary, in order to support the canal, that the subjacent and adjacent minerals should be sacrificed as a commercial subject, the company were bound to make satisfaction for the value of such minerals to the owner thereof. *Opinion* that an intimation from the canal company to the owner of the minerals that they would hold him liable for any damage done to the canal by working the minerals beneath it, was a notice to "stop working" in the sense of the Act, on the assumption that the minerals could not be worked beneath the canal without endangering it. *Marquis of Linlithgow and Young's Paraffin Light and Mineral Oil Co., Limited, v. North British Railway Co.*, p. 1327.

CONSIGNATION. See *Process*, 1.

CONTEMPT OF COURT. See *Administration of Justice*.

CONTRACT. *Construction—Prior communings—Sale of heritage—Disposition—Prior articles of sale.*

1. Articles of sale for the sale of a heritable estate contained certain conditions as to the rights of the purchaser and the seller respectively in the rents. A sale was effected in terms of the articles, and was followed by a disposition which contained an assignation of rents in the statutory form. *Held* that the rights of parties in the rents were regulated by the terms of the disposition to the exclusion of the conditions contained in the articles of sale. *Butter v. Foster*, p. 1218.

Construction — Hire-purchase agreement — Character of instalments — Appropriation of instalments as between capital and interest.

2. An agreement for the hire-purchase of certain furniture had endorsed on it an inventory of the furniture hired with cash prices annexed, the summation of which amounted to £7543. The agreement stipulated for payment by the hirer of annual sums of varying amount, the total of which was £8649; and further provided that the hirer might at any time become the purchaser of the furniture "by payment in cash of the hereon endorsed price, under deduction of the whole sums previously paid by the hirer to the owners." The hirer who had in the course of several years paid in terms of the agreement sums amounting *in cumulo* to £4966, desiring to become the purchaser of the furniture, tendered to the owners the sum of £2577, being the difference between the sums so paid and £7543, the "endorsed price." On a construction of the agreement, *held* that the expression "whole sums previously paid" must refer to the portion of the sums paid attributable to capital, to the exclusion of the portion attributable to interest; and, accordingly, that the pursuer

CONTRACT—Continued.

was not entitled to become the purchaser of the furniture on payment of the sum tendered. *Taylor v. Wylie & Lochhead, Limited*, p. 978.

Construction—Construction of arbitration clause—Proviso as to notice of dispute.

3. A contract for the supply of certain machinery to a company by the manufacturers contained a clause referring disputes and differences to arbitration, with a proviso that no dispute or difference should be deemed to have arisen or be referred to arbitration "unless one party has given notice in writing to the other of the existence of such dispute or difference within seven days after it arises." By a letter to the manufacturers the company's engineer gave notice of rejection of part of the machinery supplied. After more than seven days' interval the manufacturers wrote that they could not accept the rejection. No formal notice was given by either party of the existence of a dispute. Objection having been taken to the application of the arbitration clause, in respect that no notice of the existence of a dispute had been timeously given, *held* that the proviso with regard to notice had been duly complied with and that the arbitration clause was applicable, in respect that no dispute had arisen until the manufacturers wrote refusing to accept the rejection, and that their letter of refusal itself constituted notice of the existence of a dispute. *James Howden & Co., Limited, v. Powell Duffryn Steam Coal Co., Limited*, p. 920.

Construction—Condition—Condition precedent—Certificate of engineer that price payable.

4. A contract for the supply of machinery contained provisions for payment of the price by certain instalments, to be paid after production of the certificate of the purchasers' engineer that such instalments were due and payable. A portion of the machinery having been rejected by the purchasers, an action was brought by the sellers for the unpaid balance of the purchase price without production of the engineer's certificate that the balance sued for was due and payable. *Held*, on a construction of the contract, that the production of a certificate from the engineer had not been made a condition precedent to the right to recover payment, and, accordingly, that the action was competent. *James Howden & Co., Limited, v. Powell Duffryn Steam Coal Co., Limited*, p. 920.

Implement—Mutual obligations—Party in breach of his obligation—Title to enforce implement of counterpart.

5. Two persons agreed for the lease of an hotel, and stipulated that the tenant should take over the furniture and stock at a valuation, and should deposit £200 in bank in their joint names to account of the valuation price. After the money had been deposited, but before the furniture and stock had been taken over, the tenant intimated that he did not intend to carry out the contract, and brought an action against the landlord for delivery of the deposit-receipt. The defender lodged a counter claim of damages for breach of the agreement. *Held* that the pursuer, having declined to perform his part of the contract, could not call upon the defender to fulfil his obligations until the latter had had an opportunity of constituting his claim of damages, and, accordingly, that the pursuer was not entitled, *hoc statu*, to delivery of the deposit-receipt. *Dingwall v. Burnett*, p. 1097.

Breach—Measure of damages—Penalty or liquidate damages—Penalty clause—Claim for damages in excess of penalty.

6. An agreement between two persons for the lease of an hotel contained mutual obligations of different kinds and of varying degrees of importance. *Inter alia*, the tenant was taken bound to apply for a

CONTRACT—Continued.

transfer of the licence, to manage the hotel for the landlord until the licence was transferred, and to take over the stock at a valuation. The minute of agreement also provided :—"Both parties hereto bind and oblige themselves to implement their part of this agreement under the penalty of £50, to be paid by the party failing to the party performing or willing to perform over and above performance." The tenant having refused to go on with the lease or to carry out the agreement at all, the landlord claimed damages for breach of contract to the amount of over £300. *Held* (1) that the sum stipulated in the agreement was not liquidate damages but a penalty, and (2) that the landlord's claim for damages was not limited to the amount mentioned in the penalty clause. *Dingwall v. Burnett*, p. 1097.

Breach—Damages for delay—Measure of damages—Provision for liquidate damages for delay—Failure of contractor to complete contract—Completion of contract by other parties—Applicability of provision for liquidate damages.

7. A contract for the construction of certain works by a specified date contained a clause providing for liquidate damages at certain rates to be paid by the contractor for each week's delay beyond that date. It was further provided that if the contractor should suspend the works the employers might take possession of the plant and materials and engage others to complete the contract. The contractor became bankrupt and suspended the works, and the employers thereupon engaged other persons to complete them, but they were not completed until at least six weeks after the date specified in the original contract. *Held* that, while the employers were entitled to sue the contractor for damages for breach of contract, they could not found on the liquidate damages clause, as that clause applied only where the contractor had himself completed the contract. *British Glanzstoff Manufacturing Co., Limited, v. General Accident, Fire, and Life Assurance Corporation, Limited*, p. 591.

See *Jurisdiction*, 2—*Reparation*, 22.

CONVERSION. See *Succession*, 2.

CORPORATION DUTY. See *Revenue*, 7.

COUNTY. See *Local Government*, 3, 4.

CROWN. *Exemption of the Crown from statutory restrictions—Building restrictions—Edinburgh Corporation Act, 1906, secs. 67 and 78.*

The Commissioners of Works, as managers of the Royal Botanic Gardens, Edinburgh (which are Crown property), applied to the Dean of Guild for warrant to erect the first wing of certain proposed buildings in the Gardens, the building line of which would encroach within 30 feet of the centre line of a public street. The plans lodged showed the completion of the buildings on the same building line extending further down the street. The Edinburgh Corporation offered no opposition, and the lining was granted and the first wing of the buildings was erected. Two years afterwards the Commissioners applied for warrant to complete the buildings by erecting the other wing in accordance with the original plans, and a lining was granted. The Corporation thereupon passed a resolution, in terms of section 67 of the Edinburgh Corporation Act, 1906, that no buildings should be erected within 30 feet of the centre of the street, and brought an action of interdict against the Commissioners. The Court *assolized* the defenders; on the ground that the proposed buildings were exempted from the operation of section 67 by virtue of the provisions of section 78 exempting buildings "vested in" the

CROWN—*Continued.*

Crown, which applied to future buildings as well as to existing buildings. *Observations* on the extent to which the Crown is bound by restrictions contained in local Acts. *Magistrates of Edinburgh v. Lord Advocate*, p. 1085.

See *Patent—Process*, 10—*Justiciary Cases*, 4.

CURATOR AD LITEM. See *Process*, 23.

CURATOR BONIS. See *Judicial Factor—Process*, 23.

CUSTOM. See *Arbitration*, 2—*Heritable Office—Statute*, 1.

CY PRÈS. See *Charitable and Educational Bequests and Trusts*, 2.

DAMAGES. See *Contract*, 6, 7—*Reparation*.

DEAN OF GUILD. See *Burgh*, 7-9—*Public Health*, 7.

DEATH DUTIES. See *Marriage-Contract*, 1.

DECREE. See *Diligence*.

DILIGENCE. *Decree—Service of charge on decree—Scarcity of messengers-at-arms—Service by post—Service by Sheriff-officer—Citation Amendment (Scotland) Act*, 1882, sec. 3.

A pursuer who had obtained in the Court of Session a decree for payment against a defender in Thurso, presented a petition in which he stated that the nearest available messenger-at-arms resided in Inverness, and craved the Court to authorise service by post of a charge upon this decree; or, alternatively, to authorise any sheriff-officer in Caithness to act as messenger-at-arms. *Held* that the Court could not grant authority for service by post; but authority *granted* to a sheriff-officer to serve the charge and to carry through the diligence. *Whyte, Ridsdale, & Co.*, p. 1095.

DOCK. See *Reparation*, 16.

DUTIES ON LAND VALUES. See *Revenue*, 8, 9.

ELECTION LAW. *Household occupation franchise—“Part of a house occupied as a separate dwelling”—Inhabitant occupier of unfurnished apartments in a dwelling-house—Representation of the People Act*, 1884, secs. 2, 7 (4).

1. A widower was enrolled as a county voter as tenant of a house which consisted of three rooms and a kitchen. He, however, only occupied one of the rooms, the rest of the house being occupied by his daughter and her husband and family. The daughter cooked her father's meals in the kitchen, but he partook of them in his own room. His son-in-law paid him half the total rent and taxes, and owned the furniture in the portion of the house occupied by himself and his family. All the apartments and the street door were fitted with locks and keys, the key of the street door being left in the lock, and the last person coming in at night locking the door. *Held* that the son-in-law was not entitled to the franchise as an inhabitant occupier of a separate dwelling. *Gregory v. Traquair*, p. 637.

Lodger Franchise—Occupation “separately and as sole tenant”—Room occasionally shared with a guest—Representation of the People (Scotland) Act, 1868, sec. 4, subsec. 2.

2. A son paid for and had the sole right to occupy a bedroom in his father's house. *Held* that the fact that during the period of qualification for the lodger franchise he had occasionally *ex gratia* allowed a young brother (who could have had a bed of his own) to sleep in the room with him, did not prevent him from having occupied the

ELECTION LAW—*Continued.*

room "separately and as sole tenant" within the meaning of sec. 4 (2) of the Representation of the People Act, 1868. *Milne v. Douglas*, p. 635.

Lodger Franchise—Member of brotherhood occupying room in college.

3. A member of a voluntary association or brotherhood, which devoted itself to teaching, occupied a bedroom in a college belonging to the brotherhood. He was not paid for his services, but was provided with board, lodging, clothing, and everything necessary for his maintenance. *Held* that he was not a "lodger" for the purposes of the franchise, in respect that there was no contract of location, either express or implied, between him and the brotherhood, under which he had a right to occupy the room. *O'Connell v. Blacklock*, p. 640.

ENTAIL. *Powers of heir in possession—Sale of growing timber by heir of entail—Right of succeeding heir to prevent cutting of timber—Sale of Goods Act, 1893.*

1. The heir in possession of an entailed estate entered into a contract, constituted by offer and acceptance, with a firm of wood merchants for the sale to them of certain lots of standing timber on the estate, under the condition that the purchasers should themselves cut down and remove the timber, half the price to be paid within six days of the acceptance and the remainder when half the timber was cut, and the timber to be at the purchasers' risk from the date of acceptance. The heir died before all the timber was cut, and on the succeeding heir seeking to interdict the purchasers from proceeding with the cutting of the timber, *held* (1) that the property therein had not passed to the purchasers in virtue of the provisions of the Sale of Goods Act, 1893; and (2) that the growing timber being *pars soli* passed to the succeeding heir unaffected by this personal contract of his predecessor; and interdict *granted*. *Morison v. A. & D. F. Lockhart*, p. 1017.

Disentail—Consents—Entail executed under Private Act—Old or new entail—Entail Amendment Act, 1848, sec. 28.

2. Under the directions of a trust-deed which came into operation in 1842 certain lands were entailed. In 1873 a private Act of Parliament was obtained, under which part of the lands was sold, and others purchased in substitution therefor and entailed on the same series of heirs and under the same conditions and prohibitions. The Act provided that the heirs entitled to succeed to the lands originally entailed, and to the lands directed by the Act to be entailed, should, "notwithstanding anything in this Act contained, be entitled to avail themselves of all the benefits and privileges conferred upon heirs of entail" by the Entail Acts then in force. In a petition presented in 1912 by the heir of entail in possession for disentail of the substituted lands, *held* (1) that the lands in question were entailed under the authority of the private Act of 1873 and not of the trust-deed of 1842, and were accordingly held under a "new" entail; and (2) that there was no provision in the private Act of 1873 that the lands in question were to be in the same position as regarded proceedings for disentail as the lands originally entailed; and, accordingly, that the lands could be disentailed only with the consent of the three nearest heirs. *Morison v. Morison's Curator*, p. 1117.

Entail Amendment Act, 1848, secs. 47 and 48—Entail Amendment Act, 1868, sec. 17.

3. The Entail Amendment Act, 1848, secs. 47 and 48, and the Entail Amendment Act, 1868, sec. 17, provide that where, under deeds ex-

ENTAIL—*Continued.*

cuted after 1848 and 1868 respectively, a party of full age and born after the date of the deed is in possession of land or estate subject to conditions restricting his enjoyment thereof, or where estate, heritable or moveable, is held in liferent by or for behoof of such a party, he shall be deemed the absolute proprietor thereof. *Held* that these provisions had no application to the case of an annuity. *Drybrough's Trustee v. Drybrough's Trustee*, p. 939.

See *Superior and Vassal*, 3.

ERROR. *Essential error induced by misrepresentations—Error as to substance—Modern imitations of antique furniture.*

A dealer in modern and antique furniture sold to a customer ten ribbon-backed chairs, which he described in a receipt for part payment of the price as a "set of antique mahogany chairs," but which proved not to be genuine antiques, but to be modern imitations. The price stipulated was a fair price for the articles actually sold. The seller gave no history of the chairs or guarantee that they were antique, but he made certain representations, held not to be fraudulent, which induced the buyer to believe that he was buying a set of old chairs. *Circumstances* where *held* that there had been such misrepresentation as to the substance of the articles sold as to entitle the buyer to rescind the contract. *Edgar v. Hector*, p. 348.

See *Bill of Exchange*.

EXECUTOR. *Executor-nominate—Confirmation—Danger to estate—Judicial factor.*

1. A master made a general settlement in favour of his servant, and appointed him to be his executor. On the servant applying for confirmation objection was taken by the trustees under a former settlement of the testator and by his next of kin, who averred that the testator was weak and facile, and that the servant obtained the settlement in his favour by fraud and circumvention. They also averred that they had already brought an action for reduction of the settlement on that ground, and that, as the servant was a person of no substance, there was danger of the estate being lost should he be confirmed as executor. The Court *dismissed* the application for confirmation, and appointed a judicial factor on the estate, reserving right to the applicant to renew his application should the action of reduction be unsuccessful. *Simpson's Executor v. Simpson's Trustees*, p. 418.

Payment of debts—Provision for contingent debts—Personal liability of trustees and executors.

2. Three years after the death of a testator, who had granted a letter of guarantee, his testamentary trustees were called upon by the persons in whose favour the guarantee was granted for payment of the sum due thereunder. The trust-estate had proved insufficient to pay the testator's creditors in full, and the trustees, having paid away to them the greater part of the estate, had not sufficient funds left to pay the claim under the guarantee. The creditors under the guarantee thereupon brought an action in which they sought to have the trustees found personally liable for the sum guaranteed, in respect that they had received notice of the guarantee, and that it was their duty to have made provision for payment thereof. The Court *assuiled* the trustees from the conclusion for personal liability, *holding* that, as they were not trustees for creditors, they were entitled after six months to pay the testator's debts *primo venienti* without making provision for this contingent claim. *Taylor & Ferguson, Limited, v. Glass's Trustees*, p. 165.

ELECTION LAW—Continued.

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EXECUTOR—Continued.

Beneficiary suing for debt due to executry estate—Executor sisted as pursuer—Conditions as to expenses—Act of Sederunt, 20th March 1907, sec. 2 (a).

3. An action, in which it was sought to establish that a certain debt was due to the estate of a deceased intestate, was brought by one of the deceased's next of kin in his own name. The Lord Ordinary having dismissed the action on the ground that the pursuer had no title to sue, *conditions* as to expenses under which the Court *allowed* the executor of the deceased to be sisted as a pursuer in the action. *Morrison v. Morrison's Executrix*, p. 892.

EXPENSES. Proof—Hearing on evidence—Expense of copy of notes of evidence.

1. It is always a question of circumstances whether a successful litigant should be entitled to charge against his opponent the expense of obtaining the notes of evidence. But if the litigant proposes to make such a charge he must intimate the fact to the Lord Ordinary at the time when he asks for the notes, and must obtain the Lord Ordinary's leave to that effect. Otherwise it will be held that he asks for them simply for his own convenience, and must pay for what he gets. *Smith v. Watson*, p. 553.

Misleading statements on record.

2. *Circumstances* in which successful defenders were refused full expenses on account of misleading statements in their defences, calculated to induce the pursuer to proceed with the action which he might otherwise have abandoned. *Armour v. Duff & Co.*, p. 120.

Successful and unsuccessful defenders—Liability inter se.

3. In an action of reparation for personal injuries, brought against two defenders, in which each defender maintained that the injury was caused by the fault of the other, the Court in assoilzieing one defender found him entitled to expenses against the other. *Laing v. Paull & Williamsons*, p. 196.

Beneficiary suing for debt due to executry estate—Executor sisted as pursuer—Conditions as to expenses—Act of Sederunt, 20th March 1907, sec. 2 (a).

4. An action, in which it was sought to establish that a certain debt was due to the estate of a deceased intestate, was brought by one of the deceased's next of kin in his own name. The Lord Ordinary having dismissed the action on the ground that the pursuer had no title to sue, *conditions* as to expenses under which the Court *allowed* the executor of the deceased to be sisted as a pursuer in the action. *Morrison v. Morrison's Executrix*, p. 892.

Resignation of curator—Expenses of discharge and new appointment.

5. A curator bonis was appointed to a lunatic, whose whole estate amounted to less than £2000. Fifteen months after his appointment the curator, who desired to resign in order that he might take up a post that had been offered him abroad, petitioned the Court to discharge him and to appoint a new curator. *Held* that the expenses of the discharge and new appointment did not, in the circumstances, form a good charge against the ward's estate. *Halliday's Curator Bonis*, p. 509.

Special Case—Question depending on construction of an Act of Parliament.

6. In a special case arising out of a marriage-contract, where there was no arrangement between the parties as to expenses, and where the main question concerned the construction of an Act of Parliament and not of the deed, the unsuccessful party was found liable in expenses. *Dundas's Trustees v. Dundas's Trustees*, p. 375.

EXPENSES—*Continued.*

Workmen's Compensation Act, 1906—Unsuccessful action of damages against employer—Application for assessment of compensation—Expenses of application.

7. *Circumstances in which held that a workman, who had been unsuccessful in an action of damages for personal injuries against his employers, but had thereafter applied for, and been awarded, compensation under sec. 1 (4) of the Workmen's Compensation Act, was entitled to the expense of obtaining the award of compensation.* *Slavin v. Train & Taylor*, p. 754.

Workmen's Compensation Act, 1906—Appeal by stated case—Expenses of the appeal.

8. In a stated case under the Workmen's Compensation Act, 1906, the Court found the appellant entitled to the "expenses of the appeal." Upon a note of objections to the report of the Auditor, who had disallowed the expenses of obtaining the stated case from the Sheriff, the Court *allowed* a modified fee of three guineas for these expenses, and *observed* that in future a modified fee of three guineas and a half would be allowed. *Observed* further that there is no distinction between an award of "expenses of the appeal" and an award of "expenses of the stated case." *M'Laughlin v. Wemyss Coal Co., Limited*, p. 250.

Workmen's Compensation Act, 1906—Expenses of lodging a condescendence.

9. In an appeal by stated case from the decision of an arbitrator dismissing an application for compensation in respect that the workman had failed relevantly to aver the happening of an accident, the Court permitted the workman to submit a condescendence of the specific facts on which he relied, and thereafter allowed it to be received, and remitted to the arbitrator to proceed; but, in a question as to the taxation of the parties' accounts, *refused* to allow the appellant (who had been awarded the expenses of the appeal) the expenses of preparing and lodging the condescendence. *M'Laughlin v. Wemyss Coal Co., Limited*, p. 250.

Husband and Wife—Divorce for adultery—Expenses against co-defender—Taxation as between agent and client—Conjugal Rights (Scotland) Act, 1861, sec. 7.

10. Section 7 of the Conjugal Rights (Scotland) Act, 1861, authorises the Court, in an action of divorce for adultery at the instance of the husband, to decern against the person with whom the wife is proved to have committed adultery, provided he has been cited, for the expenses of process, and directs that "the same shall be taxed as between agent and client." *Held* that the provision as to taxation is imperative, and that there is no necessity of inserting in the interlocutor a direction to the Auditor. *Fairgrieve v. Chalmers*, p. 745.

Taxation as between agent and client in Sheriff Court action—Application of provisions of Act of Sederunt, 10th April 1908—Public Authorities Protection Act, 1893, sec. 1 (b).

11. In a Sheriff Court action against a public authority the defenders were successful, and, in terms of sec. 1 (b) of the Public Authorities Protection Act, were awarded expenses to be taxed as between agent and client. *Held* that, as the provisions of the Act of Sederunt, 10th April 1908, regulating fees in the Sheriff Court, applied to taxation as between agent and client as well as to taxation as between party and party, the defenders could not recover charges for the employment of skilled witnesses which had not been certified by the Sheriff as required by the Act of Sederunt. *Reid v. North Isles District Committee of County Council of Orkney*, p. 627.

Taxation as between party and party—Expenses of trustees.

12. A special case, which was presented to determine questions regarding the disposal of a particular portion of a trust-estate and to which the

EXPENSES—Continued.

trustees were parties, stated that it had been agreed that "the taxed expenses of the several parties" should be paid out of the fund in dispute. The Court, in disposing of the case, found "the whole parties to the special case entitled to their expenses as the same may be taxed by the Auditor," out of the fund in dispute. *Held* that under this finding the trustees' account of expenses fell to be taxed as between party and party, and not as between agent and client. *M'Gregor's Trustees v. Kimbell*, p. 261.

Taxation—Fees to counsel—Fees to skilled witnesses.

13. In a case, brought to determine whether fireclay was or was not a mineral and involving an elaborate investigation of the state of scientific knowledge on the subject, the Court, having consulted the Auditor and being satisfied that he had directed his attention to the particularity of the case, *repelled* certain objections to the fees of counsel and skilled witnesses, *observing* (1) that counsel's fees must be considered, not necessarily with a view to the day for which they are allowed, but with a view to remuneration upon the case as a whole; and (2) that fees for research in London were properly allowed where the books required for the purpose were only to be found in the British Museum. *Caledonian Railway Co. v. Glenboig Union Fireclay Co., Limited*, p. 511.

Taxation—Counsel in Sheriff Court—Higher debate fee—Time for making application for certification—Act of Sederunt, 10th April 1908, General Regulation VI., and Table of Fees, cap. I. 16.

14. A motion under the Act of Sederunt of 10th April 1908, for a higher debate fee, or for the sanction of counsel in the Sheriff Court, should properly be made to the Judge who tried the cause; and although it is not incompetent to delay the motion until the case is before the Sheriff on appeal or before the Court of Session, in such circumstances it will only be granted if it is shown, not only that the application is well founded, but also that there is very good reason why the motion has not been made before. *Reid v. North Isles District Committee of County Council of Orkney*, p. 627.

Taxation—Skilled witnesses in Sheriff Court—Witnesses not certified by Sheriff—Appeal to Court of Session—Application for certification—Time for making application—Act of Sederunt, 10th April 1908, Table of Fees, cap. X. 5 (b).

15. A successful respondent in an appeal from the Sheriff to the Court of Session, to whom expenses were awarded, *held* not to be entitled to include therein charges for the services of skilled witnesses in a proof before the Sheriff-substitute, not certified by the Sheriff-substitute, on the ground that the motion for certification, not having been made to the Judge who tried the case or within the time allowed by the Act of Sederunt, could not be entertained in the Court of Session. *Reid v. North Isles District Committee of County Council of Orkney*, p. 627.

Taxation—Debate fee in Sheriff Court—Attendance fee in Sheriff Court—Act of Sederunt, 10th April 1908, General Regulations VI., and Table of Fees, cap. I. 12 (1) and 15 (2).

16. Expenses were awarded as between agent and client in an action which had been debated before the Sheriff-substitute and Sheriff for eleven and twenty-three hours respectively. The successful party in moving for the allowance of higher debate fees asked, as an alternative, that he should be found entitled to an attendance fee at ten shillings per hour, which would have amounted to more than the higher debate fees asked for. *Held* that this alternative proposal could not be entertained. *Reid v. North Isles District Committee of County Council of Orkney*, p. 627.

EXPENSES—*Continued.*

Decree in name of agent-disburser—Action for two separate sums—Decree for one—Right to set off against expenses awarded to defender.

17. In an action, concluding for payment of two sums on different grounds of liability, the pursuers obtained decree for one of the sums only, and the defender was awarded modified expenses. A motion was thereafter made for decree for the defender's expenses in name of the agent-disburser, which was opposed by the pursuers on the ground that they would thereby be deprived of their right to set off the sum for which they had obtained decree against the expenses found due to the defender. The Court *refused* the motion. *Masco Cabinet Co., Limited, v. Martin*, p. 896.

Decree in name of agent-disburser—Action settled by parties pending appeal—Right of agent to be sisted in order to obtain decree for expenses.

18. In an action in the Sheriff Court the Sheriff pronounced decree against the defender and found him liable to the pursuer in the expenses of the action. While an appeal was pending in the Court of Session the parties, without the knowledge of the pursuer's agents, came to a compromise, in terms of which the pursuer accepted a sum in full settlement of all his claims of principal and expenses in the action. The defender having moved the Court, in respect of this settlement, to assoilzie him from the conclusions of the action and to find no expenses due to or by either party, the pursuer's agents lodged a minute in which they craved to be sisted as parties to the action in order that decree might be pronounced against the defender in their favour as agents-disbursers for the expenses of the action. *Held* that the agents were entitled to be sisted in terms of their minute. *Ammon v. Tod*, p. 306.

See *Process*, 6.

FACILITY. See *Fraud*, 1, 2.

FACULTIES AND POWERS. See *Succession*, 11.

FEE AND LIFERENT. See *Succession*, 5, 6, 10, 11.

FISHINGS. *Salmon Fisheries (Scotland) Act, 1868, sec. 21—Possession of salmon in close time—Defence that salmon taken with rod and line—Onus of proof.*

The Salmon Fisheries (Scotland) Act, 1868, sec. 21, renders liable to a penalty any person who shall "have in his possession any salmon taken" during the "annual close time." It has been decided that "annual close time" refers only to net-fishing, and that there is no offence if the salmon was taken by rod and line at a time when rod-fishing was open. *Held* that proof of possession within the close time is *prima facie* proof of the offence, and that the onus of establishing capture by rod and line rests on the accused. *Fishmongers of London v. Stiven*, (J.) p. 28.

See *Justiciary Cases*, 12.

FOREIGN. See *Arbitration*, 3—*Jurisdiction*, 1—*Trust*, 5.

FORUM CONVENIENS. See *Jurisdiction*, 2.

FRANCHISE. See *Election Law*.

FRAUD. *Facility and circumvention—Testament—Reduction—Sufficiency of averments of impetration.*

1. In an action for the reduction of certain testamentary writings, executed during the latter years of a testator who died at the age of ninety-three, by which the children of a deceased daughter were excluded in favour of the testator's surviving children, the pursuer (an excluded grandchild) averred that the testator during the latter

FRAUD—Continued.

years of his life was in a weak and facile condition, and that one of his surviving daughters, B, taking advantage of that condition, induced him to make the testamentary dispositions complained of. The defenders objected that the pursuer did not aver any specific facts regarding the impetration of the deeds and that there was nothing which could relevantly connect B with the alleged impetration. *Held* that the bare averment of impetration, when read along with certain averments as to the surrounding facts and circumstances, disclosed a relevant case of fraud and circumvention against B; and issues allowed. *Horsburgh v. Thomson's Trustees*, p. 267.

Facility and Circumvention—Will—Reduction—Relevancy of averments that testator's relatives suffered from mental disease.

2. In an action for reduction of a will on the grounds of insanity and of facility and circumvention, the pursuer averred that the testator was peculiarly liable to suffer from mental disease as mental disease was hereditary in his family, and, in support of this, made specific averments as to the diseased mental condition of various near relatives of the testator. Objection having been taken to the relevancy of these averments, *held* that the averments were not necessarily irrelevant, and objection repelled. *Houston v. Aitken*, p. 1037.

Contract to construct railway—Alleged fraudulent misdescription of nature of soil—Proof of fraud.

3. A railway company invited tenders for the construction of a line of railway, and, for the information of intending offerers, exhibited what purported to be a journal of bores taken along the proposed line. A firm of contractors to whom that journal had been exhibited tendered for the work, and a lump sum contract was entered into with them for the construction of the railway. During the progress of the work the contractors discovered that the strata contained more rock or hard substance than they had anticipated, and it ultimately appeared that the so-called journal was not the actual record kept by the borers (who were not professional borers but were ordinary servants of the company), but was compiled by the company's engineer from notes supplied by the borers, and that in several instances he had described strata as soft which the borers had described as hard or rock. *Held* that the representations made to the pursuers with regard to the journal of bores were not false or fraudulent, in respect that the engineer had compiled the journal honestly and to the best of his ability, and had only altered the descriptions given by the borers where he honestly believed these descriptions to be erroneous. *Boyd & Forrest v. Glasgow and South-Western Railway Co.*, (H. L.) p. 93.

See *Justiciary Cases*, 14, 16, 17.

FRIENDLY SOCIETY. *Friendly Societies Act*, 1896, sec. 68 (7)—*Competency of stated case after judgment in inferior Court.*

Held that a case stated under the Friendly Societies Act, 1896, sec. 68 (7), must be stated during the progress of the reference, and cannot be stated after the Court or arbitrator has given judgment. *Smith v. Scottish Legal Life Assurance Society*, p. 611.

GAMING. See *Justiciary Cases*, 3, 5, 6.

HERITABLE AND MOVEABLE. See *Succession*, 2.

HERITABLE OFFICE. *Principal Usher in Scotland—Emoluments—Fees from Peers of the United Kingdom—Treaty of Union, 1706, Art. 20—Act of Union, 1707—Statute—Custom.*

At the time of the Union the holder of the office of principal Usher within the Kingdom of Scotland was, under a royal charter dated 21st January 1686, ratified by Act dated 15th June 1686, entitled to fees from all

HERITABLE OFFICE—Continued.

Scotsmen receiving honours from the King as sovereign of Scotland, and from Englishmen in Scotland who received such honours. In an action of declarator brought in 1908 by the holders of the office, held that, inasmuch as Article XX. of the Act of Union did not enlarge the rights of the office but merely reserved these rights unchanged, its holders were not entitled to fees from recipients of honours whose titles were not purely Scottish titles but were titles of the United Kingdom of Great Britain and Ireland; and that, as Article XX. was unambiguous in its terms, no consideration could be given to the fact that from 1766 to 1904 the holders of the office had claimed and received such fees. Walker Trustees v. Lord Advocate, (H. L.) p. 12.

HIRING. See *Contract*, 2.

HORSE. See *Sale*, 2.

HOUSING. See *Public-Health*, 8, 9—*Sheriff*, 10-12.

HUSBAND AND WIFE. *Proof of marriage—Presumption of legitimacy—Presumption where parents have not enjoyed status of married persons and the de quo quæritur is existence of marriage.*

1. In a competition for the distribution of an intestate estate certain of the claimants averred that a marriage had taken place in 1819 between Lieutenant D., an officer in a Highland regiment, and A., a milliner in Glasgow, and that their father was the legitimate offspring of that marriage. The existence of the marriage was denied by the other claimants. At a proof no direct evidence of the marriage, either documentary or otherwise, was adduced, nor was it shown that Lieutenant D. or any of his family had ever acknowledged the marriage, or made any allusion thereto, or that the parties had ever lived publicly together or enjoyed the status of married persons. The claimants relied mainly on hearsay evidence as to statements made by A. and her sisters, and on an unbroken tradition in A.'s family to the effect that Lieutenant D. and A. had been married persons. They maintained that, in the circumstances, there was a presumption of legitimacy which had not been displaced, and that the marriage was proved. *Held* that the marriage had not been proved, the Lord President *observing* that the presumption of legitimacy applied only where persons were living more or less in the married state, and did not apply where the *de quo quæritur* was whether there was a marriage or not. *Deans's Judicial Factor v. Deans*, p. 441.

Widow's allowance for mournings—Discharge of legal rights.

2. A widow's allowance for mournings is a privileged debt due by her husband's estate, and is not discharged by her acceptance of provisions under her husband's will which are therein declared to be "in full satisfaction of all terce of lands, *jus relictæ*, or legal share of moveables, and any other right or claim competent to her" through his decease. *Griffiths' Trustees v. Griffiths*, p. 626.

Wife's capacity to contract—Assignment of spes successionis—Mandate to wife's father's trustees to retain her share of his estate.

3. A married woman, with consent of her husband, undertook that any debt due by her husband to her father at the latter's death should "form a debt due" by her and "a deduction from" her share of her father's estate. The agreement was contained in a deed signed by her and delivered to her father. In an action for legitim brought by her against her father's trustees after his death (when her husband's indebtedness to her father admittedly exceeded her share of legitim), the pursuer pleaded that the agreement was not binding upon her, in respect that it was a personal obligation undertaken by

HUSBAND AND WIFE—Continued.

a married woman. *Held* that the agreement was binding, in respect that it was more than a personal obligation by the wife, being a mandate to her father's trustees to retain her share of his estate, and was effectual even though the subject dealt with was a *spes successionis*. *Coats v. Bannochie's Trustees*, p. 329.

Married Women's Policies of Assurance (Scotland) Act, 1880, sec. 2—Policy "for the benefit of" the wife.

4. Terms of a policy described as an "endowment bond" effected by a husband with a life assurance society, which were *held* to constitute the policy a policy "for the benefit of his wife" within the meaning of sec. 2 of the Married Women's Policies of Assurance (Scotland) Act, 1880, the proceeds of which fell to the widow and not to the husband's creditors. *Chrystal's Trustee v. Chrystal*, p. 1003.

Divorce—Divorce for Adultery—Collusion.

5. *Observed* that in Scotland there cannot be collusion unless facts are proved which show that the oath of calumny has been falsely sworn; and that the mere fact that a woman, who may have repented of misconduct, gives information to her husband afterwards will never be collusion. *Fairgrieve v. Chalmers*, p. 745.

See *Expenses*, 10—*Process*, 12, 41.

INCOME-TAX. See *Revenue*, 2-5.

INNUEENDO. See *Reparation*, 4-7.

INSANITY. *Facility and Circumvention—Will—Reduction—Relevancy of averments that testator's relatives suffered from mental disease.*

In an action for reduction of a will on the grounds of insanity and of facility and circumvention, the pursuer averred that the testator was peculiarly liable to suffer from mental disease as mental disease was hereditary in his family, and, in support of this, made specific averments as to the diseased mental condition of various near relatives of the testator. *Held* that the averments were not necessarily irrelevant. *Houston v. Aitken*, p. 1037.

INSURANCE. *Life insurance—Married Women's Policies of Assurance (Scotland) Act, 1880, sec. 2—Policy "for the benefit of" the wife.*

A married man effected with a life assurance society a policy of assurance, described as an "endowment bond," in terms of which the society undertook, in consideration of the payment of certain annual premiums, to pay to him the principal sum assured, with interest and profits, on the expiry of twenty years. The society also undertook, in the event of the husband's death before the expiry of the twenty years, to pay the principal sum assured to his widow, whom failing, to the husband's executors, administrators, or assigns. The husband having died within the twenty years, survived by his widow, and his estate having been sequestrated, *held* that the policy in question was a policy "for the benefit of his wife" within the meaning of sec. 2 of the Married Women's Policies of Assurance (Scotland) Act, 1880, and accordingly that the proceeds thereof fell to the widow and not to the husband's creditors. *Chrystal's Trustee v. Chrystal*, p. 1003.

INTERDICT. *Title of proprietor to interdict nuisance affecting letting value of his property.*

1. *Opinions* that the law of Scotland allows "a proprietor to apply for interdict in respect of operations by a third party, complained of by his tenant, and lowering, or reasonably calculated to lower, the letting value of his tenement." *M'Ewen v. Steedman & M'Alister*, p. 156.

Public Authorities Protection Act, 1893—Applicability to action of interdict.

2. *Observed* that the provisions of the Public Authorities Protection

INTERDICT—*Continued.*

Act, 1893, which impose a limit of time within which actions must be brought against public authorities, cannot be prayed in aid in a question of interdict, because the Court can only give interdict against what is a continuing wrong. *Farquhar & Gill v. Magistrates of Aberdeen*, p. 1294.

See *Bankruptcy—Process*, 25, 27—*Right in Security*, 1—*Title to Sue*, 7.

INTEREST. *Rate of interest—Rate where trustees personally liable.*

Circumstances in which the representatives of a trustee, who were found liable to refund to the trust-estate a sum of money which had been lost through his negligence, were ordained to pay interest thereon at the rate of 3½ per cent. *Lees' Trustees v. Dun*, p. 50.

See *Contract*, 2.

ISSUE. See *Reparation*, 2.JUDICIAL FACTOR. *Curator bonis—Resignation of curator—Expenses of discharge and new appointment.*

A curator bonis was appointed to a lunatic, whose whole estate amounted to less than £2000. Fifteen months after his appointment the curator, who desired to resign in order that he might take up a post that had been offered him abroad, petitioned the Court to discharge him and to appoint a new curator. *Held* that the expenses of the discharge and new appointment did not, in the circumstances, form a good charge against the ward's estate. *Halliday's Curator Bonis*, p. 509.

See *Executor*, 1.

JURISDICTION. *Foreign—Reconvention—Continued dependency of action of convention.*

1. A Scottish company, using arrestments *ad fundandam jurisdictionem*, brought an action in the Court of Session against an English company. The English company appeared to defend, and subsequently brought a counter action against the Scottish company. The actions were conjoined, and both were finally disposed of in the Inner House upon a reclaiming note, with a finding of expenses in favour of the Scottish company, and the accounts of expenses were remitted to the Auditor to tax and to report. Before the Court had approved of the Auditor's report and decerned for expenses, and while the period for appeal to the House of Lords was still current, the Scottish company brought another action arising out of the same subject-matter against the English company, and pleaded jurisdiction *ex reconventionem*. When this action was raised, the English defenders were making no claim against the pursuers, but had paid the sums due by them under the decrees in the conjoined actions, and were also willing to pay the accounts of expenses in these actions when taxed. *Held* that the English company was not subject to the jurisdiction of the Scottish Court *ex reconventionem*, inasmuch as the original actions had been finally disposed of on the merits by a decree of that Court. *Hurst, Nelson, & Co., Limited, v. Spenser Whatley, Limited*, p. 1041.

Forum conveniens—Contract—Construction.

2. A Scottish company entered into a contract with an English company to be executed in Wales, which contained an arbitration clause providing for the settlement of disputes by arbitration within the meaning of the English Arbitration Act. The Scottish company, having used arrestments *ad fundandam jurisdictionem*, brought an action in Scotland against the English company, in which the question was raised whether the matters in dispute were covered by the arbitration clause. The defenders pleaded *forum non conveniens*, in respect that the contract was an English one to be implemented furth of Scotland, and

JURISDICTION—*Continued.*

that the arbitration clause demanded construction according to the law of England. *Circumstances* in which the Court *repelled* this plea, found that the matters in dispute fell to be determined by arbitration in terms of the contract, and *sisted* process *in hoc statu* until the matters should be so determined. James Howden & Co., Limited, v. Powell Duffryn Steam Coal Co., Limited, p. 920.

See *Arrestment*—*Sheriff*, 1—*Trade Union*, 2, 3.

JUS QUÆSITUM TERTIO. *Trade union rules—Agreement with member to pay sick benefit to dependants—Revocable agreement—Claim by dependant.*

The rules of a trade union, which could be altered at the will of the general council, provided that if a member became insane his wife, family, or parent, if dependent upon him, should be eligible to receive sick benefit for one year. In an action at the instance of the wife of an insane member against the union for recovery of sick benefit, the defenders maintained that, as the rules could be altered, the pursuer had no indefeasible *jus quæsitum tertio*, and so had no title to sue. *Held* that as the agreement embodied in the rules, though revocable, had not been revoked when the pursuer's claim arose, she had a good title to sue. Love v. Amalgamated Society of Lithographic Printers of Great Britain and Ireland, p. 1078.

JUSTICIARY CASES. *Procedure—Proof—Admissibility of witness—Witness present in Police Court when other witnesses examined—Evidence (Scotland) Act, 1840, sec. 3.*

1. Section 3 of the Evidence Act, 1840 (which relaxes the common law rule excluding a witness who has heard the evidence given by other witnesses), applies only to proceedings in the Courts specified in the section, among which the Burgh Police Court is not included; and accordingly, in proceedings in that Court, it is a good objection to a witness that he has been present in Court during the examination of other witnesses in the case. Docherty and Graham v. M'Lennan, (J.) p. 102.

Procedure—Proof—Admissibility of witness—Examination of additional witness after case closed.

2. *Held* that it was not competent for the prosecutor in a criminal trial in a Burgh Police Court, even with the leave of the presiding magistrate, to adduce a witness after the case for the prosecution had been closed. Docherty and Graham v. M'Lennan, (J.) p. 102.

Procedure—Proof—Complaint libelling second offence—Stage at which previous conviction should be proved—Street Betting Act, 1906, sec. 1—Summary Jurisdiction (Scotland) Act, 1908, sec. 34.

3. Where a previous conviction was libelled as an aggravation and not as a substantive charge, *held* that it had been competently proved after the accused had been found guilty of the offence for which he was prosecuted; and that it would have been incompetent to prove it *in causa*. Campbell v. Kerr, (J.) p. 10.

Procedure—Proof—Public and official documents—Regulations for the Territorial Force—Extent to which Regulations prove themselves—Necessity of lodging copy in process—The Army Act, 1881 (as amended by the Annual Army Acts to 1911), sec. 163—The Territorial and Reserve Forces Act, 1907, sec. 26 (2).

4. *Held* that the Regulations for the Territorial Force and for County Associations may be proved by production of a copy purporting to be printed by a Government printer without other evidence; but that the Court does not take judicial notice of the Regulations, and, therefore, that a prosecutor desiring to found on them must lodge a copy in process before closing his case. Todd v. Anderson, (J.) p. 105.

JUSTICIARY CASES—*Continued.*

Statutory Offences—Betting—Aggravation—Complaint libelling second offence—Stage at which previous conviction should be proved—Street Betting Act, 1906, sec. 1—Summary Jurisdiction (Scotland) Act, 1908, sec. 34.

5. The Street Betting Act, 1906, which prohibits betting in public places, imposes a certain penalty for a first offence and a larger penalty for a second offence. A complaint charged an accused with a contravention of the Act, and that "such offence is a second offence, you having been previously convicted as in the list annexed, whereby you are liable" to the larger penalty. *Held* that the previous conviction was libelled as an aggravation and not as a substantive charge, and had been competently proved after the accused had been found guilty of the offence for which he was prosecuted; and that it would have been incompetent to prove it *in causa*. *Campbell v. Kerr*, (J.) p. 10.

Statutory Offences—Betting—"Public place"—"Unenclosed ground"—Open shed on quay—Street Betting Act, 1906, sec. 1.

6. On a quay belonging to a harbour trust there was a shed, in the sides of which there were large openings without gates or doors. The public had free access to both quay and shed. *Held* that the shed was "unenclosed ground," and was a "public place" within the meaning of the Street Betting Act, 1906. *Campbell v. Kerr*, (J.) p. 10.

Statutory Offences—Managing a brothel—Manager found "in" a "building or part of a building" used as a brothel—Common stair leading to brothel—Glasgow Police Act, 1866, sec. 142.

7. A person, who managed as a brothel a house situated on the first floor of a common stair, admitted a man and woman to the house for the purpose of prostitution but did not himself enter the house; he was then met by two constables on the stair-landing outside the door of the house with the key of the door (which he had locked) in his possession. *Held* that he was found "in" the house in the sense of section 142 of the Glasgow Police Act, 1866. *M'Intyre v. Thomson*, (J.) p. 19.

Statutory Offences—Coal-mine—Facilities for checkweigher—Failure to provide "shelter from weather"—Shelter not artificially heated—Coal Mines Regulation Act, 1887, sec. 13 (2)—Coal Mines (Weighing of Minerals) Act, 1905, sec. 1 (4).

8. *Held* that the fact that the owners of a colliery provided no means for the artificial heating of the checkweigher's weigh-house did not constitute a failure to provide him with "a shelter from the weather." *Dalmellington Iron Co., Limited, v. Mackenna*, (J.) p. 63.

Statutory Offences—Motor Car—Charge of exceeding speed limit—Proof of warning or notice of intended prosecution—Motor Car Act, 1903, sec. 9.

9. In a prosecution for a contravention of section 9 of the Motor Car Act, 1903 (which imposes a speed limit), the prosecutor must prove that the warning or notice of the intended prosecution required by the section was given to the accused; and a conviction, without such proof, is bad. *Dickson v. Stevenson*, (J.) p. 1.

Statutory Offences—Frequenting public place with intent to commit felony—"Place adjacent to a street or highway"—Hotel—Vagrancy Act, 1824, sec. 4—Prevention of Crimes Act, 1871, sec. 15.

10. *Held* that the entrance hall and staircase of the Central Station Hotel in Glasgow, which opened directly on to a public street, was a "place adjacent to a street or highway" in the sense of the Vagrancy Act, 1824, sec. 4 (as amended and applied to Scotland by the Prevention of Crimes Act, 1871, sec. 15), which is directed against suspected persons or reputed thieves frequenting such a place with intent to commit felony. *M'Intyre v. Morton*, (J.) p. 58.

JUSTICIARY CASES—Continued.

Statutory Offences—Hanging “linen clothes or other such article” on roadside hedge—Herring nets—Ejusdem generis—General Turnpike Act, 1831, sec. 96—Roads and Bridges (Scotland) Act, 1878, sec. 123 and Schedule C.

11. *Held* that a complaint, which charged an accused with contravening section 96 of the General Turnpike Act, 1831, by hanging herring fishing-nets on a roadside hedge, was irrelevant, as herring fishing-nets did not fall under the category “linen clothes or other such article.” *Patience v. Mackenzie, (J.) p. 7.*

Statutory Offences—Fishing within “exclusive fishery limits of the British Islands”—Sea Fisheries Act, 1883, secs. 7, 28, and First Schedule—Application of Schedule to Foreigner not a subject of a Power signatory to the convention in the Schedule—Complaint—Relevancy.

12. A Norwegian subject, the master of a trawler registered in Norway, was convicted on a complaint which set forth that, contrary to the Sea Fisheries Act, 1883, he had fished “within the exclusive fishing limits of the British Islands as defined by Article II.” of the First Schedule to that Act, viz., at a point within three miles of a line drawn across a certain bay. The First Schedule consists of an international convention entered into between Great Britain and certain countries, of which Norway is not one. *Held* that the accused, not being the subject of a signatory nation, was not bound by the provisions of the convention, and that, accordingly, as the *locus* of the offence was defined in the complaint by reference to these provisions, the complaint was irrelevant; and conviction *quashed*. *Jensen v. Wilson, (J.) p. 3.*

Statutory Offences—Possession of salmon in close time—Defence that salmon taken with rod and line—Onus of proof—Salmon Fisheries (Scotland) Act, 1868, sec. 21.

13. The Salmon Fisheries (Scotland) Act, 1868, sec. 21, renders liable to a penalty any person who shall “have in his possession any salmon taken” during the “annual close time.” It has been decided that “annual close time” refers only to net-fishing, and that there is no offence if the salmon was taken by rod and line at a time when rod-fishing was open. *Held* that proof of possession within the close time is *prima facie* proof of the offence, and that the onus of establishing capture by rod and line rests on the accused. *Fishmongers of London v. Stiven, (J.) p. 28.*

Statutory Offences—Travelling in tramway without paying requisite fare—Proof of fraud—Tramways Act, 1870, sec. 51.

14. *Held* that a person cannot be convicted of an offence under section 51 of the Tramways Act, 1870, which makes it an offence to travel without having paid the requisite fare, unless it appears that he acted with fraudulent intention. *Nimmo v. Lanarkshire Tramways Co., (J.) p. 23.*

Statutory Offences—Weights and measures—Weighing and selling goods under weight—Necessity of libelling both weighing and selling—Power of specified officials to enter premises where goods exposed for sale—Right to delegate power—Burgh Police (Scotland) Act, 1892, sec. 430.

15. *Held* (1) that, as section 430 of the Burgh Police (Scotland) Act, 1892, in terms imposed a penalty only on persons who both sold and also incorrectly weighed goods, a complaint which charged the accused merely with selling goods under weight was irrelevant; (2) that under the section the powers therein conferred were confined to the officials mentioned, and could not be delegated; and that, accordingly, a sale to a messenger sent by one of these officials for the purpose of purchasing the article would not support a charge of contravention of the section. *Masterton v. Soutar, (J.) p. 74.*

JUSTICIARY CASES—*Continued.*

Statutory Offences—Weights and Measures—Selling goods under weight—Implied representation as to weight—Label “Not sold by weight”—Fraudulent intent—Glasgow Corporation Act, 1907, sec. 60.

16. A boy entered a shop belonging to a limited company and presented a written order for $\frac{1}{4}$ lb. of butter. The salesman, without remark, handed him a mould or print of butter contained in a wrapper on which was printed “This article is not sold by weight.” The butter weighed only 3 oz. $7\frac{1}{2}$ drams, and the sum paid by the boy was the price, according to the current wholesale rates, of that quantity of butter. The company had instructed their employees not to sell butter by weight, but this instruction was not always obeyed. The company having been convicted of a contravention of section 60 of the Glasgow Corporation Act, 1907, *held* (1) that the butter had been represented as being of the weight asked for, the notice on the wrapper not being sufficient to displace the representation implied in the transaction between the buyer and seller; but (2) that the company were entitled to the benefit of the exception in that section, having proved that the deficiency in weight arose without any fraudulent intent; and conviction *quashed*. *Galbraith’s Stores, Limited, v. M’Intyre, (J.)* p. 66.

Statutory Offences—Weights and Measures—Selling goods under weight—Goods weighed along with wrapper—Absence of fraudulent intent—Burgh Police (Scotland) Act, 1892, sec. 430.

17. A firm of provision merchants was in the practice of making up their tea in packets in readiness for delivery to purchasers. The tea contained in the packets, which were sold as $\frac{1}{2}$ lb. packets, fell below that weight by $5\frac{1}{2}$ drams, the weight of the paper wrapper of the packet; and on the outside of the wrapper was printed “This packet is guaranteed gross weight.” It appeared that in the district where the firm carried on business “gross weight” was understood to mean the combined weight of an article and its receptacle; and that in the grocery trade it was a general practice for a grocer, when he was weighing tea in the presence of the purchaser, to put a paper bag along with the tea into the scales. A purchaser having been supplied with one of these packets in response to a request for $\frac{1}{2}$ lb. of tea,—*held* that section 430 of the Burgh Police (Scotland) Act, 1892, was not thereby contravened, as it appeared from the circumstances that the deficiency in the weight of the tea was not due to fraudulent intent. So *held* also in circumstances which were similar, except that the words printed on the packet were: “Full weight of tea including wrapper.” *Masterton v. Soutar, (J.)* p. 74.

Review—Advocation—Interlocutor finding libel relevant—Competency of advocation.

18. A person charged under an indictment in the Sheriff Court having, before the diet fixed for trial of the case, brought an advocation of the Sheriff-substitute’s interlocutor at the first diet, repelling objections to the relevancy of the libel on the ground that it disclosed no crime and was also wanting in specification, *held* that the advocation was incompetent, and the bill *refused*. *Muir v. Hart, (J.)* p. 41.

See Administration of Justice—Penalty—Public Health, 1, 2—Sheriff, 14—Statute, 2.

LAW-AGENT. *See Agent and Client.*

LEASE. *Urban tenement—Premises let for specific business—Business interfered with by operation carried on by landlord on adjoining premises.*

1. The top flat of an urban tenement was let to a tenant for the purposes of a photographic business. During the tenancy the proprietor of the tenement carried out alterations upon the lower flats which

LEASE—Continued.

necessitated extensive building operations, and these caused structural and other damage in the top flat and interference with and detriment to the tenant's business. *Held* that, while the landlord was admittedly bound to restore the structural damage done to the tenant's premises, he was also liable in damages (1) for injury done to the tenant's furniture and materials; (2) for injury to his business during the work of restoration; and (3) for injury to his business during the landlord's building operations, but only in so far as this was due to physical and tangible injury to the premises (as from vibration or dust), and not where it was immaterial or temporary (as from noise or occasional obstruction to the access). *Observed* (distinguishing the law of England) that in Scotland a landlord carrying on operations *in suo* is liable in reparation to his tenant for the consequences thereof only in so far as they amount to a derogation from his grant. *Observations* on the distinction between the liability of a landlord and of a neighbouring third party for the consequences of operations carried on *in suo*. *Huber v. Ross*, p. 898.

Management—Outgoing—Rules of good husbandry—Five-shift rotation of crops—Obligation of tenant to sow grass seeds with waygoing white crop.

2. The tenant of a farm obliged himself under his lease to cultivate it "agreeably to the rules of good husbandry," and in particular "by at least the five-shift rotation," which was therein defined. Under this rotation the white crop on one-fifth of the land at his outgoing fell to be followed by young grass in the next year. *Held* that the tenant was bound in the last year of his lease to sow grass seeds along with his waygoing white crop upon that portion of the land, he receiving reasonable remuneration therefor; or, alternatively, to grant all necessary facilities to the landlord or incoming tenant to do so. *Gordon v. Hogg*, p. 986.

Outgoing—Valuation of sheep stock—Arbitration—Basis of valuation.

3. A lease of a farm provided that the tenant should, at the end of the lease, leave the sheep stock on the farm to the proprietor or incoming tenant at a valuation to be fixed by arbitration. In a case stated under the Agricultural Holdings (Scotland) Act, 1908, with regard to the basis of valuation to be adopted by the arbiter, *held* that it is the duty of the arbiter to value the sheep upon the basis of their value to an occupant of the farm in view of the arbiter's estimate of the return to be realised by such occupant from them, in accordance with the course of prudent management, in lambs, wool, and price when ultimately sold; and not upon the basis either (1) of market value only, or (2) of the cost and loss which would be involved in the re-stocking of the farm with a like stock if the present sheep stock were removed. *Held* further that the arbiter is entitled to take into account both current market prices and the special qualities of the sheep, both in themselves and in their relation to the ground, which in his opinion will tend either to enhance or to diminish the return to be realised from them by an occupant of the farm. *Observations, per curiam*, on the valuing of the stock as part of the farm as a going business, and on the consideration to be given to acclimatisation. *Williamson v. Stewart*, p. 235.

See *Right in Security*, 1—*Sale*, 6.

LEGACY. See *Charitable and Educational Bequests and Trusts*.

LEGITIM. See *Marriage-Contract*, 2.

LIEN. See *Company*, 1—*Ship*, 1.

LIMITATION OF ACTIONS. *Public Authorities Protection Act, 1893, sec. 1*
 (a)—*Time limit—Applicability to action of interdict.*

1. *Observed* by the Lord President that the provisions of the Public Authorities Protection Act, 1893, which impose a limit of time within which actions must be brought against public authorities, cannot be prayed in aid in a question of interdict, because the Court can only give interdict against what is a continuing wrong. *Farquhar & Gill v. Magistrates of Aberdeen*, p. 1294.

Claim for compensation against Local Authority under Public Health Act, 1897—Application to Local Government Board for appointment of arbiter—Limitation of time for taking proceedings—Public Health (Scotland) Act, 1897, sec. 166—Public Authorities Protection Act, 1893, secs. 1, 3.

2. A veterinary surgeon, duly authorised, seized and carried away under sec. 43 of the Public Health Act, 1897, meat which appeared to him to be diseased, but which eventually did not prove to have been diseased. The owners of the meat claimed compensation from the local authority for the value of the meat, and presented an application to the Local Government Board, more than six months after the seizure of the meat, for the appointment of an arbiter to ascertain the compensation due. *Held* that the proceedings were timeously taken, in respect that this was not the case of an "action or prosecution" for a "wrong" in the sense of sec. 166 of the Public Health Act, which had to be brought within two months, nor of an "action, prosecution, or other proceeding" in the sense of sec. 1 of the Public Authorities Protection Act, which had to be brought within six months. *Held* further (*per* Lord Salvesen) that, in any event, an action, prosecution, or other proceeding on account of an act done under the Public Health (Scotland) Act, would fall within the proviso in sec. 3 of the Public Authorities Protection Act, so as to exclude the application of that statute. *Corporation of Glasgow v. Smithfield and Argentine Meat Co., Limited*, p. 364.

LIQUIDATE DAMAGES. See *Contract*, 6, 7.

LOAN. *Issue of redeemable stock by a municipality—"Redeemable"—Edinburgh Corporation Stock Act, 1894, sec. 5—Edinburgh Improvement and Tramways Act, 1896, sec. 83.*

The Corporation of Edinburgh, under powers conferred by Acts of Parliament, issued Corporation stock, the certificates of which bore that the holders were the proprietors of a certain value "of Edinburgh Corporation two and a half per cent Redeemable Stock, subject to the Acts of Parliament relating thereto . . . Redeemable at par after Whitsunday 1927." *Held*, on a construction of the certificate, together with the Acts which authorised, and the resolution of the Corporation which effected, the creation of the stock, that the Corporation were bound on the application of the holders to redeem the stock at par at Whitsunday 1927, and had not merely an option of so doing. *British Linen Bank v. Magistrates of Edinburgh*, p. 139.

LOCAL GOVERNMENT. *Issue of redeemable stock by a municipality—"Redeemable"—Edinburgh Corporation Stock Act, 1894, sec. 5—Edinburgh Improvement and Tramways Act, 1896, sec. 83.*

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LOCAL GOVERNMENT—*Continued.*

Corporation were bound on the application of the holders to redeem the stock at par at Whitsunday 1927, and had not merely an option of so doing. *British Linen Bank v. Magistrates of Edinburgh*, p. 139.

Rates and assessments—Exemptions—“Ground exclusively appropriated as burial ground”—Cemetery only partially occupied and earning profit—Rating Exemptions (Scotland) Act, 1874, sec. 1.

2. *Held* that the whole of a portion of ground belonging to a cemetery company fenced off and enclosed for burial purposes, was “exclusively appropriated as burial ground,” and accordingly exempted from assessments and rates under the Rating Exemptions (Scotland) Act, 1874, sec. 1, notwithstanding the facts (1) that the lairs into which it was divided were only in course of being sold and occupied, and (2) that the company derived a profit from the sale of lairs. *Wood v. Western Cemetery Co., Limited*, p. 1173.

Burgh—County—Extension of burgh boundaries—Inclusion of portion of county—Adjustment of liabilities by arbiter—Method of adjustment—Local Government (Scotland) Act, 1889, sec. 50—Burgh Police (Scotland) Act, 1903, sec. 96.

3. In an arbitration under sec. 50 of the Local Government (Scotland) Act, 1889, as applied by sec. 96 of the Burgh Police (Scotland) Act, 1903, between an extended burgh and the adjoining county the county maintained that the Sheriff was bound to make his adjustment of liabilities on the principle of apportionment according to the rateable values of the area taken into the burgh and the area retained by the county. *Held* that there was no one particular method of adjustment incumbent on the arbiter; and accordingly that he was entitled to choose his own method, with which the Court would not interfere unless it was clearly wrong. *Lanark County Council v. Magistrates of Motherwell*, p. 1251.

Burgh—County—Extension of burgh boundaries—Inclusion of portion of county—Adjustment of liabilities—“Property”—Claim by county for loss of prospective and contingent income—Local Government (Scotland) Act, 1889, sec. 50—Burgh Police (Scotland) Act, 1903, sec. 96.

4. A tramway company, authorised by Act of Parliament to lay tramways in a county, were bound, in every year in which their profits sufficed to provide a certain dividend, to pay the county £50 for every mile of tramway laid in the county. A portion of the county in which lines were authorised, but not laid, having been transferred to a burgh, *held* that the contingent right to payments from the tramway company was not “property” within the meaning of sec. 50 of the Local Government (Scotland) Act, 1889, to be taken into account in adjusting the financial liabilities of the burgh and county. *Lanark County Council v. Magistrates of Motherwell*, p. 1251.

See *Process*, 34.

MALICE. See *Reparation*, 2, 3, 8.

MARRIAGE-CONTRACT. *Construction—Death-duties—Incidence of duties—Obligation to “make up” the capital held by the marriage-contract trustees to a certain sum—Whether trustees entitled to receive capital sum free of death-duties.*

1. A father was a party to his son’s marriage-contract which provided that a sum of £30,000 should be vested in the trustees, to be made up as follows:—(1) by an immediate payment by the father of £20,000; (2) by the appointment of the son to a share of a fund liferented by the father, valued at the date of the contract at £6250, but whose actual value could not be ascertained until the termination of the liferent; and (3) by an obligation undertaken by the father binding his executors to pay to the trustees the sum of £3750, or

MARRIAGE-CONTRACT—Continued.

such other sum more or less as should “make up the sum of £30,000 to be received by the trustees.” *Held* that the father’s obligation did not bind his estate to make good the total sum of £30,000 free of all Government duties. *Dundas’s Trustees v. Dundas’s Trustees*, p. 375.

Antenuptial contract—Provisions in lieu of legitim—Power to revoke—Reserved power—Repugnancy.

2. A father by his marriage-contract settled on the children of the marriage or of any future marriage, equally or as he might appoint, the whole estate (subject to an annuity and certain liferents) then belonging to him or which might belong to him at his death, in satisfaction of their legitim, but reserved power to revoke or vary the provisions in their favour. *Held* that this reservation was not repugnant to the other provisions of the deed but was valid and effectual, and that the reserved power had been duly exercised by the father in his testamentary settlement, by which (after providing for certain annuities and a legacy) he bequeathed his whole estate to the children of the marriage in liferent and to their issue in fee. *Simpson’s Trustees v. Taylor*, p. 280.

See *Revenue*, 1—*Succession*, 4.

MASTER AND SERVANT. Unauthorised sale by servant—Liability of Master.

In the prosecution of a dairyman for selling, by the hand of his servant, milk which was not genuine, it was proved that the servant who sold the milk had no authority to do so, his duty being merely to deliver milk to his master’s customers. *Held* that, as the servant had exceeded his authority in selling the milk, there had been no sale by the accused; and that he must, therefore, be acquitted. *Lindsay v. Dempster*, (J.) p. 110.

See *Reparation*, 18, 19, 20—*Workmen’s Compensation Act*.

MESSENGER-AT-ARMS. See Diligence.**MINES AND MINERALS. “Freestone”—Whether freestone a mineral a question of fact—Railways Clauses Consolidation (Scotland) Act, 1845, sec. 70.**

1. Whether “freestone” is or is not a mineral within the meaning of sec. 70 of the *Railways Clauses Consolidation (Scotland) Act, 1845*, is always a question of fact to be determined in view of the particular circumstances of each case. *Caledonian Railway Co. v. Symington*, (H. L.) p. 9.

Oil shale.

2. *Held* that in 1818 oil shale was not included as a mineral in the vernacular of the mining world, the commercial world, and land-owners. *Marquis of Linlithgow and Young’s Paraffin Light and Mineral Oil Co., Limited, v. North British Railway Co.*, p. 1327.

Coal Mines Regulation Act, 1887—Regulations—Enforcement.

3. Opinion (per Lord Kinnear) that the *Coal Mines Regulation Act* does not place upon mineowners an absolute duty of seeing that statutory rules are observed, but that, if injury occurs through a breach of a rule, the onus is on the mineowners of proving that they have done all in their power to prevent such breach. *Black v. Fife Coal Co., Limited*, (H. L.) p. 33.

Duties on land values—Provisions as to minerals—Meaning of expression “minerals”—Felsite whinstone—Granite—Finance (1909-10) Act, 1910, secs. 20, 22, 24.

4. *Held* that all substances obtained from the crust of the earth, other than the surface soil, by mining, quarrying, or open working are minerals in the sense of the *Finance (1909-10) Act, 1910*, with the exception of those substances expressly excepted in the Act; and

MINES AND MINERALS—Continued.

accordingly that Felsite whinstone and granite, not being among the excepted substances, were minerals, and subject to mineral rights duty. *Anstruther's Trustees v. Inland Revenue*, p. 1165.

See *Compulsory Powers*, 3—*Justiciary Cases*, 8—*Valuation Acts*, 15.

MINOR AND PUPIL. *Action of damages by father as tutor and administrator for his pupil children—Necessity for separate conclusions for each child.* Held that a father, suing as administrator-in-law for his pupil children for damages for personal injuries suffered by them, must conclude for a separate sum for each child and not for a lump sum. *Gray v. Caledonian Railway Co.*, p. 339.

MORA.

Observations (per Lord Salvesen) on the elements necessary to support the plea of mora. *Lees's Trustees v. Dun*, p. 50.

MOTOR CAR. See *Justiciary Cases*, 9—*Reparation*, 13.

NEGLIGENCE. See *Reparation*.

NEWSPAPER. *Application to restrain publication of statements tending to prejudice course of justice.*

During a strike at Glasgow acts of violence were committed, in connection with which certain persons were apprehended and charged with having been part of a riotous mob which forced the Allan Line shed at Princes Dock. Prior to their trial the *Glasgow Herald* newspaper published a letter commenting on the occurrences, and calling on the magistrates to take steps to prevent their repetition. The letter contained this passage:—"Instances have occurred which clearly demonstrate the determination of the men to carry out their leaders' advice, notably that in which the Allan Line sheds at Princes Docks were rushed and the 'Sicilian' boarded, when a number of men were arrested, and subsequently remitted to the Sheriff." The accused persons presented a petition to the High Court, setting forth the letter, and craving the Court to prohibit the newspaper from publishing any statement relative to the acts with which the petitioners were charged, or anything prejudicial to their case. Held that, there being nothing in the letter complained of but a statement of facts already known to the public, it was not prejudicial to the petitioners' case; and petition refused. *Cowie v. George Outram & Co., Limited*, (J.) p. 14.

NOBILE OFFICIUM. *Trade Incorporation—Alteration of bye-laws—Application by sole surviving member of incorporation—Burgh Trading Act, 1846, sec. 3.*

Observed that a petition under the Burgh Trading Act, 1846, sec. 3, presented by a trade incorporation for the sanction of the Court to certain resolutions and proposed alterations on the bye-laws of the incorporation, was not an appeal to the *nobile officium* of the Court, but only to the exercise of its statutory jurisdiction. *Incorporation of Tailors of Edinburgh v. Muir's Trustee*, p. 603.

See *Trust*, 3.

NUISANCE. *Vibration caused by machinery—Industrial district.*

Held that vibration due to the working of a gas-engine, whereby the structure of the adjoining premises was injured and the comfort of their occupants affected, constituted a nuisance which might be restrained by interdict, notwithstanding that the premises were situated in an industrial district of Glasgow. *M'Ewen v. Steedman & M'Alister*, p. 156.

ONUS. See *Presumption*.

PARENT AND CHILD. *Presumption of legitimacy.*

1. *Observed* by the Lord President that the presumption of legitimacy applied only where persons were living more or less in the married state, and did not apply where the *de quo quæritur* was whether there was a marriage or not. Deans's Judicial Factor v. Deans, p. 441.

Bastard—Aliment—Custody—Death of mother—Claim for aliment by maternal grandmother—Denial of paternity coupled with offer to accept custody of the child.

2. B. gave birth to an illegitimate child and claimed aliment from F., whom she alleged to be the father. F. denied paternity, but offered to pay aliment, and did so for four years until B.'s death, when he offered to take charge of the child himself. The offer was refused by B.'s mother, with whom the child was living and continued to live, and who subsequently brought an action against F. for a finding that he was the father and for payment as aliment of the sums disbursed by her for its support since B.'s death. In his defences F. denied paternity, and renewed his offer to take charge of the child. *Held* that F.'s offer to take charge of the child, even though coupled with a denial of paternity, was a conclusive answer to the claim for aliment made by its grandmother, who stood in no legal relationship to it and was under no obligation to support it and had no right to its custody. Brown v. Ferguson, p. 22.

PARTNERSHIP. *Dissolution—Petition to Court—Expediency of procedure by petition—Partnership Act, 1890, sec. 35.*

1. Two partners of a firm presented a petition to the Junior Lord Ordinary for an order dissolving the firm in terms of sec. 35 of the Partnership Act, 1890, in which they averred that the remaining partner's conduct was calculated to affect prejudicially the carrying on of the business. Answers were lodged by the remaining partner. The Court, *holding* that procedure by petition, while competent, was, in the circumstances, inexpedient, in respect that the parties were at variance on matters requiring investigation by means of a proof which would be more suitably conducted in an ordinary action, *dismissed* the petition. Macnabs v. Macnab, p. 421.

Liabilities of partners—Partner of firm of law-agents acting as secretary of company—Misapplication of company's funds—Liability of firm—Money received "in the course of its business"—Partnership Act, 1890, sec. 11 (b).

2. A company brought an action against a firm of law-agents and H., one of the partners, for repayment of sums embezzled by C., the other partner, during a period in which he was secretary of the company, and paid by him temporarily into the firm's account. *Circumstances* in which the Court *assolized* the defenders, *holding* (1) that they were not liable under the Partnership Act, 1890, sec. 11 (b), in respect that the moneys had not been received by the firm "in the course of its business"; and (2) that they were not liable at common law, in respect that they had discharged the onus which lay on them of proving that the firm had not been gratuitously benefited by the payments into its bank account. New Mining and Exploring Syndicate, Limited, v. Chalmers & Hunter, p. 126.

PATENT. *Reduction—Patent affecting business of firm—Title and interest of individual partner to sue—Concurrence of Lord Advocate—Patents and Designs Act, 1907, sec. 94 (3).*

In an action for revocation of a patent relating to concrete, brought with the concurrence of the Lord Advocate, the pursuer averred that he was a civil engineer, and was a member of a firm doing a large business in reinforced concrete, and that "the pursuer's business" was in danger of being affected by the enforcement of the

PATENT—Continued.

defender's patent. The action was brought in the name of the pursuer as an individual and not of his firm. *Held* that the pursuer had a title and interest to sue in his own name. *Observed* that the concurrence of the Lord Advocate did not preclude the Court from considering the relevancy of the pursuer's averments. *Melville v. Cummings*, p. 1185.

PENALTY. *Recovery of statutory penalty—Procedure—Summary application—Plate (Scotland) Act, 1836, secs. 2, 18, and 22—Summary Jurisdiction (Scotland) Act, 1908, sec. 4.*

Proceedings for the recovery of penalties under the Plate (Scotland) Act, 1836, must be brought under the forms of the Summary Jurisdiction (Scotland) Act, 1908, and not in the form of an ordinary action in the Sheriff Court. *Glasgow Goldsmiths Company v. Mackenzie & Co.*, p. 992.

See *Contract*, 6, 7.

PERSONAL OBJECTION. *Building restrictions—Enforcement—Edinburgh Corporation Act, 1906, secs. 67 and 78.*

1. The Commissioners of Works, as managers of the Royal Botanic Gardens, Edinburgh (which are Crown property), applied to the Dean of Guild for warrant to erect the first wing of certain proposed buildings in the Gardens, the building line of which would encroach within 30 feet of the centre line of a public street. The plans lodged showed the completion of the buildings on the same building line extending further down the street. The Edinburgh Corporation offered no opposition, and the lining was granted and the first wing of the building was erected. Two years afterwards the Commissioners applied for warrant to complete the buildings by erecting the other wing in accordance with the original plans, and a lining was granted. The Corporation thereupon passed a resolution, in terms of section 67 of the Act, that no buildings should be erected within 30 feet of the centre of the street, and brought an action of interdict against the Commissioners. The Court *assolized* the defenders, the ground of Lord Johnston's opinion being that the Corporation, by permitting the first warrant to be granted and a portion of the buildings to be erected within the 30 foot space, were barred from objecting to the completion of the buildings on the same building line. *Magistrates of Edinburgh v. Lord Advocate*, p. 1085.

Negligence of original trustee—Action by assumed trustees—Alleged delay and contributory negligence of pursuers—Right to maintain action for behoof of beneficiaries.

2. Assumed trustees brought an action against the representatives of a deceased trustee for recovery of funds which they alleged had been lost to the trust-estate through his negligence. The defenders pleaded that the pursuers were barred by *mora*, and by the fact that they had themselves been guilty of negligence which had contributed to the loss. *Held* that, assuming the truth of the allegations against the pursuers, they were still entitled to prosecute the action for behoof of the beneficiaries whom they represented. *Lees's Trustees v. Dun*, p. 50.

PLEDGE. See *Right in Security*, 2.

POLICE FORCE. See *Reparation* 2.

POLICE OFFENCES. *Contravention of order regulating traffic—Burgh Police (Scotland) Act, 1892, sec. 385.*

Held that an "order," made by magistrates in pursuance of section 385 of the Burgh Police (Scotland) Act, 1892, by which omnibuses were forbidden to turn in certain streets of the burgh was invalid, in

POLICE OFFENCES—*Continued.*

respect that, as the regulation was intended to be permanent, it could be competently made only by bye-law. *Taylor v. Nicol*, (J.) p. 38.

POOR. *Relief*—"Able-bodied."

1. *Circumstances* in which a man, who had supported himself but had not earned, and deponed that he was not able to earn, enough to support his children also, was *held* to be able-bodied in a question as to the poor-law. *Observed* that a man who is able to support himself, but cannot support his children, is "able-bodied" within the meaning of the poor-law. *Observed* (*per* Lord Salvesen)—"I think it would be dangerous to hold that in determining whether a man is able-bodied within the meaning of the poor-law, regard should be had to anything but the physical (in which I include mental) condition of the man himself." *Old Machar Parish Council v. Aberdeen Parish Council*, p. 26.

Derivative settlement—Deserted children—Acquisition by father of new settlement during children's chargeability.

2. In 1905 four pupil children became chargeable (in respect of their father's refusal to support them) to the parish of Old Machar, where their father had then a settlement. In 1906 the father, who was able-bodied, left that parish and was not traced till 1909, when he was found in Aberdeen, where he had acquired a settlement. The children had in the meantime been supported by Old Machar, and that parish on discovering the father gave notice to Aberdeen of a claim of relief from the future maintenance of the children. *Held* that, owing to the location of the father as an able-bodied man with a settlement in Aberdeen, Old Machar ceased to be liable for the maintenance of the children from the date of the notice; that Aberdeen was bound to relieve Old Machar of the sums expended on the maintenance of the children after that date; and that it fell to Aberdeen to take such steps as they might think fit to make the father support his family. *Old Machar Parish Council v. Aberdeen Parish Council*, p. 26.

Pauper lunatic—Capacity to acquire settlement—Proof of insanity—Effect of certificate.

3. In an action between two parish councils to determine which was liable to support a female pauper who had been confined in a lunatic asylum on a certificate of insanity granted in 1908, the question depended upon whether, during the three years between 1903 (when she attained puberty) and 1906 she was mentally capable of acquiring a settlement in the parish in which she then resided. *Held* that, in determining the question of the pauper's mental capacity during these years, the certificate of insanity subsequently granted raised no legal presumption of incapacity at the earlier period, but was merely one among other items of evidence to be taken into consideration. *Stirling Parish Council v. Dunblane Parish Council*, p. 316.

Pauper lunatic—Action to determine liability for pauper lunatic—Competency of appeal to Court of Session—Lunacy (Scotland) Act, 1857, sec. 78.

4. *Held* that sec. 78 of the Lunacy (Scotland) Act, 1857 (which contains a clause making the Sheriff's decision final), only applies to the summary recovery of outlays with regard to pauper lunatics where there is no dispute as to the parties liable to reimburse these, and does not apply to actions brought to determine the liability of parishes *inter se* for the support of pauper lunatics, and accordingly does not prevent an appeal from the Sheriff to the Court of Session in such actions. *Stirling Parish Council v. Dunblane Parish Council*, p. 316.

See Process, 26.

POOR'S-ROLL. *Reporters equally divided in opinion—Appeal from Sheriff Court.*

1. Where the reporters on *probabilis causa* reported to the Court that they were equally divided in opinion as to the admission to the poor's-roll of an applicant who desired to prosecute an appeal against two adverse judgments in the Sheriff Court, the two advocates being in favour of, and the two law-agents against, the applicant's admission, the Court *refused* the application. *Walker v. Smith*, p. 1149.

Poverty—Circumstances warranting admission.

2. *Held* that a workman, who was earning 30s. a week and who was living apart from and was not supporting his family, was not entitled to be admitted to the poor's-roll for the purpose of defending an action of divorce. *Penn v. Penn*, p. 102.

PRESCRIPTION. *Positive Prescription—Habite Title—Title by Progress—Service—Competency of looking at prior writs to ascertain character of possession.*

In an action between a superior and his vassal, the latter asserted a proprietary right in a castle situated, as he alleged, on certain lands held by him, and founded his right on possession of the castle for the prescriptive period following on a decree of special service of the lands (in which the castle was not mentioned), with their parts and pertinents, recorded in 1880. *Held* that it was competent to look at the prior writs to ascertain the nature of the vassal's possession of the castle, and that, as these writs disclosed that the vassal's possession thereof was not as proprietor but as keeper for the superior, the service was not a *habite* title on which to found prescription; and claim for vassal *repelled*. *Observations* on the effect of a decree of service as the foundation for a prescriptive title. *Duke of Argyll v. Campbell*, p. 458.

PRESUMPTION. *Bills of Exchange—Bills of Exchange Act, 1882, secs. 46 (2) (e), 50 (2) (b).*

Observations as to the presumptions and the onus of proof with regard to waiver of the statutory requirements of the Bills of Exchange Act, 1882. *Mactavish's Judicial Factor v. Michael's Trustees*, p. 425.

See *Fishings—Ship*, 6—*Valuation Acts*, 11—*Workmen's Compensation Act*, 5, 17.

PROCESS. *Sisting of new pursuer—Beneficiary suing for debt due to executry estate—Executor sisted as pursuer—Conditions as to expenses—Consignation in lieu of caution—Act of Sederunt, 20th March 1907, sec. 2 (a).*

1. An action, in which it was sought to establish that a certain debt was due to the estate of a deceased intestate, was brought by one of the deceased's next of kin in his own name. The Lord Ordinary having dismissed the action on the ground that the pursuer had no title to sue, *circumstances* in which the Court *allowed* the executor of the deceased to be sisted as a pursuer in the action on payment by the original pursuer of the expenses already incurred, and on consignation by him of the sum of £200, in lieu of caution, in security of any expenses in which the executor might be found liable in the course of the proceedings; the Court intimating that the executor would, in the future, be entitled to apply to the Lord Ordinary, if necessary, for further indemnification. *Morrison v. Morrison's Executrix*, p. 892.

Tender—Conjoined actions at the instance of different pursuers—Duty of defender to apportion sum tendered.

2. Where separate actions for salvage services at the instance of two pursuers having conflicting interests had been brought against the same defender and had been conjoined, *opinion per curiam* that, if the defender desired to put in a tender in the conjoined actions, he should (following the English practice) be obliged to apportion the

PROCESS—*Continued.*

sum tendered between the pursuers. *Lindsey Steam Fishing Co., Limited, v. Actieselskabet Bonheur*, p. 1235.

Reclaiming—Printing documents for Inner House—Documents not in process.

3. It is the duty of the Clerks of Court in the Inner House to refuse to receive into process prints of any documents which are not already in process. If a party has failed to lodge a document on which he intended to found, he must move the Court for leave to lodge it. *Grierson v. Mitchell*, p. 173.

Reclaiming—Competency—Failure to box prints—Excusable cause—Conjoined actions—Record in one action only boxed—Judicature Act, 1825, sec. 18—A. S., 11th July 1828, sec. 77.

4. Objection was taken to the competency of a reclaiming note against an interlocutor of the Lord Ordinary, disposing of two conjoined actions, on the ground that the reclaimer had boxed copies of the record in one only of these actions. The Court (after consultation with the Judges of the Second Division) *repelled* the objection, *holding* that it was within the power of the Court to permit prints to be lodged if in their view it was from some excusable cause that they were not lodged at the proper time, and that in the circumstances of this case there was excusable cause, looking to the confusion between the two records brought about by the conjoining of the actions. *Henderson v. D. & W. Henderson*, p. 171.

Reclaiming—Competency—Boxing—Failure to print amendments allowed in Outer House—Judicature Act, 1825, sec. 18—A. S., 11th July 1828, sec. 77.

5. *Circumstances* in which a reclaiming note was allowed to be received when amendments on the record, allowed in the Outer House on the last day of the proof, had not been added to the copies of the record boxed to the Court. *Sharp's Trustee v. T. Y. Paterson & Co., Limited*, p. 972.

Reclaiming—Double reclaiming notes—Competency—Court of Session Act, 1868, sec. 52.

6. A party can competently present a reclaiming note after his opponent has already reclaimed. But it is a question for the Auditor to decide whether there was any proper reason for presenting a second reclaiming note, and, if there was not, it will be his duty to disallow the expenses of that note. *Observations* on the circumstances in which a second reclaiming note may properly be presented. *Fairgrieve v. Chalmers*, p. 118.

Reclaiming—Effect of reclaiming note in bringing prior interlocutor under review—Interlocutor importing appointment of proof—Finality—Court of Session Act, 1868, secs. 28, 52—Act of Sederunt, 10th March 1870, secs. 1 (3) and 2.

7. *Held* that a reclaiming note against the judgment of the Lord Ordinary, disposing of the cause, did not submit to review under sec. 52 of the Court of Session Act, 1868, a prior interlocutor appointing proof which had not been reclaimed against within six days, in respect that that interlocutor had become final under sec. 28 of that Act, and secs. 1 (3) and 2 of the Act of Sederunt, 10th March 1870. *Copeland v. Lord Wimborne*, p. 355.

Proof or jury trial—Dangerous machine—Construction of tramway car.

8. In an action of damages for personal injuries brought against a tramway company, the pursuer averred that, as a tramway car passed her, her dress was caught by a stay that projected beneath the car between the front and rear wheels, whereby she was thrown down, and run over and injured. She averred that the accident was due to the faulty construction of the car, in respect that there were no guards covering

PROCESS—*Continued.*

the space between the front and rear wheels. *Held* that there were no such intricacies in the construction of the tramway car as to render the case unsuitable for trial before a jury; and issue *allowed*. *Gibb v. Edinburgh and District Tramways Co., Limited*, p. 580.

Diligence for recovery of writs—Letter-books—Primary and secondary evidence.

9. In an action of suspension and interdict, the respondent obtained a diligence for recovery, *inter alia*, of letters written by the complainers or anyone on their behalf relating to certain matters on record, and "failing principals," for recovery of copies thereof. He subsequently applied for another diligence to recover, *inter alia*, the letter-books of the complainers' agents containing copies of letters relating to certain other specified matters. *Held* that as the respondent had not attempted to show that the principal letters were unavailable, he was not entitled, *hoc statu*, under the first diligence to recover the letter-books containing copies of letters written by the complainers' agents, or to obtain the second diligence. *Caledonian Railway Co. v. Symington*, p. 1033.

Diligence for recovery of writs—Action of damages for criminal charge made maliciously and without probable cause—Precognitions supplied to Crown officials.

10. In an action of damages in respect of a criminal charge, alleged to have been made maliciously and without probable cause, and to have been contained in certain documents including precognitions lodged by the defenders with the criminal authorities, the Court *granted* diligence at the instance of the pursuer for recovery of the precognitions, no objection to their production being stated for the Lord Advocate. *Mills v. Kelvin & James White, Limited*, p. 995.

Diligence for recovery of writs—Slender contained in newspaper report.

11. In an action of damages against newspaper proprietors for a slander contained in a report in their newspaper of a political meeting, the pursuer, who averred malice and founded on letters and paragraphs, reflecting on his conduct, published in previous issues of the newspaper as indicating malice, moved for a diligence to recover—(1) the manuscript notes or reports from which these paragraphs were printed; (2) all communications relating to the subject-matter of the paragraphs (a) passing between the defenders and their local correspondents, or (b) addressed to the defenders by members of the public; (3) (a) all notes of the proceedings of the meeting in question made by the defenders' reporters or correspondents, (b) all written reports of the meeting supplied to the defenders; and (4) all correspondence between the defenders and their local correspondents referring to the publication of the matters complained of. The Court, in consideration of the detailed averments of malice, *granted* the diligence. *Reid v. Johnston & Co.*, p. 187.

Deposition of witness to lie in retentis—Divorce—Pursuer going abroad—Pursuer's evidence and oath de calumnia taken on commission before case called.

12. The pursuer in an action of divorce, who was employed abroad but had returned to Scotland for the purpose of raising her action and had been admitted to the poor's-roll, presented a petition in which she stated that she was compelled to return to her employment before the summons could be called (which, owing to the fact that her husband resided in Australia, could not be done within three months), and craved the Court to appoint a commissioner to take her oath *de calumnia* and her evidence, her deposition to lie *in retentis* subject to the orders of the Court. The Court *granted* the prayer of the petition. *Anderson*, p. 1144.

PROCESS—Continued.

Jury Trial—Case sent to sittings—Postponement of trial—Grounds for postponement—Act of Sederunt, 19th November 1910, sec. 4.

13. Where one of the parties to a jury trial has objected to the trial proceeding at the sittings and the Lord Ordinary has repelled the objection and sent the case to the sittings, a postponement of the trial will not be granted unless strong grounds can be shown for interfering with the decision of the Lord Ordinary, or unless there has been a change of circumstances since the date of that decision. *Carey v. Carey*, p. 1325.

Conjunction of actions—Competing actions against same defender—Competency of conjoining actions—Method of conducting proof—Right of competing pursuers to cross-examine each other's witnesses.

14. Two shipowners brought separate actions against the same defender in respect of salvage services rendered to the defender's vessel. The claims of the two pursuers were mutually hostile. *Held* that the Lord Ordinary had rightly conjoined the actions, but his interlocutor varied by the addition of a declaration that (following the English practice) counsel for the one pursuer should have the right to cross-examine the witnesses for the other. *Lindsey Steam Fishing Co., Limited, v. Actieselskabet Bonheur*, p. 1235.

Action of damages laid alternatively at common law or under the Employers Liability Act—Necessity of discriminating between grounds of claim.

15. In an action concluding for damages at common law, or alternatively under the Employers Liability Act, 1880, *held* that the pursuer's averments, although they did not discriminate between the two grounds of claim, were relevant, in respect that they disclosed and gave notice of what was a good ground of claim either at common law or under the Act. *Campbell v. United Collieries, Limited*, p. 182.

Action of damages by father as tutor and administrator for his pupil children—Necessity for separate conclusions for each child.

16. *Held* that a father, suing as administrator-in-law for his pupil children for damages for personal injuries suffered by them, must conclude for a separate sum for each child and not for a lump sum. *Gray v. Caledonian Railway Co.*, p. 339.

Multiplepinding—Competency—Double distress.

17. A small-debt action of multiplepinding was brought in name of an insurance company by a creditor of a deceased policy holder, the fund *in medio* being the sum due under the policy, and the object of the action being to supersede the necessity of executry administration. *Held* that the multiplepinding was incompetent, there being no double distress. *Britannic Assurance Co., Limited, v. James Henderson, Limited*, (J.) p. 31.

Multiplepinding—Condescence of fund in medio—Real raiser's right of retention against claimant.

18. In an action of multiplepinding the pursuer and real raiser may state in a condescence of the fund *in medio*, made up after claimants have been ranked by a final interlocutor, any claim of compensation or retention which he has against a claimant who has been ranked and preferred to the whole or part of the fund. *Ramsay's Judicial Factor v. British Linen Bank*, p. 206.

Petition for dissolution of partnership—Expediency of procedure by petition—Partnership Act, 1890, sec. 35.

19. Two partners of a firm presented a petition to the Junior Lord Ordinary for an order dissolving the firm in terms of sec. 35 of the Partnership Act, 1890. Answers were lodged by the remaining partner. The Court, *holding* that procedure by petition, while competent, was, in the circumstances, inexpedient, in respect that the

PROCESS—*Continued.*

parties were at variance on matters requiring investigation by means of a proof, which would be more suitably conducted in an ordinary action, *dismissed* the petition. *Macnabs v. Macnab*, p. 421.

Special case—Method of stating questions of law.

20. *Observations per curiam* on the way in which questions of law should be stated in special cases. *Davidson's Trustees*, p. 693.

Special case—Competency—All parties interested not represented—Partial competency.

21. *Circumstances* in which *held* that a special case was competent in so far as it raised the question of a liferenter's right to immediate payment of the fee of the fund liferented, in respect that there were sufficient contradictors present; but incompetent in so far as it sought—in the event of the liferenter's claim being rejected—to determine the rights of parties in the fund on the termination of the liferent, in respect that the parties who might be interested could not be ascertained until that event happened, and so were not all necessarily represented in the case. *Scott's Trustees v. Bruce*, p. 105.

Special case—Competency—No real contention between the parties—Trust—Power to sell.

22. A special case, to which the parties were the trustees on a trust-estate and the beneficiaries interested in the estate, was brought to determine a question as to the trustees' power to sell certain heritable subjects, the trustees maintaining that they had no such power, the other parties maintaining that they had. All the parties, however, were agreed that a sale would be expedient. *Held* that, although there was no real contention between the parties, the special case was competent. *Mitchell Innes's Trustees v. Mitchell Innes*, p. 228.

Special case—Competency—Insane party—Curator ad litem—Curator bonis.

23. Where the curator *ad litem* to one of the parties to a special case represented to the Court that the party was insane, and submitted the question whether a curator bonis should not be appointed, the Court found it unnecessary to appoint a curator bonis, and, on the curator *ad litem* lodging a minute adopting the case on behalf of his ward, allowed the case to proceed. *Swan's Trustees v. Swan*, p. 273.

Appeal—Summary cause—Printing—Sheriff Courts (Scotland) Act, 1907, sec. 8.

24. In an appeal in a summary cause to the Court of Session under sec. 8 of the Sheriff Courts (Scotland) Act, 1907, only those portions of the process should be printed to which the Court is entitled to refer. *Observations* (per Lord Salvesen) as to the portions of the process to which the Court is entitled to refer in such an appeal, and *opinion* that, as the Sheriff's findings in fact are conclusive, the proof cannot be referred to. *Cranston v. Mallow & Lien*, p. 112.

Appeal—Competency—Value of cause—Action concluding for interdict and for £50 damages—Question of interdict exhausted prior to appeal—Sheriff Courts (Scotland) Act, 1907, sec. 28.

25. The pursuers in an action in the Sheriff Court sought to interdict the defenders from interfering with subjects of which the pursuers were tenants, and claimed the sum of £50 in respect of damages. Interim interdict was granted; but before judgment was pronounced on the merits the pursuers' tenancy of the subjects expired. The Sheriff-substitute accordingly recalled the interim interdict; but, on the pecuniary conclusion, found the defenders liable in the sum sued for. *Held* that, as all that now remained in the action was the pecuniary conclusion which was below the statutory limit, appeal to the Court of Session was incompetent. *David Allen & Sons Billposting, Limited, v. Dundee and District Billposting Co., Limited*, p. 970.

PROCESS—Continued.

Appeal—Competency—Value of cause—Continuing liability—Sheriff Courts (Scotland) Act, 1907, sec. 28.

26. An action was raised in the Sheriff Court by a parish that had maintained a person detained in a lunatic asylum against the parish. On her settlement for recovery of £17, 9s. 1d. expended on her maintenance, and for decree ordaining the defenders to free and relieve the pursuers of future expenditure. The only question raised in the action was whether, in the circumstances, the patient was a proper object of parochial relief. During the progress of the action the patient recovered and was discharged. *Held* that an appeal against the Sheriff's judgment was incompetent in respect that the sum concluded for did not exceed £50, and that there was no question of continuing liability which could exceed that amount. *Melrose Parish Council v. Hawick Parish Council*, p. 1029.

Appeal—Competency—Sentence in Sheriff Court for breach of interdict—Appeal to Court of Session.

27. A judgment of the Sheriff, imposing a sentence of fine or imprisonment in a petition and complaint for breach of an interdict granted in the Sheriff Court, can competently be appealed to the Court of Session. *Maclachlan v. Bruce*, p. 440.

Appeal—Competency—Action to determine liability for pauper lunatic—Lunacy (Scotland) Act, 1857, sec. 78.

28. *Held* that sec. 78 of the Lunacy (Scotland) Act, 1857 (which contains a clause making the Sheriff's decision final), only applies to the summary recovery of outlays with regard to pauper lunatics where there is no dispute as to the parties liable to reimburse these, and does not apply to actions brought to determine the liability of parishes *inter se* for the support of pauper lunatics, and accordingly does not prevent an appeal from the Sheriff to the Court of Session in such actions. *Stirling Parish Council v. Dunblane Parish Council*, p. 316.

Appeal—Competency—Appeal against order for formation of streets—Appeal on ground that appellant's property not in burgh—Burgh Police (Scotland) Act, 1892, sec. 339.

29. *Held* that the right of appeal, given by sec. 339 of the Burgh Police (Scotland) Act, 1892, to any person aggrieved by any order of the Magistrates made under the Act, is given upon the hypothesis that the property in respect of which the order is made is situated within the burgh, and accordingly that an appeal against an order to form a footway by a person whose ground of objection was that his property was not situated within the burgh was incompetent. *Christie v. Magistrates of Leven*, p. 678.

Appeal—Competency—Summary removing in Sheriff Court—Refusal of written answers—Discretion of Sheriff—Sheriff Courts (Scotland) Act, 1907, First Schedule, Rules 119, 121, 122.

30. In a summary removing in the Sheriff Court the allowance of written answers is a matter for the Sheriff's discretion, and, even where written answers are tendered, a Sheriff is entitled to refuse them and to dispose of the cause summarily, with the effect of excluding review. *Thomson v. Bent Colliery Co., Limited*, p. 242.

Stated case by Sheriff—Friendly Societies Act, 1896, sec. 68 (7)—Competency of stated case after judgment in inferior Court.

31. *Held* that a case stated under sec. 68 (7) of the Friendly Societies Act, 1896, for the opinion of the Court of Session on a question of law by the court or arbitrator to whom a dispute has been referred under the rules of a friendly society must be stated during the progress of the reference, and cannot be stated after the court or arbitrator has given judgment. *Smith v. Scottish Legal Life Assurance Society*, p. 611.

PROCESS—Continued.

Stated case by Sheriff—Housing, Town Planning, &c., Act, 1909, sec. 39
 (1) (a)—*Closing Order—Competency of stating case after judgment pronounced by the Sheriff.*

32. The Housing, Town Planning, &c., Act, 1909, allows any person aggrieved by a closing order to appeal to the Sheriff, and enacts (sec. 39) that the Sheriff may "at any stage of the proceedings on appeal" state a special case on a question of law for the opinion of the Court. *Held* that such a case must be stated during the progress of the appeal, and cannot be stated after the Sheriff has given judgment. *Johnston's Trustees v. Glasgow Corporation*, p. 300.

Stated case by Sheriff—Housing, Town Planning, &c., Act, 1909, sec. 39
 —*Order on Sheriff to state a case—Procedure.*

33. In an appeal to the Sheriff under the Housing, Town Planning, &c., Act, 1909, against a closing order, the Sheriff, who had allowed a proof, refused to state a case for the opinion of the Court of Session. The appellant thereupon presented a note to the Court under sec. 39 of the Act for an order on the Sheriff to state a case, and appended a list of the questions of law which he desired to have stated. The Court sustained the competency of the note; but, by consent of parties, without ordering the Sheriff to state a case, answered the questions of law in the note, and remitted to the Sheriff to give effect to these answers. *Kirkpatrick v. Town-Council of Maxwelltown*, p. 288.

Stated case by Sheriff—Extension of burgh boundaries—Adjustment of liabilities—Arbitration by Sheriff—Competency of stating case after findings and allowance of proof—Local Government (Scotland) Act, 1889, sec. 50 (3)—Burgh Police (Scotland) Act, 1903, sec. 96.

34. Objection having been taken to the competency of a special case stated by a Sheriff when adjusting the financial relations between an extended burgh and county on the ground that, not having been stated until after the Sheriff had made certain findings and allowed a proof, it was not timeous, *held* that the case was timeously presented in respect that, no final judgment having been pronounced, it had been duly presented during the progress of the proceedings. *Lanark County Council v. Magistrates of Motherwell*, p. 1251.

Small-debt appeal—Review—Small Debt (Scotland) Act, 1837, sec. 31—Wilful deviation from statute which prevents substantial justice being done.

35. A small-debt action of multiplepoinding was brought in name of an insurance company by a creditor of a deceased policy-holder, the fund *in medio* being the sum due under the policy. The summons did not comply with section 10 of the Small Debt (Scotland) Act, 1837, which enacts that the "common debtors" shall be cited, the only parties cited being creditors of the deceased. The representatives of the deceased had not confirmed, and were not cited. The Sheriff-substitute, although aware of the fact that the statute had not been complied with, repelled an objection to the competency of the action based on that fact, and pronounced a decree of ranking and payment. *Held* that an appeal against this interlocutor was competent, as the Sheriff-substitute's intentional disregard of the statute was a deviation therefrom, which had taken place "wilfully," and which also prevented substantial justice from being done in respect that a decree in the action would not afford the insurance company complete exoneration. *Britannic Assurance Co., Limited, v. James Henderson, Limited*, (J.) p. 31.

Workmen's Compensation Act, 1906—Appeal by stated case—Appellant allowed to lodge a condescendence.

36. In an appeal by stated case from the decision of an arbitrator dis-

PROCESS—*Continued.*

missing an application for compensation in respect that the workman had failed relevantly to aver the happening of an accident, the Court permitted the workman to submit a condensation of the specific facts on which he relied, and thereafter *allowed* it to be received, and remitted to the arbitrator to proceed. *M'Laughlin v. Wemyss Coal Co., Limited*, p. 250.

Workmen's Compensation Act, 1906—Appeal by stated case—Order for transmission of process—A. S., 26th June 1907, sec. 17 (f).

37. In an appeal by stated case the Court remitted to the arbitrator for a statement of the facts on which he had based his judgment. The arbitrator having reported, the appellant stated that the evidence in the arbitration had been recorded in shorthand, and moved the Court, in respect of the unsatisfactory nature of the arbitrator's report, to order the process to be transmitted to the Court of Session. The respondent made no objection, and the Court *ordered* the process to be transmitted. *Millar v. Refuge Assurance Co., Limited*, p. 37.

Workmen's Compensation Act, 1906—Appeal by stated case—Remit to arbitrator to reconsider his award.

38. In an appeal by way of stated case in an arbitration under the Workmen's Compensation Act, the Court, without answering the questions put, *remitted* the case to the arbitrator to reconsider his award in light of the opinions expressed by the House of Lords in a judgment pronounced after the date of his decision. *Weir v. North British Railway Co.*, p. 1073.

Workmen's Compensation Act, 1906, sec. 1 (4)—Unsuccessful action of damages against employer—Application for assessment of compensation.

39. *Observations (per the Lord President)* on the character of the proceedings and the scope of the inquiry that will follow on the granting of a motion for the assessment of compensation under the Workmen's Compensation Act, 1906, made by a workman who has been unsuccessful in an action for damages. *Slavin v. Train & Taylor*, p. 754.

Removal to Court of Session for jury trial—Competency—Action of damages by father of deceased workman against son's employers—Workmen's Compensation Act, 1906, secs. 13 and 14—Sheriff Courts (Scotland) Act, 1907, secs. 30 and 52.

40. In an action in the Sheriff Court at the instance of a father, whose son had been accidentally killed, against his son's employers for damages under the Employers Liability Act or alternatively at common law, the pursuer averred that the deceased paid his earnings to his parents for the maintenance of the house. The cause having, on the motion of the pursuer, been remitted to the Court of Session for jury trial under section 30 of the Sheriff Courts Act, 1907, the defenders objected to the competency of the remission on the ground that the pursuer, being a dependant of the deceased, or at anyrate his legal personal representative, was, in virtue of section 13 of the Workmen's Compensation Act, 1906, a "workman" in the sense of that Act, and that accordingly, by section 14 of that Act, his right to have the cause removed to the Court of Session for jury trial was excluded. Held that although it might be that the right of one in the position of the pursuer to have the cause remitted to the Court of Session had been taken away by sections 13 and 14 of the Workmen's Compensation Act, 1906, the right, if taken away, had been restored by sections 30 and 52 of the Sheriff Courts (Scotland) Act, 1907. *Lawrie v. Banknock Coal Co., Limited*, (H. L.) p. 20.

Remission of cause from Sheriff Court—Action of separation and aliment remitted to Court of Session—Power of Court to send it back to Sheriff—Sheriff Courts (Scotland) Act, 1907, sec. 5.

41. A Sheriff having, *ex proprio motu*, remitted an action of separation

PROCESS—*Continued.*

and aliment to the Court of Session, the Court *remitted* it back to the Sheriff, *holding* (1) that the section does not prevent the Court from dealing with a remitted cause as it thinks fit, and in particular sending it back to the Sheriff; and (2) that as the record did not disclose any special difficulty in the case, the Sheriff was not justified in declining to exercise his jurisdiction. *Dunbar v. Dunbar*, p. 19.

See *Arrestment—Company*, 3—*Title to sue and defend—Workmen's Compensation Act*, 30.

PROOF. *Hearsay—Admissibility—Statements made by deceased person at date when his evidence would not have been admissible.*

1. *Opinion reserved* by the Lord President as to the accuracy of the dicta of Lord Watson and Lord Blackburn in the *Dysart Peerage* case, (1881) 6 App. Cas. 489, to the effect that if a person at the time of an alleged marriage would not have been a competent witness to speak to the fact of the marriage, it was not possible afterwards to take his hearsay testimony, although, in the meantime, the law had been altered and he had become a competent witness. *Deans's Judicial Factor v. Deans*, p. 441.

Public and official documents—Regulations for the Territorial Force—Extent to which Regulations prove themselves—Necessity of lodging copy in process—The Army Act, 1881 (as amended by the Annual Army Acts to 1911), sec. 163—The Territorial and Reserve Forces Act, 1907, sec. 26 (2).

2. *Held* that the Regulations for the Territorial Force and for County Associations may be proved by production of a copy purporting to be printed by a Government printer without other evidence; but that the Court does not take judicial notice of the Regulations, and, therefore, that a prosecutor desiring to found on them must lodge a copy in process before closing his case. *Todd v. Anderson*, (J.) p. 105.

See *Process*, 9-12, 14—*Reparation*, 6, 7.

PROPERTY. *Building restriction—Exemption of the Crown from statutory restriction—Edinburgh Corporation Act, 1906, secs. 67 and 78.*

1. *Observations* on the extent to which the Crown is bound by building restrictions contained in local Acts. *Magistrates of Edinburgh v. Lord Advocate*, p. 1085.

Building restriction—"Villas or dwelling-houses"—Legality of erecting tenements.

2. In a disposition of a plot of building ground the disponent prohibited the erection of houses or buildings "other than villas or dwelling-houses with offices and such enclosing walls as my said disponent may think proper to build." *Held* that the erection of a tenement of dwelling-houses was not prohibited. *Bainbridge v. Campbell*, p. 92.

Building restriction—Title and interest of singular successor in dominant tenement to enforce.

3. A proprietor disposed to two purchasers two adjacent portions of his property, the dispositions containing mutual restrictions *altius non tollendi* imposed on each portion for the benefit of the other. On one of the purchasers proposing to erect buildings on his portion beyond the specified height, the singular successor of the purchaser of the other portion, which was situated *ex adverso* of the proposed buildings, and was separated therefrom by a distance of 60 feet, objected to the erection. He did not aver that any specific injury would be done to his property if the buildings were erected beyond the specified height. *Held* that the dispositions had created a servitude *altius non tollendi*, which the singular successor in the dominant tenement had both a title and, in virtue of the propinquity

PROPERTY—Continued.

of his property, an interest to enforce. *Proprietors of Royal Exchange Buildings, Glasgow, Limited, v. Cotton*, p. 1151.

Building restriction—Superior and Vassal—Buildings to be “occupied as self-contained lodgings.”

4. Certain ground, with buildings thereon, was feued out by a feu-contract which, besides a general nuisance clause against the carrying on of certain specified trades, contained a clause declaring that the feuar “and his foresaids shall be bound and obliged to maintain and uphold in good repair in all time coming on the said three steadings of ground the three lodgings now erected thereon which shall be occupied as self-contained lodgings.” All the restrictions, prohibitions, &c., in the feu-contract were declared to be real burdens affecting the ground and buildings. The proprietor of one of these self-contained houses proposed to convert the basement floor into premises to be occupied for a cabinet-making business (which was not a trade prohibited by the general nuisance clause), by gutting it, and severing it from the upper floors, and giving it a separate entrance. In an action at the instance of the superiors to interdict him from doing so, *held* that the proposed occupation of the premises was in contravention of the restrictions in the feu-contract, and interdict *granted* against such occupation. *Montgomerie-Fleming’s Trustees v. Kennedy*, p. 1307.

Common interest—Pro indiviso ownership—Division of property.

5. A division of heritable subjects proposed by one of three *pro indiviso* proprietors was resisted by the others on the ground that a bond, which had been granted by the co-proprietors, existed over the subjects, and that the bondholders refused to allocate it in the event of division. The bond contained a provision that £500 should be paid annually towards reduction of the principal sum, and that so long as the interest and this annual payment were made the bond should not be called up or repaid for five years, of which only one had expired. *Held* that the pursuer was entitled to insist in her common law right to a division, in respect that it did not appear that a division would sacrifice the interests of any of the parties, and that, in entering into the bond, the co-proprietors could not be held to have bound themselves to refrain from resorting to a division during its subsistence. *Morrison v. Kirk*, p. 44.

See *Local Government*, 4—*Nuisance—Title to Heritage*.

PUBLIC HEALTH. Food and Drugs—Sale of milk deficient in fat—Unauthorised sale by servant—Liability of master.

1. In the prosecution of a dairyman for selling, by the hand of his servant, milk which was not genuine, it was proved that the servant who sold the milk had no authority to do so, his duty being merely to deliver milk to his master’s customers. *Held* that, as the servant had exceeded his authority in selling the milk, there had been no sale by the accused; and that he must, therefore, be acquitted. *Lindsay v. Dempster*, (J.) p. 110.

Food and Drugs—Genuineness of milk—Milk sold in condition yielded by cow—Deficiency of fat due to method of feeding—Sale of Food and Drugs Act, 1875, sec. 6—Sale of Milk Regulations, 1901, (1) and (2).

2. In a complaint the offence charged was that of selling “sweet milk which was not of the nature, substance, and quality of sweet milk, the article demanded by the purchaser, in respect that” it did not contain the percentage of milk fat and solids required by the Regulations, “contrary to the Sale of Food and Drugs Act, 1875, section 6, and to the Sale of Milk Regulations, 1901.” It was proved that the milk did not contain the percentage of milk fat and solids

PUBLIC HEALTH—*Continued.*

required by the Regulations; that it had not been tampered with or adulterated, but had been sold in the same condition as yielded by the cows; and that the deficiency of milk fat and solids was due to the method of feeding, which had been purposely adopted to produce quantity of milk irrespective of quality. *Held* that the milk was "genuine" and that the accused was not guilty of the offence charged. *Scott v. Jack*, (J.) p. 87.

Possession and sale of food—Seizure of meat erroneously alleged to be unsound—Claim for compensation—Liability of Local Authority—Public Health (Scotland) Act, 1897, secs. 43, 164, 166.

- 3. A veterinary surgeon, approved by the local authority under the Public Health Act, 1897, seized and carried away, under sec. 43 of that Act, meat which appeared to him to be diseased, but which eventually did not prove to have been diseased. The owners of the meat claimed compensation from the local authority for the value of the meat. *Held* that the local authority were not relieved from liability by virtue of sec. 166 of the Public Health Act, the claim not being a claim of damages for an "irregularity" committed by one of their officers in the sense of that section, but a claim for compensation under sec. 164. *Corporation of Glasgow v. Smithfield and Argentine Meat Co., Limited*, p. 364.

Claim for compensation against Local Authority under Public Health Act, 1897—Application to Local Government Board for appointment of arbiter—Limitation of time for taking proceedings—Public Health (Scotland) Act, 1897, sec. 166—Public Authorities Protection Act, 1893, secs. 1, 3.

4. A veterinary surgeon, under sec. 43 of the Public Health Act, 1897, seized and carried away meat which appeared to him to be diseased, but which eventually did not prove to have been diseased. The owners of the meat claimed compensation from the local authority for the value of the meat, and presented an application to the Local Government Board, more than six months after the seizure of the meat, for the appointment of an arbiter to ascertain the compensation due. *Held* that the proceedings were timeously taken, in respect that this was not the case of an "action or prosecution" for a "wrong" in the sense of sec. 166 of the Public Health Act, which had to be brought within two months, nor of an "action, prosecution, or other proceeding" in the sense of sec. 1 of the Public Authorities Protection Act, which had to be brought within six months. *Corporation of Glasgow v. Smithfield and Argentine Meat Co., Limited*, p. 364.

Building regulations—Glasgow Building Regulations Act, 1900, secs. 4 and 38—"Enclosed space of back ground" in "hollow square."

5. The Glasgow Building Regulations Act, 1900, sec. 38, prohibits the erection of buildings other than those of a specified class "within the enclosed space of back ground in any hollow square," and by sec. 4 defines a hollow square as including certain geometrical figures enclosed by buildings and streets. *Circumstances* in which the site of proposed buildings was *held* to be within the enclosed space of back ground in a hollow square. *Porter v. Nisbet*, p. 400.

Building regulations—Glasgow Building Regulations Act, 1900, sec. 38—Discretion of Dean of Guild to sanction erection of buildings within enclosed space of back ground in hollow square.

6. *Held* that the effect of sec. 38 of the Glasgow Building Regulations Act, 1900, which prohibits the erection of buildings within the enclosed space of back ground in a hollow square, and which contains a proviso that, where certain requirements are satisfied, the Dean of Guild may grant decree for the erection, was to put it entirely within

PUBLIC HEALTH—Continued.

the discretion of the Dean of Guild, in the case of buildings which satisfied these requirements, to grant or to refuse the lining. *Porter v. Nisbet*, p. 400.

Building regulations—Glasgow Building Regulations Act, 1900, sec. 38—Statutory prohibition of certain class of buildings—Title of individual objector to plead statutory prohibition.

7. *Held* that neighbouring proprietors who objected to a petition for lining on the ground that the proposed buildings contravened statutory restrictions, had no title to enforce these restrictions in respect that they had no interest, as their property would not be injuriously affected by the proposed buildings. *Maguire v. Smith's Trustees*, p. 410.

Building regulations—Housing, Town Planning, &c., Act, 1909, sec. 43—“Back-to-back houses.”

8. In a petition to a Dean of Guild Court for warrant to erect a block of three-storied tenements,—each storey containing four dwelling-houses, two to the front and two to the back—it appeared from the plans produced that in the centre of each tenement there was a space or well containing a common stair which was roofed over, and that all the houses in each tenement entered from this well. It also appeared that in each storey the division between the front and back houses was formed in the centre by the walls enclosing the well, and on each side of the well by an unbroken wall common to the front and back houses. *Held* that the proposed houses were “back-to-back houses” within the meaning of sec. 43 of the Housing, Town Planning, &c., Act, 1909, which prohibits the erection of such houses as dwellings for the working classes; and that warrant for their erection fell to be refused. *Murrayfield Real Estate Co., Limited, v. Magistrates of Edinburgh*, p. 217.

Building regulations—Housing, Town Planning, &c., Act, 1909, secs. 15 and 17—Closing order—Dwelling-house—Tenement—“Dangerous or injurious to health”—Procedure—Form of order—Warning to owner.

9. A local authority, acting under section 17 (2) of the Housing, Town Planning, &c., Act, 1909, issued, upon a representation by their medical officer, a closing order with regard to a tenement of dwelling-houses, as being, in the words of the statute, a “dwelling-house . . . in a state so dangerous or injurious to health as to be unfit for human habitation.” *Held* (1) that a tenement of dwelling-houses was a “dwelling-house” in the sense of the Act, and that a closing order was competently issued with regard to a whole tenement generally; (2) that a closing order was competently issued without specifying as between two alternatives, whether the house was “dangerous” or “injurious to health”; (3) that, the closing order being in a statutory form which did not require a statement of the grounds upon which it was issued, non-disclosure of these grounds in the order did not render it inept; (4) that the closing order was competently issued without previous exercise by the local authority of their statutory powers under section 15 to require remedial works, and without affording to the owner of the house an opportunity of being heard. *Kirkpatrick v. Town-Council of Maxwelltown*, p. 288.

See *Sheriff*, 10-12.

PUBLIC-HOUSE. See *Valuation Acts*, 10, 13, 16.

PUBLIC POLICY. *Condition in settlement that heirs succeeding to peerage shall denude—Validity.*

A clause in a *mortis causa* disposition of heritage providing that in case any of the heirs succeeding thereunder to certain lands should succeed to a peerage, they should be bound to denude themselves of all right

PUBLIC POLICY—*Continued.*

in the lands *held* not void as against public policy. *Earl of Caithness v. Sinclair*, p. 79.

RAILWAY. *Negligence in relation to public—Sparks from engine—Improper construction—Negligent use.*

1. In an action of damages against a railway company the pursuer averred that the driver of an engine, while passing a platform, put on steam carelessly, unnecessarily, and unskilfully, in such volume that large quantities of live cinders and soot were driven from the funnel and injured the bystanders. He also averred that the defenders or their servants were in fault in not having the funnel properly cleaned and in not having a cage at the mouth. *Averments* which were *held* not to disclose a relevant case of improper construction, but to disclose a relevant case of improper use, of the engine. *Gray v. Caledonian Railway Co.*, p. 339.

Carriage of goods at reduced rates—Liability excluded except for “wilful misconduct”—Breach of regulations—Failure of railway servants to gauge load.

2. A railway company contracted to convey the plant of a switchback railway at a special reduced rate, one of the conditions of the contract being that the proprietor of the goods should relieve the company of all liability except for damage arising from the “wilful misconduct” of the company’s servants. One of the company’s regulations directed that all loads must be gauged “when there is any reason to doubt that they are not within the dimensions” specified for the lines over which they have to travel. The stationmaster at the station of departure did not gauge the load, but merely judged the height of it with his eye and concluded that it did not exceed the dimensions. In this, however, he was mistaken, and part of the load, in the course of transit, came in contact with the smoke-board of a bridge beneath which the train was passing, and was damaged. *Held* that the damage was due to “wilful misconduct” of the station-master, for which the company was liable. *Bastable v. North British Railway Co.*, p. 555.

See *Burgh*, 10, 11—*Compulsory Powers*, 1—*Reparation*, 16.

RATES AND ASSESSMENTS. See *Burgh*, 1, 2—*Local Government*, 2—*Title to sue and defend*, 6, 7—*Valuation Acts*, 3.

RECONVENTION. See *Jurisdiction*, 1.

REDUCTION. See *Fraud*, 1, 2.

RENT. See *Contract*, 1—*Sale*, 6.

REPARATION. *Premises let for specific business—Business interfered with by operations carried on by landlord on adjoining premises.*

1. The top flat of an urban tenement was let to a tenant for the purposes of a photographic business. During the tenancy the proprietor of the tenement carried out alterations upon the lower flats which necessitated extensive building operations, and these caused structural and other damage in the top flat and interference with and detriment to the tenant’s business. *Held* that, while the landlord was admittedly bound to restore the structural damage done to the tenant’s premises, he was also liable in damages (1) for injury done to the tenant’s furniture and materials; (2) for injury to his business during the work of restoration; and (3) for injury to his business during the landlord’s building operations, but only in so far as this was due to physical and tangible injury to the premises (as from vibration or dust), and not where it was immaterial or temporary (as from noise or occasional obstruction to the access). *Huber v. Ross*, p. 898.

REPARATION—*Continued.*

Wrongous Apprehension—Police-Constable—Privilege—Issue—Whether malice and want of probable cause to be put in issue.

2. In an action of damages for wrongful apprehension, directed against two police-constables who had apprehended the pursuer without a warrant, the Court *held* that, in the circumstances of the case, it was unnecessary to insert malice and want of probable cause in the issue, in respect that the pursuer's averments disclosed a case of such wrongful and unreasonable conduct on the part of the defenders that their actings could not be regarded as privileged. *Harvey v. Sturgeon*, p. 974.

Malicious prosecution—Private prosecutor—Want of probable cause—Slander—Privilege—Sufficiency of averments of malice.

3. The pursuer, a wholesale bottler, received a letter from the solicitors of the defenders, a firm of brewers, stating that certain stout, which had been sold by him as their stout, had proved on analysis to be of lower original gravity than the stout manufactured by them, owing to adulteration by the pursuer. The pursuer having repudiated the charge, the defenders, with the concurrence of the Procurator-fiscal, prosecuted him for an offence against the Merchandise Marks Act, 1887. In the trial which followed the pursuer was acquitted. In an action of damages for slander and malicious prosecution, founded on the letter and prosecution respectively, the pursuer averred that the defenders had acted maliciously, recklessly, and without making a sufficient investigation into the facts of the case; that the tests applied by them to the stout in question had been inadequate; and that they had failed to allow him an opportunity of checking their analysis of it. *Held* (1) that the pursuer was not entitled to an issue of malicious prosecution, as the defenders were privileged in their action and there were no facts set forth from which malice and want of probable cause could be inferred; and (2) that he was not entitled to an issue on the letter, as it merely led up to, and formed a step in, the prosecution. *Chalmers v. Barclay, Perkins, & Co., Limited*, p. 521.

Slander—Innuendo—Failure to aver facts and circumstances supporting innuendo.

4. In an action of damages for slander the pursuer founded on a sentence taken from a letter written by the defender, and innuendoed it as charging him with a fraudulent attempt to obtain money. In his record he did not state any facts and circumstances to substantiate the innuendo, nor did he quote any part of the letter except the single sentence complained of. The Court *refused* an issue on the ground (1) that the sentence complained of was not *prima facie* slanderous, and (2) that the pursuer was not entitled to an opportunity of proving facts and circumstances which would give to that sentence a slanderous meaning without specifically averring them, and without producing the rest of the letter. *Smith v. Walker*, p. 224.

Slander—Slander of a class—Title of individuals to sue—Innuendo—Province of jury.

5. A newspaper published an article on Ireland stating that in Queenstown instructions were issued by the Roman Catholic religious authorities that all Protestant shop assistants should be discharged, and that a shopkeeper who had refused so to act had had his shop proclaimed and had been forced to close it. An action was brought by the Roman Catholic Bishop at Queenstown and six of his clergy (who averred that they were the Roman Catholic religious authorities referred to), in which they, suing as individuals, sought to recover separate sums of damages on account of the accusations in

REPARATION—Continued.

the article. The article was innuendoed as charging the pursuers with abusing their religious influence to procure the indiscriminate dismissal of Protestant shop assistants, and with ruining a shop-keeper's business. *Held* (1) that the pursuers were entitled to sue for damages as individuals; (2) that it was for the jury to determine whether they or any of them were the Roman Catholic religious authorities referred to; and (3) that the article could bear the slanderous meaning put upon it. *Browne v. Thomson & Co.*, p. 359.

Slander—Slander uttered in foreign language—Proof—Innuendo.

6. Where the words complained of in an action of slander have been uttered in a foreign language, not only must they be set forth on record as spoken in that language, but their English equivalent must be set forth in the same way as an innuendo is set forth, and the pursuer must prove (first) that the words were actually spoken, and (second) that their English equivalent is that which he avers. *Bernhardt v. Abrahams*, p. 748.

Slander—Proof—Innuendo—Innuendo not proved by witnesses.

7. The pursuer in an action of slander put in issue a private letter, which he innuendoed as accusing him of dishonesty and which he alleged had been shown by the defender to three persons. The Court set aside a verdict of a jury for the pursuer, and ordered a new trial, on the ground that the innuendo had not been put to any of these persons, and that none of them had testified that he considered that the letter contained an accusation of dishonesty. *Bernhardt v. Abrahams*, p. 748.

Slander—Trade Slander—Representation that person is unworthy of commercial credit—Privilege—Malice—Trade Protection Society.

8. A local association of traders issued to its members a list of the names and addresses of certain persons in the district. The list bore no title and contained no comment, but it was admittedly compiled from the "black lists." A person brought an action of damages for slander against the association, in which he averred that the list was known in the district as the "black list," and that the defenders by inserting his name in it had represented that he was unworthy of business credit. The Court *held* (1) that the publication of the pursuer's name was defamatory; but (2) that the defenders were privileged; and, as facts inferring malice were not averred, *dismissed* the action. *Barr v. Musselburgh Merchants Association*, p. 174.

Negligence—Explosion of naphtha vapour in private yard—Failure to specify cause.

9. A boy, seven years of age, was killed by the explosion of a barrel containing naphtha vapour, which was standing on a lorry in a ship-building yard. The Court *dismissed* an action of damages by the boy's father against the owners of the yard as being in the circumstances irrelevant, in respect that the pursuer had failed to specify in what way the defenders were responsible for the proximate cause of the accident, namely, the ignition of the vapour. *Howie v. Ailsa Shipbuilding Co., Limited*, p. 1225.

Negligence—Faulty construction of tramway car.

10. In an action of damages for personal injuries brought against a tramway company, the pursuer averred that when she was standing close to a passing tramway car her dress was caught by a stay that projected beneath the car between the front and rear wheels, whereby she was thrown down, and run over and injured. She averred that the accident was due to the faulty construction of the car, in respect that there were no guards covering the space between the front and rear wheels, a precaution that was reasonable and practicable, and almost universally adopted by other car systems. *Held* that the

REPARATION—*Continued.*

pursuer's averments disclosed a relevant case of faulty construction. *Gibb v. Edinburgh and District Tramways Co., Limited*, p. 580.

Negligence—Accident caused by defective footway—Disused railway embankment in burgh area frequented by public—Responsibility of magistrates—Burgh Police (Scotland) Act, 1892, sec. 4 (31)—Burgh Police (Scotland) Act, 1903, sec. 104 (2) (c).

11. In an action against the Magistrates of a burgh the pursuer claimed damages for personal injuries resulting from a fall sustained by him at a place within the area of the burgh, which he described as a "promenade" and a public thoroughfare within the jurisdiction and under the control of the defenders. He averred that the defenders had neglected a duty of keeping the place in a condition of safety for the public. The place in question was an embankment situated between a public railway and the seashore; it belonged to a private owner, and with his tacit consent it was frequented by the public, for whose convenience the Magistrates had provided seats. *Held* that the place in question being neither a street in the ordinary sense of the term, nor a public street or public footpath within the meaning of the Burgh Police Acts, the defenders were under no obligation to keep it in a safe condition; and defenders *assolzie'd*. *Taylor v. Magistrates of Saltcoats*, p. 880.

Negligence—Accident caused by defective pavement—Opening in pavement covered by metal disc—Liability of proprietor of disc—Liability of road authority—Aberdeen Police and Water-Works Act, 1862, secs. 307, 323, and 344—Aberdeen Municipality Extension Act, 1871, sec. 143.

12. A woman, while walking on the foot-pavement of a public street placed her foot on a metal disc in the pavement covering an opening into a cellar, with the result that the disc tilted and her leg was injured. The tilting was due to the worn condition of the bevel in the flagstone of the pavement on which the disc rested. The disc was the property of P. & W., and the opening which it covered led into their cellar. Under certain local Acts P. & W. were bound to keep the covering in repair, but the pavement was vested in the Town-Council, and could not be altered without their consent. *Held* (1) that the Town-Council, being bound to keep the pavement in a safe condition for the public, and having failed to do so, were liable; but (2) that P. & W. were not liable as they could not interfere with the pavement. *Laing v. Paull & Williamsons*, p. 196.

Negligence—Collision of vehicles—Side road entering main road—Duties of drivers on side road and main road respectively.

13. While it is the duty of vehicles approaching a main road from a side road to give way to vehicles on the main road, this rule does not absolve vehicles on the main road from the duty of approaching the entrance to the side road with caution. *Robertson v. Wilson*, p. 1276.

Negligence—Flooding of agricultural land in burgh—Action against magistrates as drainage and road authority.

14. The tenant of a market garden on the estate of Craigentenny, which was annexed to the burgh of Edinburgh by the Edinburgh Corporation Act, 1900, brought an action against the Magistrates of Edinburgh (a) as the drainage authority (b) as the road authority, for damages caused to his garden by the overflowing of the Craigentenny burn. *Circumstances* in which the Court *assolzie'd* the defenders. *Hanley v. Magistrates of Edinburgh*, p. 1199.

Negligence—Sparks from engine—Improper construction—Negligent use.

15. In an action of damages against a railway company the pursuer averred that the driver of the engine of a train, while passing a platform, put on steam carelessly, unnecessarily, and unskilfully, in

REPARATION—Continued.

such volume that large quantities of live cinders and soot were driven from the funnel and injured the bystanders. He also averred that the defenders or their servants were in fault in not having the funnel properly cleaned, and in not having a cage at its mouth. *Averments which were held not to disclose a relevant case of improper construction, but to disclose a relevant case of improper use, of the engine.* *Gray v. Caledonian Railway Co., p. 339.*

Negligence—Railway—Private dock—Shunting operations inside dock—Duty to close dock gates or give warning.

16. In a dock owned by a railway company three lines of rails connecting the quays with the main railway system crossed the road leading into the dock on the level at a point inside and opposite the dock gate. A seaman entered the dock by the gate, which was open, and attempted to pass between two wagons which were standing on the crossing. While he was doing so the wagons were shunted, and he was caught between the buffers and injured. *Held* that there was no duty on the railway company either to shut the gate or to give warning before beginning to shunt the wagons. *Clark v. North British Railway Co., p. 1.*

Negligence—Carriage of goods—"Wilful misconduct"—Overloaded wagon—Breach of regulations—Failure of railway servants to gauge load.

17. A railway company contracted to convey the plant of a switchback railway at a special reduced rate, one of the conditions of the contract being that the proprietor of the goods should relieve the company of all liability except for damage arising from the "wilful misconduct" of the company's servants. One of the company's regulations directed that all loads must be gauged "when there is any reason to doubt that they are not within the dimensions" specified for the lines over which they have to travel. The station-master at the station of departure did not gauge the load, but merely judged the height of it with his eye and concluded that it did not exceed the dimensions. In this, however, he was mistaken, and part of the load, in the course of transit, came in contact with the smoke-board of a bridge beneath which the train was passing, and was damaged. *Held* that the damage was due to "wilful misconduct" of the station-master, for which the company was liable. The legal meaning of "wilful misconduct" considered. *Bastable v. North British Railway Co., p. 555.*

Negligence—Master and Servant—Management of mine—Responsibilities of owners—Competency of officials—Breach of statutory duty—Common employment—Coal Mines Regulation Act, 1887, sec. 49.

18. An action of damages at common law or under the *Employers Liability Act, 1880*, was brought against the owners of a pit by the representatives of a miner who had lost his life through inhaling carbon-monoxide gas. The managers and fireman were possessed of the qualifications and experience usually required of persons holding these offices, but were unfamiliar with the indications of this gas, which is of rare occurrence in mines. Although such indications were present they did not detect them, and consequently failed to comply with the rules imposed by the *Coal Mines Regulation Act, 1887*, as to inspecting and reporting and withdrawing workmen when dangerous gas is present. The defenders, who admitted that the accident was due to the breach of these rules on the part of their managers and fireman, maintained that, so far as the action was laid at common law, they were not liable. *Held* that the defenders could not plead common employment but were liable at common law, in respect that (as it was proved that they had failed to secure that the persons in charge of the mine were competent to deal with the dangers arising from the presence of poisonous gas), they had been guilty of a

REPARATION—Continued.

breach of the duty imposed on them of taking all practicable steps to secure observance of the statutory rules. Black v. Fife Coal Co., Limited, (H. L.) p. 33.

Negligence—Master and Servant—Common Law—Employers Liability Act, 1880—Casual danger—Danger emerging in course of work.

19. A father brought an action of damages at common law and alternatively under the Employers Liability Act, in respect of his son's death, against a firm of shipbuilders in whose employment his son was killed. He averred that his son was employed on the deck of a vessel in course of construction to pick up from the deck and throw over the side the parings of red-hot rivets which fell from riveters who were working above; that in the performance of this duty he had to run quickly from place to place; and that in so doing he slipped, fell from the deck (which was unfenced), and was killed. He further averred that the footing on the deck was uncertain, and that on the occasion in question it had been rendered slippery by a recent shower of rain; that a reasonable and usual precaution for the safety of workmen was to erect a temporary fence at a place of this kind; and that the defenders and their foreman had known of the danger to which the workmen were exposed and had negligently failed to take this precaution. The Court, holding that the danger averred was a casual danger emerging in course of the work, *dismissed* the action as laid at common law as irrelevant, but allowed an issue under the Employers Liability Act. *M'Millan v. Barclay, Curle, & Co., Limited, p. 263.*

Negligence—Master and Servant—Action laid alternatively at common law or under the Employers Liability Act—Pleadings—Necessity of discriminating between grounds of claim.

20. In an action brought in the Sheriff Court by a father against a colliery company, concluding for damages at common law or alternatively under the Employers Liability Act, 1880, in respect of the death of his son, who was killed while in the employment of the defenders, the pursuer averred a defective condition of the defenders' works, but did not discriminate between the two grounds of claim. *Held* that the pursuer's averments were relevant, in respect that they disclosed and gave notice of what was a good ground of claim either at common law or under the Act. *Campbell v. United Collieries, Limited, p. 182.*

Negligence—Ship—Damage to ship in course of discharge—Liability of charterers—Negligence of stevedores engaged and paid, but not controlled, by charterers.

21. In an action brought by the owners against the charterers of a ship for damages in respect of injury received by the ship during the discharge of the cargo, the pursuers averred that the defenders were liable, in respect that they had employed and paid the stevedores and the owners of a crane engaged in the discharge, by whose negligence the injury was caused. *Held* that, as it was not averred that the defenders had undertaken the control of the discharge of the cargo, the pursuers had failed to set forth a relevant case; and action *dismissed*. *Ballantyne & Co. v. Paton & Hendry, p. 246.*

Negligence—Public Hospital—Unskilful treatment of patient—Responsibility of governing body—Contract.

22. Apart from special contract the managers of a public hospital are not responsible to the patients whom they receive (whether paying or non-paying) for unskilful or negligent medical treatment, provided they have exercised due care in the selection of a competent staff. *Circumstances* in which a special contract was held not sufficiently averred. *Foote v. Directors of Greenock Hospital, p. 69.*

REPARATION—*Continued.**Contributory negligence—Disclosure in pursuer's pleadings.*

23. A pursuer in an action of damages in respect of the death of his son, who was killed while working in a coal-pit, averred that the lad, his lamp having become extinguished, continued to advance towards the place of his work on the face, and in doing so stepped on an unfenced piece of machinery in motion, and sustained the injuries from which he died. Averments which were *held* not to disclose such a clear case of contributory negligence as to disentitle the pursuer to a proof. *Campbell v. United Collieries, Limited*, p. 183.

See *Minor and Pupil*.

REVENUE. *Settlement estate-duty—Incidence—Obligation by father to pay sum to his son's marriage-contract trustees—Marriage-contract fund settled—Succession—Parties liable for settlement estate-duty—Finance Act, 1894, sec. 5 (1)—Finance Act, 1896, sec. 19 (1).*

1. *Held* that when a father becomes a party to the marriage-settlement of a child, and covenants to pay at his death a certain sum to the marriage-contract trustees, the settlement estate-duty on that sum falls to be borne by the marriage-contract trustees, and not by the father's executors. *Dundas' Trustees v. Dundas' Trustees*, p. 375.

Income-tax—Trade "exercised within the United Kingdom"—Income-Tax Act, 1853, sec. 2, Sched. D.

2. A firm of manufacturers of yarns in Belgium employed as agents for the sale of their yarns in the United Kingdom a firm of yarn merchants and commission agents in Glasgow. The agents submitted the offers of intending purchasers to the Belgian firm for approval, and, after approval, entered into contracts on their behalf. The goods were consigned to the agents, by whom they were invoiced to the customers, and by whom payment was received and accounts discharged on behalf of the Belgian firm. Monthly account sales and quarterly statements of expenses and commission were rendered by the agents to the firm. *Held* that the Belgian firm exercised a trade within the United Kingdom in the sense of sec. 2, Schedule D, of the Income-Tax Act, 1853. *Macpherson & Co. v. Inland Revenue*, p. 1315.

Income-tax—Profits of trade—Deductions—Interest payable on short loans—Income-Tax Act, 1842, sec. 100, Schedule D, First Case.

3. A financial and investment company obtained from bankers in New York sums on temporary and fluctuating loan for periods not exceeding six months in order to pay for securities purchased by it. In stating its profit for the purpose of income-tax the company claimed to deduct the interest paid on these loans, but the Commissioners, being of opinion that the sums borrowed were utilised as additional capital, disallowed the deduction. *Held* that the company were entitled to make the deduction, in respect that the sums borrowed were not "capital" within the meaning of the Income-Tax Acts, and the interest was in fact money paid for the hire of the instrument of the company's trade, and as such fell to be treated like any other similar outlay. *Scottish North American Trust, Limited, v. Inland Revenue*, (H. L.) p. 26.

Income-tax—Interest on foreign investments—Sums "received in Great Britain in the current year"—Interest reinvested abroad in purchase of bonds—Bonds transmitted to this country—Sale of bonds in this country in a subsequent year—Sum realised from sale—Income-Tax Act, 1842, sec. 100, Sched. D, Case IV.

4. The interest derived in 1907 from the American investments of a Scottish insurance company was reinvested in America in bearer bonds, and the bonds were transmitted to this country in the same year. The bonds were afterwards sold, and the proceeds of the sale

REVENUE—Continued.

were received at the head office in August and October 1908. *Held* that the sums realised on the sale of the bonds being sums "received in Great Britain" in respect of interest on foreign securities within the meaning of sec. 100 of the Income-Tax Act, 1842, were chargeable with income-tax for the year in which the proceeds of the sales were received, although the interest had in fact been earned prior to that year. *Scottish Provident Institution v. Inland Revenue*, p. 452.

Income-tax—Deductions for wear and tear—Unexhausted deductions—Purchase of old company by new company—Right of new company to unexhausted deductions—Finance Act, 1907, sec. 26 (3).

5. A new company having purchased as a going concern the business of an old company was assessed for income-tax on the average profits of the old company for the three years preceding the purchase. The amount of deductions for wear and tear to which the old company was entitled during these three years had not been given effect to in full, owing to the fact that they exceeded the amount of the taxable income of the old company during that time. *Held* that the new company was entitled to deduct from its taxable income the balance of the deductions allowable to the old company. *Scottish Shire Line, Limited, v. Inland Revenue*, p. 1108.

Super-tax—Deductions—Farming losses—Losses not claimed as deductions from income-tax—Deductions not claimed within six months—Finance (1909-10) Act, 1910, sec. 66 (2)—Customs and Inland Revenue Act, 1890, sec. 23 (1).

6. *Held* that a taxpayer, in making a return of his income of the previous year for the purposes of the super-tax, was entitled to claim as deductions losses sustained in husbandry, although these losses had not been claimed as deductions from his income-tax, and although his claim was not made within six months after the year of assessment. *Hill v. Inland Revenue*, p. 1246.

Corporation duty—Exemptions—Funds applied to charitable purposes—Customs and Inland Revenue Act, 1885, sec. 11.

7. The Grand Lodge of Freemasons in Scotland held and administered by means of committees three benevolent and annuity funds, which were kept separate from the general funds of the body and were appropriated entirely to benevolent purposes. These funds were derived from grants given by Grand Lodge, from contributions by members of Grand Lodge, from a proportion of the fees for intrants paid by daughter lodges, and from voluntary donations and subscriptions by lodges and by individuals. The funds were administered for the relief of distress among freemasons and their relatives and dependants; the relief given being entirely within the discretion of the committees, and no one having any legal right to participate in the benefits of the funds. *Held* that the funds were not benefit or provident funds, but were appropriated to charitable purposes within the meaning of sec. 11 of the Inland Revenue Act, 1885, and were accordingly exempt from corporation duty. *Grand Lodge of Freemasons v. Inland Revenue*, p. 1064.

Duties on land values—Valuation—"Assessable site value"—Minus value—Finance (1909-10) Act, 1910, sec. 25 (4).

8. *Held* that under sec. 25 (4) of the Finance (1909-10) Act, 1910, the "assessable site value" of land can never be a minus quantity. *Herbert's Trustees v. Inland Revenue*, p. 948.

Duties on land values—Provisions as to minerals—Meaning of expression "minerals"—Felsite whinstone—Granite—Finance (1909-10) Act, 1910, secs. 20, 22, 24.

9. *Held* that all substances obtained from the crust of the earth, other than the surface soil, by mining, quarrying, or open working are

REVENUE—Continued.

minerals in the sense of the Finance (1909-10) Act, 1910, with the exception of those substances expressly excepted in the Act; and accordingly that Felsite whinstone and granite, not being among the excepted substances, were minerals, and subject to mineral rights duty. *Anstruther's Trustees v. Inland Revenue*, and *Paton v. Inland Revenue*, p. 1165.

RIGHT IN SECURITY. *Bond and disposition in security—Creditor in possession by consent of insolvent debtor—Power to grant lease—Agreement between proprietor and tenant affecting the subjects—Rights and liabilities of bondholder—Heritable Securities (Scotland) Act, 1894, sec. 6.*

1. In 1908 a company disposed certain heritable subjects to a bank in security for an overdraft, for which three of its directors were made personally liable. In May 1909 the company granted a five years' lease of a shop, forming part of the subjects, to an auctioneer, and in July, in respect of a payment by him of a small sum down, undertook by letter not to let, during the currency of the lease, an adjoining shop, also forming part of the subjects, to any person carrying on an auctioneer's business. In 1910, the company being unable to repay the overdraft, payment was made by the directors, who got from the bank an assignation of the bond, and intimated to the company that they intended to enter into possession of the subjects and collect the rents through certain factors. The company thereafter passed a resolution that it should be left to these factors to collect the rents for behoof of the assignees, and notified the tenants to that effect. In 1911 the factors let the adjoining shop for a year to another auctioneer for the purposes of his business. In an action in which the tenant under the earlier lease sought to interdict the assignees from granting the later lease, the Court *refused* interdict, *holding* (1) that the company's undertaking was not binding upon the bank, the original bondholder, and therefore was not binding on the bank's assignees; (2) that the latter were in the position of heritable creditors in possession, and as such were entitled to grant the lease in question. *Mackenzie v. Imlay's Trustees*, p. 685.

Pledge—Transfer of Property—Delivery-Order—Appropriation of goods—Sale—Reduction—Holder for value and in good faith.

2. A, by means of fraudulent misrepresentations as to his solvency, induced the owner of a cargo of timber to sell it to him. He accepted bills for the price, and in return received the bill of lading blank endorsed. The timber, on delivery, was stored with a firm of timber measurers subject to A's orders. A borrowed money from certain lenders (one of whom was aware that A was in great financial difficulties), and in security therefor he granted to the lenders delivery-orders for certain parcels of the timber. Shortly afterwards A became bankrupt. The sale, on the ground of A's fraud, was subsequently reduced at the instance of the unpaid vendor, who claimed the whole of the timber as being still his property. Claims were also made by the holders of the delivery-orders to the portions of timber covered by these orders. The First Division held (1) that the holders of the delivery-orders had obtained them for value and in good faith; (2) that the timber transferred by the delivery-orders had been sufficiently identified and appropriated to the transferees; and (3) that consequently the holders of the delivery-orders had acquired a valid title to the timber good against the unpaid vendor. In an appeal the House affirmed that judgment, with a variation as to a small portion of the timber, consisting of 300 logs, which the House held, on the evidence, had not been sufficiently identified and appropriated to the transferees. *Price & Pierce, Limited, v. Bank of Scotland*, (H. L.) p. 19.

See *Company, l—Ship*, 1.

ROAD. See *Burgh*, 6—*Justiciary Cases*, 11—*Reparation*, 12, 13.

SALE. *Hire-purchase agreement—Character of instalments—Appropriation of instalments as between capital and interest.*

1. An agreement for the hire-purchase of certain furniture had endorsed on it an inventory of the furniture hired with cash prices annexed, the summation of which amounted to £7543. The agreement stipulated for payment by the hirer of annual sums of varying amount, the total of which was £8649; and further provided that the hirer might at any time become the purchaser of the furniture "by payment in cash of the hereon endorsed price, under deduction of the whole sums previously paid by the hirer to the owners." The hirer, who had in the course of several years paid in terms of the agreement sums amounting *in cumulo* to £4966, desiring to become the purchaser of the furniture, tendered to the owners the sum of £2577, being the difference between the sums so paid and £7543, the "endorsed price." On a construction of the agreement, *held* that the expression "whole sums previously paid" must refer to the portion of the sums paid attributable to capital, to the exclusion of the portion attributable to interest; and, accordingly, that the purchaser was not entitled to become the purchaser of the furniture on payment of the sum tendered. *Taylor v. Wylie & Lochhead, Limited*, p. 978.

Sale under warranty—Horse—Rejection.

2. A horse was sold with a warranty that it was a good worker and sound in wind, and the purchasers bargained that they should have a week's trial. *Held* that the contract was one of sale under warranty and not one of sale on approbation, and accordingly that the purchasers were entitled to reject the horse within the week if it was disconform to the warranty, but not otherwise. *Cranston v. Mallow & Lien*, p. 112.

Rescission—Error as to substance of articles sold—Modern imitations of antique furniture.

3. A dealer in modern and antique furniture sold to a customer ten ribbon-backed chairs, which he described in a receipt for part payment of the price as a "set of antique mahogany chairs," but which proved not to be genuine antiques, but to be modern imitations. The price stipulated was a fair price for the articles actually sold. The seller gave no history of the chairs or guarantee that they were antique, but he made certain representations, *held* not to be fraudulent, which induced the buyer to believe that he was buying a set of old chairs. *Circumstances where held* that there had been such misrepresentation as to the substance of the articles sold as to entitle the buyer to rescind the contract. *Edgar v. Hector*, p. 348.

Sale of moveables—Transference of property—Sale of growing timber—Sale of Goods Act, 1893, secs. 17, 18, and 62.

4. The heir in possession of an entailed estate entered into a contract, constituted by offer and acceptance, with a firm of wood merchants for the sale to them of certain lots of standing timber on the estate, under the condition that the purchasers should themselves cut down and remove the timber, half the price to be paid within six days of the acceptance and the remainder when half the timber was cut, and the timber to be at the purchasers' risk from the date of acceptance. The heir died before all the timber was cut. *Held*, in a question between the purchasers and the succeeding heir that—even assuming the growing timber to be "goods" in the sense of sec. 62 of the Sale of Goods Act—the property therein had not passed in virtue of the provisions of that Act, in respect that this was not a contract for the immediate sale of timber in a deliverable state, but

SALE—Continued.

was merely a personal contract to allow the purchaser to cut and remove the timber. *Morison v. A. & D. F. Lockhart*, p. 1017.

Sale of heritage—Disposition—Prior articles of sale.

5. Articles of sale for the sale of a heritable estate contained certain conditions as to the rights of the purchaser and the seller respectively in the rents. A sale was effected in terms of the articles, and was followed by a disposition which contained an assignation of rents in the statutory form. *Held* that the rights of parties in the rents were regulated by the terms of the disposition to the exclusion of the conditions contained in the articles of sale. *Butter v. Foster*, p. 1218.

Sale of heritage—Assignation of rents—Legal and conventional terms—Pastoral farm—Mansion-house and shootings—Titles to Land Consolidation (Scotland) Act, 1868, sec. 8, Sched. B. No. 1.

6. A landed estate, consisting of a mansion-house and shootings and farms, was sold with entry at Martinmas 1910, and the disposition contained an assignation of rents in the statutory form. A hill or sheep farm on the estate had been let in 1895 on a lease which was still current. The lease provided for entry at Whitsunday 1895 as to the houses, yards, hill pasture, and natural grass, and also provided for payment of the rent at two terms in the year, beginning the first term's payment at Whitsunday 1896. The mansion-house and shootings had been let for the year 1910, the rent being payable one-half on 1st January 1910 and the other half on 1st July 1910. Questions having arisen between the purchaser and the seller as to the apportionment between them of the rents, *held* (1) with regard to the farm—that the rent conventionally payable at Martinmas 1911 was legally due at Martinmas 1910 for the crop up to that date, and so fell to the seller. *Held* (2) with regard to the mansion-house and shootings—that the rent must be regarded as running *de die in diem*, and, accordingly, that the seller must pay to the purchaser the portion of the half year's rent, received on 1st July 1910, that effeired to the period from 11th November to 31st December 1910. *Butter v. Foster*, p. 1218.

See *Justiciary Cases*, 15-17—*Right in Security*, 2.

SERVICE OF HEIRS. Prescription.

Observations on the effect of a decree of service as the foundation for a prescriptive title. *Duke of Argyll v. Campbell*, p. 458.

SERVITUDE. *Altius non tollendi*—Title and interest of singular successor in dominant tenement to enforce.

A proprietor disposed to two purchasers two adjacent portions of his property, the dispositions containing mutual restrictions *altius non tollendi* imposed on each portion for the benefit of the other. On one of the purchasers proposing to erect buildings on his portion beyond the specified height, the singular successor of the purchaser of the other portion, which was situated *ex adverso* of the proposed buildings, and was separated therefrom by a distance of 60 feet, objected to the erection. He did not aver that any specific injury would be done to his property if the buildings were erected beyond the specified height. *Held* that the dispositions had created a servitude *altius non tollendi*, which the singular successor in the dominant tenement had both a title and, in virtue of the propinquity of his property, an interest to enforce. *Proprietors of Royal Exchange Buildings, Glasgow, Limited, v. Cotton*, p. 1151.

SET OFF. See *Compensation*.

SETTLEMENT ESTATE-DUTY. See *Revenue*, 1.

SHERIFF. Jurisdiction—Furthcoming—Arrestee subject to the jurisdiction—Whether jurisdiction must be founded against common debtor—Sheriff Courts (Scotland) Act, 1907, sec. 6, subsec. (g).

1. *Held*, in construing sec. 6, subsec. (g) of the Sheriff Courts (Scotland) Act, 1907, that an action of furthcoming may competently proceed in the Sheriff Court if the arrestee is subject to the jurisdiction, without the necessity of founding jurisdiction against the common debtor. *Observations* as to the necessity of intimating to the common debtor that decree of furthcoming is being asked for. *Leggat Brothers v. Gray*, p. 230.

Defences—Documents challengeable ope exceptionis—"Deed or writing"—Decree of Court—Sheriff Courts (Scotland) Act, 1907, First Schedule, Rule 50.

2. *Held* that a decree of Court pronounced *in foro* was not "a deed or writing" in the sense of rule 50 of the First Schedule to the Sheriff Courts (Scotland) Act, 1907, and accordingly could not be objected to *ope exceptionis* in a Sheriff Court action. *Leggat Brothers v. Gray*, p. 230.

Expenses—Debate Fee—Attendance Fee—Act of Sederunt, 10th April 1908, General Regulations VI., and Table of Fees, cap. 1, 12 (1), and 15 (2).

3. Expenses were awarded as between agent and client in an action which had been debated before the Sheriff-substitute and Sheriff for eleven and twenty-three hours respectively. The successful party in moving for the allowance of higher debate fees asked, as an alternative, that he should be found entitled to an attendance fee at ten shillings per hour, which would have amounted to more than the higher debate fees asked for. *Held* that the alternative proposal could not be entertained. *Reid v. North Isles District Committee of County Council of Orkney*, p. 627.

Expenses—Skilled witnesses—Certification—Time for application—Act of Sederunt, 10th April 1908, Table of Fees, cap. X. 5 (b).

4. A successful respondent in an appeal from the Sheriff to the Court of Session to whom expenses were awarded, *held* not to be entitled to include therein charges for the services of skilled witnesses in a proof before the Sheriff-substitute not certified by him, on the ground that the motion for certification, not having been made to the judge who heard the case and within the time allowed by the Act of Sederunt, could not be entertained in the Court of Session. *Reid v. North Isles District Committee of County Council of Orkney*, p. 627.

Expenses—Counsel—Higher Debate Fee—Certification—Time for application—Act of Sederunt, 10th April 1908, General Regulations VI., and Table of Fees, cap. 1, 16.

5. A motion for a higher debate fee or for the sanction of counsel should be made to the Judge who heard the cause; and, although it is not incompetent to delay the motion until the case is before the Sheriff on appeal or before the Court of Session, in such circumstances it will only be granted if it is shown, not only that the application is well founded, but also that there is very good reason why the motion has not been made before. *Reid v. North Isles District Committee of County Council of Orkney*, p. 627.

Expenses—Taxation as between agent and client—Application of provisions of Act of Sederunt, 10th April 1908—Public Authorities Protection Act, 1893, sec. 1 (b).

6. In a Sheriff Court action against a public authority the defenders were successful, and, in terms of sec. 1 (b) of the Public Authorities Protection Act, were awarded expenses to be taxed as between agent and client. *Held* that, as the provisions of the Act of Sederunt, 10th April 1908, regulating fees in the Sheriff Court, applied to

SHERIFF—Continued.

taxation as between agent and client as well as to taxation as between party and party, the defenders could not recover charges for the employment of skilled witnesses which had not been certified by the Sheriff as required by the Act of Sederunt. *Reid v. North Isles District Committee of County Council of Orkney*, p. 627.

Recovery of statutory penalty—Summary application—Plate (Scotland) Act, 1836, secs. 2, 18, and 22—Summary Jurisdiction (Scotland) Act, 1908, sec. 4.

7. Proceedings for the recovery of penalties under the Plate (Scotland) Act, 1836, must be brought under the forms of the Summary Jurisdiction (Scotland) Act, 1908, and not in the form of an ordinary action in the Sheriff Court. *Glasgow Goldsmiths Company v. Mackenzie & Co.*, p. 992.

Action of separation and aliment—Cause remitted to Court of Session—Power of Court to send it back to Sheriff—Sheriff Courts (Scotland) Act, 1907, sec. 5.

8. A Sheriff having, *ex proprio motu*, remitted an action of separation and aliment to the Court of Session under sec. 5 of the Sheriff Courts (Scotland) Act, 1907, the Court remitted it back to the Sheriff, holding (1) that the section does not prevent the Court from dealing with a remitted cause as it thinks fit, and in particular sending it back to the Sheriff; and (2) that as the record did not disclose any special difficulty in the case, the Sheriff was not justified in declining to exercise his jurisdiction. *Dunbar v. Dunbar*, p. 19.

Arbitration—Summary application to appoint arbiter—Preliminary question involving a proof—Competency of summary procedure—Arbitration (Scotland) Act, 1894—Sheriff Courts (Scotland) Act, 1907, sec. 3 (p).

9. One of the parties to a contract for the sale of oil, under which disputes were referred to "arbitration in Glasgow," presented a petition in the Sheriff Court, under the Arbitration (Scotland) Act, 1894, for the appointment of an arbiter, and averred that the expression quoted imported into the reference clause a custom of the oil trade in Glasgow by which each party nominated an arbiter, and the arbiters an oversman. The other party to the contract maintained that the reference to arbitration was not sufficiently specific to come within the scope of the Arbitration Act, 1894. The proceedings were conducted in the Sheriff Court under the rules prescribed by the Sheriff Courts (Scotland) Act, 1907, for summary applications, and the Sheriff, having allowed a proof of the custom averred, granted leave to appeal against his interlocutor. *Held* that, in view of the questions which had arisen, the case was inappropriate for summary procedure; and cause remitted to the Sheriff to be transferred to the ordinary Court. *United Creameries Co., Limited, v. Boyd & Co.*, p. 617.

Appeal against closing order under Housing, Town Planning, &c., Act, 1909, sec. 39 (1) (a)—Refusal of Sheriff to order condescendence and answers—Act of Sederunt, 4th November 1910—Public Health.

10. An appeal having been taken to the Sheriff from a closing order issued by a local authority under the Housing, Town Planning, &c., Act, 1909, upon a report by their Medical Officer of Health, which was communicated to the owner of the house to be closed, the Sheriff refused to order a condescendence and answers, and allowed the appellant a proof. *Held* that such an appeal is a summary application and not a summary cause, and accordingly that the Sheriff is judge of the procedure to be followed; and that, as the owner had sufficient notice in the report of the Medical Officer of the case he had to meet, the Sheriff had acted rightly in refusing to order a

SHERIFF—Continued.

condescendence. *Kirkpatrick v. Town-Council of Maxwelltown*, p. 288.

Appeal against closing order under the Housing, Town Planning, &c., Act, 1909, sec. 39—Order to state a case—Procedure—Public Health.

11. In an appeal to the Sheriff under the Housing, Town Planning, &c., Act, 1909, against a closing order, the Sheriff, who had allowed a proof, refused to state a case for the opinion of the Court of Session. The appellant thereupon presented a note to the Court under sec. 39 of the Act for an order on the Sheriff to state a case, and appended a list of the questions of law which he desired to have stated. The Court sustained the competency of the note; but, by consent of parties, without ordering the Sheriff to state a case, answered the questions of law in the note, and remitted to the Sheriff to give effect to these answers. *Kirkpatrick v. Town-Council of Maxwelltown*, p. 288.

Appeal against closing order under the Housing, Town Planning, &c., Act, 1909, sec. 39 (1) (a)—Statement of special case for opinion of Court of Session—Competency of stating case after judgment pronounced by the Sheriff—Public Health.

12. The Housing, Town Planning, &c., Act, 1909, allows any person aggrieved by a closing order to appeal to the Sheriff, and enacts (sec. 39) that the Sheriff may "at any stage of the proceedings on appeal" state a special case on a question of law for the opinion of the Court. *Held* that such a case must be stated during the progress of the appeal, and cannot be stated after the Sheriff has given judgment. *Johnston's Trustees v. Glasgow Corporation*, p. 300.

Summary removing—Refusal of written answers—Discretion—Sheriff Courts (Scotland) Act, 1907, First Schedule, Rules 119, 121, 122.

13. In a summary removing the allowance of written answers is a matter for the Sheriff's discretion, and, even where written answers are tendered, a Sheriff is entitled to refuse them and to dispose of the cause summarily, with the effect of excluding review. *Thomson v. Bent Colliery Co., Limited*, p. 242.

Small-debt procedure—Review—Small Debt (Scotland) Act, 1837, sec. 31—Wilful deviation from statute which prevents substantial justice.

14. A small-debt action of multiplepounding was brought in name of an insurance company by a creditor of a deceased policy-holder, the fund *in medio* being the sum due under the policy. The summons did not comply with section 10 of the Small Debt (Scotland) Act, 1837, which enacts that the "common debtors" shall be cited, the only parties cited being creditors of the deceased. The representatives of the deceased had not confirmed, and were not cited. The Sheriff-substitute, although aware of the fact that the statute had not been complied with, repelled an objection to the competency of the action based on that fact, and pronounced a decree of ranking and payment. *Held* that an appeal against this interlocutor was competent, as the Sheriff-substitute's intentional disregard of the statute was a deviation therefrom, which had taken place "wilfully," and which also prevented substantial justice from being done in respect that a decree in the action would not afford the insurance company complete exoneration. *Britannic Assurance Co., Limited, v. James Henderson, Limited*, (J) p. 31.

See *Reparation*, 20—*Poor's-Roll*, 1—*Process*, 24-28, 31, 34, 40, 41.

SHERIFF OFFICER. See *Diligence*.

SHIP. *Maritime lien—Necessaries—Necessaries supplied in foreign port.*

1. *Held* (by the Lord Ordinary) that the law of Scotland, like the law of England, does not recognise a maritime lien for necessaries

SHIP—Continued.

even when they have been supplied to a ship in a foreign port. *Constant v. Christensen*, p. 1371.

Owner—Brokers—Order from brokers for ship's stores—Liability for price.

2. A ship chandler received an order from a firm of "steamship owners and brokers" in these terms:—"Please supply the s.s. 'Silvia' with the following stores." He delivered the goods under the erroneous belief that the firm were the owners of the vessel, and sought to hold them liable for the price. *Held* that the firm were not liable, in respect that they were acting as agents for the owners, and—since the latter could be discovered by reference to the Register of Shipping—as agents for a disclosed principal. *Armour v. Duff & Co.*, p. 120.

Collision—Compulsory pilot—Merchant Shipping Act, 1894, sec. 633.

3. A ship, proceeding up the Clyde in charge of a compulsory pilot, collided with a vessel lying moored at a wharf. In an action of damages by the owners of the latter vessel against the owners of the former vessel, *held* that the defenders fell to be assoilzied, in respect that, the ship being in charge of a compulsory pilot, it was necessary for the pursuers to prove that the collision was caused by the fault of the defenders or those for whom they were responsible, and this they had failed to do. *Alexander Stephen & Sons, Limited, v. Allan Line Steamship Co., Limited*, (H. L.) p. 69.

Damage to ship in course of discharge—Liability of charterers—Negligence of stevedores engaged and paid, but not controlled, by charterers.

4. In an action brought by the owners against the charterers of a ship for damages in respect of injury received by the ship during the discharge of the cargo, the pursuers averred that the defenders were liable, in respect that they had employed and paid the stevedores and the owners of a crane engaged in the discharge, by whose negligence the injury was caused. *Held* that, as it was not averred that the defenders had undertaken the control of the discharge of the cargo, the pursuers had failed to set forth a relevant case; and action dismissed. *Ballantyne & Co. v. Paton & Hendry*, p. 246.

Charter-party—Construction—Liability for damage to ship through negligent discharge.

5. A charter-party provided:—"Cargo to be loaded, stowed, and discharged free of expense to steamer, with use of steamer's winch and winchmen if required." *Held* that this clause had not the effect of transferring the duty of discharging the cargo from the shipowner, on whom it rests at common law, to the charterer, so as to render the latter responsible for damage received by the ship in the course of discharge. *Ballantyne & Co. v. Paton & Hendry*, p. 246.

Bill of Lading—Through bill of lading—Construction—Acknowledgment that goods in good order at place of departure—Goods found damaged at place of arrival—Claim against last carrier—Onus.

6. A quantity of flour in bags was consigned from Minneapolis, U.S.A., to Glasgow on a "through" bill of lading signed by an agent on behalf of the various carriers on the route (including the steamship company carrying from New York to Glasgow), and bearing that the goods were "received at Minneapolis in apparent good order, except as noted." On receiving the cargo at New York the steamship company notified a few bags as damaged, but on the discharge of the cargo at Glasgow a large number of bags were found to have been "caked," i.e., damaged by fresh water. The consignees thereupon brought an action of damages against the steamship company. Circumstances in which *held* that (except as regarded the small number of bags which had been notified as damaged) the defenders were bound by the admission in the through bill of lading that the flour had been received in apparent good order,

SHIP—Continued.

and the onus was on them to prove that the damage had been sustained before the flour came into their possession; and that, having failed to discharge that onus, they were liable to the pursuers. Crawford & Law v. Allan Line Steamship Co., Limited, (H. L.) p. 56.

Demurrage—Exemption of any "claim for damages" for delay "by reason of" a strike—Claim for demurrage—Congestion at port of discharge following on termination of a strike.

7. A charter-party, which allowed ten days on demurrage beyond the lay days at a certain rate, contained a clause providing that the days for discharging should not count during the continuance of a strike, and also providing that in case of delay "by reason of" a strike no "claim for damages" should lie. The ship was detained at the port of discharge for four days beyond the lay days, not owing to the continuance of a strike, but owing to congestion following on the termination of a strike. In an action for demurrage for these four days, *held* (1) that the detention was a "delay by reason of" a strike, which excluded claims for damages, and (2) that claims for damages for delay were not limited to claims for detention beyond the demurrage period, but included claims for demurrage. *Moor Line, Limited, v. Distillers Co., Limited, p. 514.*

Demurrage—Exceptions—"Stoppage at collieries"—Causes which "prevent or delay the loading."

8. A charter-party stipulated that a vessel should load a cargo of coals in sixty running hours, time not to count in case of "delays through stoppages at collieries with which steamer is booked to load," or "any accidents or cause beyond control of the charterers which may prevent or delay the loading." A colliery company, who were supplying to the charterers a certain class of coal, having temporarily restricted the output for the purpose of economic working and thereby diminished the supply, failed to deliver coal in sufficient quantities to allow loading to proceed continuously, and the consequent delay caused the vessel to exceed her stipulated loading time. *Held* that the charterers were not relieved from a claim for demurrage by the clause of exception, in respect (1) that the restricted output of the coal in question was not a "stoppage at collieries" in the sense of the charter-party, and (2) that it did not "prevent or delay the loading" but delayed the provision of the cargo. *"Arden" Steamship Co., Limited, v. Mathwin & Son, p. 211.*

Salvage—Competing actions against same defender—Competency of conjoining actions—Right of competing pursuers to cross-examine each other's witnesses.

9. Two shipowners brought separate actions against the same defender in respect of salvage services rendered to the defender's vessel. The claims of the two pursuers were mutually hostile. *Held* that the Lord Ordinary had rightly conjoined the actions, but his interlocutor *varied* by the addition of a declaration that (following the English practice) counsel for the one pursuer should have the right to cross-examine the witnesses for the other. *Lindsey Steam Fishing Co., Limited, v. Actieselskabet Bonheur, p. 1235.*

Salvage—Conjoined actions at the instance of different pursuers—Duty of defender to apportion sum tendered amongst pursuers.

10. Where separate actions for salvage services at the instance of two pursuers having conflicting interests had been brought against the same defender and had been conjoined, *opinion per curiam* that, if the defender desired to put in a tender in the conjoined actions, he should (following the English practice) be obliged to apportion the sum tendered between the pursuers. *Lindsey Steam Fishing Co., Limited, v. Actieselskabet Bonheur, p. 1235.*

SLANDER. See *Reparation*, 3-8.

STATUTE. *Construction—Repeal—Reference to practice under repealed statute.*

1. Question whether a repealing statute can be construed by reference to the practice which prevailed under the statute which it repeals. *Thomson v. Bent Colliery Co., Limited*, p. 242.

Bye-law—Order—Ultra vires—Regulation of traffic—Burgh Police (Scotland) Act, 1892, sec. 385.

2. Under sec. 385 of the *Burgh Police (Scotland) Act, 1892*, the magistrates of a burgh may make "bye-laws and issue notices and orders," *inter alia*, "regulating the traffic, or any particular traffic, in streets within the burgh." The Act further provides that such bye-laws shall be confirmed by the Sheriff and the Secretary for Scotland, but contains no such provision with regard to notices and orders. *Held* that an "order," made by magistrates in pursuance of this section, by which omnibuses were forbidden to turn in certain streets of the burgh was invalid, in respect that, as the regulation was intended to be permanent, it could be competently made only by bye-law. *Taylor v. Nicol, (J.)* p. 38.

Crown—Local Acts—Exemption of the Crown.

3. Observations on the extent to which the Crown is bound by restrictions contained in local Acts. *Magistrates of Edinburgh v. Lord Advocate*, p. 1085.

See *Heritable Office*.

STATUTES.

Act 1449, cap. 18, p. 1125.

Act 1469, cap. 36, pp. 698, 1125.

Act 1669, cap. 18, p. 1125.

Act 1672, cap. 19, pp. 698, 1125.

Act 1681, cap. 17, pp. 698, 1125.

6 *Anne, cap. xi. (Act of Union, 1707)*, p. (H. L.) 12.

20 *Geo. II. cap. 50 (Tenures Abolition Act, 1747)*, pp. 459, 698, 1125.

48 *Geo. III. cap. 151 (Justice and Appeals (Scotland) Act, 1808)*, p. 172.

57 *Geo. III. cap. lvi. (Union Canal Act, 1817)*, p. 1327.

59 *Geo. III. cap. xxix. (Edinburgh and Glasgow Union Canal Act, 1819)*, p. 1328.

5 *Geo. IV. cap. 83 (Vagrancy Act, 1824)*, p. (J.) 58.

6 *Geo. IV. cap. 120 (Judicature Act, 1825)*, pp. 171, 972.

7 and 8 *Geo. IV. cap. 53 (Excise Act, 1827)*, p. 303.

1 and 2 *Will. IV. cap. 43 (General Turnpike Act, 1831)*, p. (J.) 7.

3 and 4 *Will. IV. cap. 30 (Exemption from Rates (Scotland) Act, 1833)*, pp. 1176, 1181.

6 and 7 *Will. IV. cap. 42 (Rosebery Act, 1836)*, p. 1120.

6 and 7 *Will. IV. cap. 69 (Plate (Scotland) Act, 1836)*, p. 992.

7 *Will. IV. and 1 Vict. cap. 41 (Small-Debt (Scotland) Act, 1837)*, p. (J.) 31.

1 and 2 *Vict. cap. 119 (Sheriff Courts (Scotland) Act, 1838)*, p. 244.

3 and 4 *Vict. cap. 59 (Evidence (Scotland) Act, 1840)*, p. (J.) 102.

5 and 6 *Vict. cap. 35 (Income-Tax Act, 1842)*, pp. 452, 1108, 1316, (H. L.) 26.

8 and 9 *Vict. cap. 19 (Lands Clauses Consolidation Act, 1845)*, p. 1120.

8 and 9 *Vict. cap. 33 (Railways Clauses Consolidation (Scotland) Act, 1845)*, pp. 1340, (H. L.) 9, 87.

8 and 9 *Vict. cap. 83 (Poor-Law Act, 1845)*, p. 836.

9 and 10 *Vict. cap. 17 (Burgh Trading Act, 1846)*, pp. 603, 887.

10 and 11 *Vict. cap. 17 (Waterworks Clauses Act, 1847)*, p. 1340.

10 and 11 *Vict. cap. 48 (Lands Transference Act, 1847)*, p. 698.

11 and 12 *Vict. cap. 36 (Entail Amendment Act, 1848)*, pp. 939, 1117.

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- 16 and 17 Vict. cap. 34 (*Income-Tax Act*, 1853), pp. 453, 1315.
 16 and 17 Vict. cap. 80 (*Sheriff Courts (Scotland) Act*, 1853), p. (J.) 43.
 17 and 18 Vict. cap. 31 (*Railway and Canal Traffic Act*, 1854), p. 558.
 17 and 18 Vict. cap. 91 (*Lands Valuation (Scotland) Act*, 1854), pp. 759, 772, 776, 807, 816, 821, 836, 850, 854.
 18 and 19 Vict. cap. 68 (*Burial Grounds (Scotland) Act*, 1855), pp. 793, 1174, 1176, 1180, 1183.
 19 and 20 Vict. cap. 79 (*Bankruptcy (Scotland) Act*, 1856), p. 1012.
 20 and 21 Vict. cap. 58 (*Valuation Act*, 1857), p. 854.
 20 and 21 Vict. cap. 71 (*Lunacy (Scotland) Act*, 1857), p. 316.
 22 and 23 Vict. cap. xvii. (*Glasgow Public Parks Act*, 1859), pp. 819, 823.
 24 and 25 Vict. cap. 37 (*Poor-Law Act*, 1861), p. 836.
 24 and 25 Vict. cap. 86 (*Conjugal Rights (Scotland) Act*, 1861), p. 746.
 25 and 26 Vict. cap. 101 (*Police and Improvement Act*, 1862), pp. (H. L.) 88, 89, 90.
 25 and 26 Vict. cap. cciii. (*Aberdeen Police and Water-Works Act*, 1862), pp. 196, 1294.
 28 and 29 Vict. cap. 62 (*Poor Rates (Scotland) Act*, 1865), pp. 1176, 1182.
 29 and 30 Vict. cap. cclxxiii. (*Glasgow Police Act*, 1866), pp. 976, (J.) 19.
 31 and 32 Vict. cap. 48 (*Representation of the People (Scotland) Act*, 1868), p. 635.
 31 and 32 Vict. cap. 84 (*Entail Amendment Act*, 1868), p. 939.
 31 and 32 Vict. cap. 95 (*Court of Justiciary (Scotland) Act*, 1868), p. (J.) 47.
 31 and 32 Vict. cap. 100 (*Court of Session Act*, 1868), pp. 118, 355.
 31 and 32 Vict. cap. 101 (*Titles to Land Consolidation (Scotland) Act*, 1868), p. 1218.
 31 and 32 Vict. cap. 123 (*Salmon Fisheries (Scotland) Act*, 1868), p. (J.) 28.
 33 and 34 Vict. cap. 78 (*Tramways Act*, 1870), p. (J.) 23.
 34 and 35 Vict. cap. 31 (*Trade Union Act*, 1871), pp. 534, 1078.
 34 and 35 Vict. cap. 112 (*Prevention of Crimes Act*, 1871), p. (J.) 58.
 34 and 35 Vict. cap. cxli. (*Aberdeen Municipality Extension Act*, 1871), p. 196.
 36 and 37 Vict. cap. i. (*Morison's Estate Act*, 1873), p. 1117.
 37 and 38 Vict. cap. 20 (*Rating Exemptions (Scotland) Act*, 1874), pp. 794, 1173, 1183.
 38 and 39 Vict. cap. 17 (*Explosives Act*, 1875), p. 1229.
 38 and 39 Vict. cap. 63 (*Sale of Food and Drugs Act*, 1875), pp. (J.) 87, 110.
 39 and 40 Vict. cap. 22 (*Trade Union Act Amendment Act*, 1876), p. 534.
 41 and 42 Vict. cap. 8 (*Public Parks (Scotland) Act*, 1878), p. 816.
 41 and 42 Vict. cap. 15 (*Customs and Inland Revenue Act*, 1878), p. 1108.
 41 and 42 Vict. cap. 51 (*Roads and Bridges (Scotland) Act*, 1878), p. (J.) 7.
 41 and 42 Vict. cap. lx. (*Glasgow Public Parks Act*, 1878), pp. 819, 823.
 42 and 43 Vict. cap. 42 (*Valuation Act*, 1879), p. 854.
 42 and 43 Vict. cap. cxxxii. (*Edinburgh Municipal and Police Act*, 1879), p. 1201.
 43 and 44 Vict. cap. 26 (*Married Women's Policies of Assurance (Scotland) Act*, 1880), p. 1003.
 43 and 44 Vict. cap. 42 (*Employers Liability Act*, 1880), p. 263.
 44 and 45 Vict. cap. 58 (*Army Act*, 1881), p. (J.) 105.
 45 and 46 Vict. cap. 61 (*Bills of Exchange Act*, 1882), p. 425.
 45 and 46 Vict. cap. 77 (*Citation Amendment (Scotland) Act*, 1882), p. 1095.

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- 46 and 47 Vict. cap. 22 (*Sea Fisheries Act*, 1883), p. (J.) 3.
 48 and 49 Vict. cap. 3 (*Representation of the People Act*, 1884), p. 637.
 48 and 49 Vict. cap. 51 (*Customs and Inland Revenue Act*, 1885), p. 1064.
 48 and 49 Vict. cap. cxxiii. (*Aberdeen Corporation Water Act*, 1885), p. 1295.
 49 and 50 Vict. cap. 29 (*Crofters Holdings (Scotland) Act*, 1886), p. 773.
 50 and 51 Vict. cap. 35 (*Criminal Procedure Act*, 1887), p. (J.) 43.
 50 and 51 Vict. cap. 58 (*Coal Mines Regulation Act*, 1887), pp. 184, (J.) 63, (H. L.) 33.
 50 and 51 Vict. cap. 69 (*Conveyancing (Scotland) Acts (1874 and 1879) Amendment Act*, 1887), p. 566.
 52 and 53 Vict. cap. 49 (*Arbitration Act*, 1889), p. 303.
 52 and 53 Vict. cap. 50 (*Local Government (Scotland) Act*, 1889), p. 1251.
 53 and 54 Vict. cap. 8 (*Customs and Inland Revenue Act*, 1890), p. 1246.
 53 and 54 Vict. cap. 39 (*Partnership Act*, 1890), pp. 126, 421.
 53 and 54 Vict. cap. ccxliii. (*London County Council's (General Powers) Act*, 1890), p. 833.
 54 and 55 Vict. cap. 34 (*Local Authorities Loans (Scotland) Act*, 1891), p. 142.
 54 and 55 Vict. cap. 69 (*Penal Servitude Act*, 1891), p. (J.) 59.
 54 and 55 Vict. cap. cxxxvi. (*Edinburgh Municipal and Police (Amendment) Act*, 1891), p. 219.
 55 and 56 Vict. cap. 55 (*Burgh Police (Scotland) Act*, 1892), pp. 293, 678, 880, 1285, (J.) 38, 74, (H. L.) 87.
 56 and 57 Vict. cap. 8 (*Local Authorities Loans (Scotland) Act*, 1891, Amendment Act, 1893), p. 142.
 56 and 57 Vict. cap. 61 (*Public Authorities Protection Act*, 1893), pp. 364, 628, 1295.
 56 and 57 Vict. cap. 71 (*Sale of Goods Act*, 1893), p. 1017.
 57 and 58 Vict. cap. 13 (*Arbitration (Scotland) Act*, 1894), p. 617.
 57 and 58 Vict. cap. 30 (*Finance Act*, 1894), p. 375.
 57 and 58 Vict. cap. 44 (*Heritable Securities (Scotland) Act*, 1894), p. 685.
 57 and 58 Vict. cap. lvi. (*Edinburgh Corporation Stock Act*, 1894), p. 139.
 57 and 58 Vict. cap. 60 (*Merchant Shipping Act*, 1894), p. (H. L.) 69.
 58 and 59 Vict. cap. 41 (*Lands Valuation (Scotland) Amendment Act*, 1895), p. 772.
 59 and 60 Vict. cap. 25 (*Friendly Societies Act*, 1896), p. 611.
 59 and 60 Vict. cap. 28 (*Finance Act*, 1896), p. 375.
 59 and 60 Vict. cap. ccxxiv. (*Edinburgh Improvements and Tramways Act*, 1896), p. 139.
 60 and 61 Vict. cap. 38 (*Public Health (Scotland) Act*, 1897), p. 364.
 60 and 61 Vict. cap. 53 (*Congested Districts (Scotland) Act*, 1897), p. 772.
 62 and 63 Vict. cap. 47 (*Private Legislation Procedure (Scotland) Act*, 1899), pp. 1286, 1302.
 62 and 63 Vict. cap. 51 (*Sale of Food and Drugs Act*, 1899), pp. (J.) 88, 110.
 63 and 64 Vict. cap. 49 (*Town-Councils (Scotland) Act*, 1900), p. 1286.
 63 and 64 Vict. cap. cxxi. (*Hamilton, Motherwell, and Wishaw Tramways Act*, 1900), p. (J.) 23.
 63 and 64 Vict. cap. cxxxiii. (*Edinburgh Corporation Act*, 1900), pp. 219, 1199.
 63 and 64 Vict. cap. cl. (*Glasgow Building Regulations Act*, 1900), pp. 400, 410.
 3 Edw. VII. cap. 33 (*Burgh Police (Scotland) Act*, 1903), pp. 880, 1251, 1285, (H. L.) 87.
 3 Edw. VII. cap. 36 (*Motor-Car Act*, 1903), p. (J.) 1.

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- 3 *Edw. VII. cap. cliii. (Lanarkshire Tramways Order Confirmation Act, 1903)*, p. 1254.
- 5 *Edw. VII. cap. 9 (Coal Mines (Weighing of Minerals) Act, 1905)*, p. (J.) 63.
- 6 *Edw. VII. cap. 43 (Street Betting Act, 1906)*, p. (J.) 10.
- 6 *Edw. VII. cap. 58 (Workmen's Compensation Act, 1906)*, pp. 15, 37, 99, 189, 250, 256, 334, 343, 584, 644, 668, 754, 966, 996, 1073, 1145, 1190, 1239, 1262, (H. L.) 1, 7, 20, 70, 74.
- 6 *Edw. VII. cap. clxiii. (Edinburgh Corporation Act, 1906)*, p. 1085.
- 7 *Edw. VII. cap. 9 (Territorial and Reserve Forces Act, 1907)*, p. (J.) 105.
- 7 *Edw. VII. cap. 13 (Finance Act, 1907)*, p. 1108.
- 7 *Edw. VII. cap. 29 (Patents and Designs Act, 1907)*, p. 1185.
- 7 *Edw. VII. cap. 51 (Sheriff Courts (Scotland) Act, 1907)*, pp. 19, 112, 230, 242, 293, 320, 441, 617, 970, 1029, 1101, (J.) 31, (H. L.) 20.
- 7 *Edw. VII. cap. cxlvi. (Glasgow Corporation Act, 1907)*, p. (J.) 66.
- 8 *Edw. VII. cap. lix. (Motherwell Burgh Extension and Sewage Purification Act, 1908)*, p. 1252.
- 8 *Edw. VII. cap. 62 (Local Government (Scotland) Act, 1908)*, pp. 854, (J.) 76.
- 8 *Edw. VII. cap. 64 (Agricultural Holdings (Scotland) Act, 1908)*, p. 235.
- 8 *Edw. VII. cap. 65 (Summary Jurisdiction (Scotland) Act, 1908)*, pp. 992, (J.) 2, 10.
- 8 *Edw. VII. cap. 69 (Companies (Consolidation) Act, 1908)*, pp. 5, 625, 1062.
- 9 *Edw. VII. cap. 44 (Housing, Town Planning, &c., Act, 1909)*, pp. 217, 288, 300.
- 10 *Edw. VII. cap. 8 (Finance (1909-10) Act, 1910)*, pp. 757, 761, 775, 776, 948, 1165, 1246.
- 1 *Geo. V. cap. 3 (Army (Annual) Act, 1911)*, p. (J.) 105.

STOCK EXCHANGE. "Redeemable" Municipal Stock.

A corporation issued Corporation stock, "Redeemable at par after Whitsunday 1927." Held, in the circumstances, that the Corporation were bound on the application of the holders to redeem the stock at par at Whitsunday 1927, and had not merely an option of so doing. *British Linen Bank v. Magistrates of Edinburgh*, p. 139.

STREET. See *Burgh*, 4, 5, 6, 10, 11—*Justiciary Cases*, 10—*Police Offences—Reparation*, 11, 12.

SUCCESSION. Widow's allowance for mournings—Discharge of legal rights.

1. A widow's allowance for mournings is a privileged debt due by her husband's estate, and is not discharged by her acceptance of provisions under her husband's will which are therein declared to be "in full satisfaction of all terce of lands, *jus relictæ*, or legal share of moveables, and any other right or claim competent to her" through his decease. *Griffiths' Trustees v. Griffiths*, p. 626.

Heritable and Moveable—Conversion—Implied conversion—Partial intestacy—Partial conversion.

2. A testator by his trust-disposition and settlement provided for the payment of debts, Government duty, legacies, and annuities, and also for the retention by his trustee of a sum for each of his brother's children in liferent, with fee to their issue. He directed that all these purposes should be satisfied out of his "estate, heritable and moveable," and that the residue should be divided amongst such educational, charitable, and religious purposes within the city of A, as his trustee should select. He gave the trustee a power of sale, but did not direct him to sell. The trustee paid the debts, duty, and

SUCCESSION—*Continued.*

legacies out of the moveable estate, sold a portion of the heritable estate, and expended the price and the surplus moveable estate on improving the remaining heritable estate, which he retained. The annuities were paid and the liferents were satisfied out of the rents. As a result of this system of management, the estate, while largely increased in value, came to consist entirely of heritage or the accumulated rents of heritage. The testator died in 1879. His brother, who was his sole heir in heritage and in moveables, died intestate in 1893. In 1909, in a special case, the residuary purpose of the trust was held void from uncertainty. In a competition between the heir in heritage and the heirs *in mobilibus* of the testator's brother for the undisposed of residue *held* (1) that the operative trust purposes fell to be implemented in rateable proportions out of the heritable and the moveable estate; (2) that accordingly the heritable estate was converted to the extent necessary for the execution of the operative purposes of the trust, but no further; (3) that the undisposed of residue to which the testator's brother acquired right as his heir was heritable and moveable in the proportion which heritage bore to moveables at the testator's death; and (4) that on the death of the brother intestate the residue passed to, and now fell to be divided in that proportion between, his heir in heritage and his heirs *in mobilibus*. *M'Conochie's Trustees v. M'Conochie*, p. 653.

Testament—Documents of debt pinned together with holograph writing importing legatum liberationis.

3. In the repositories of a deceased four I O U's and a letter from the borrower, acknowledging the sum for which one of them had been granted, were found pinned together and folded so that the back of the letter was outermost; and on the back of the letter there was a holograph note signed by the truster, "I don't want this money paid up." *Held* that the writing constituted a valid bequest in cancellation of the debts contained in the I O U's. *Mitchell's Trustees v. Pride*, p. 600.

Testament—Construction—Implication—Supplying prefatory words by implication—Marriage-contract.

4. A testator directed his trustees to hold a share of his residue for his daughter upon the same terms as those contained in her marriage-contract. By the marriage-contract it was provided that the wife should have the liferent of a settled fund, and "*In the third place, upon the death of the*" wife, in the event of there being children and of the husband surviving, that the husband should have a liferent, and that the fee should be paid to the children; "*And lastly, in the event of there being no child or children*" and of the husband surviving, that he should have a liferent, "*and upon the death of the*" husband that the fund should revert and belong to the wife's father, whom failing to certain other beneficiaries. There were no children of the marriage, and no provision with regard to the fee was made for the event, which happened, of the wife being the survivor of the spouses. *Held* that in order to give effect to the intention of the testator it was necessary to imply as introducing the last purpose of the marriage-contract the prefatory words of the third purpose "*upon the death of the*" wife; so that the direction for the distribution of the fee should read as if it were "*upon the death of the wife and upon the death of the husband*"—that is to say, upon the death of the survivor of the spouses. *Scott's Trustees v. Bruce*, p. 105.

Testament—Construction—Provision to widow of "liferent use and enjoyment" of house—Liferent or occupancy—Incidence of burdens and rates.

5. A testator directed his trustees on his death to give to his widow the

SUCCESSION—Continued.

“liferent use and enjoyment” of his house, to pay her an annuity, to set aside a certain sum to provide for the same, to distribute the residue of his estate between his widow and his brothers, and on the death of his widow to divide the price of the house and the annuity fund, with any surplus revenue accrued thereon, among his brothers. Power was given to the trustees to sell the house, with the consent of the widow, and thereafter to pay her the annual income of the price during her life. Held that the interest of the widow in the house was a liferent and not a mere right of occupancy, and accordingly that the feu-duty, proprietor’s taxes, and landlord’s repairs fell to be paid by her and not by the trustees. Johnstone v. Mackenzie’s Trustees, (H. L.) p. 106.

Testament—Construction—Provision of “liferent use and enjoyment” of house, coupled with direction for immediate distribution of the residue —Liferent or occupancy—Liability for proprietor’s burdens.

6. A testator directed his trustee, after payment of the expenses of administering the trust, to give the “liferent use and enjoyment” of a dwelling-house and furnishings to his sister, to pay certain legacies, and to realise and divide the whole residue of his estate among certain residuary legatees; and he directed that on the death of his sister the house and furnishings should be sold and the proceeds divided between the residuary legatees. *Held* that the sister’s right in the house was one of occupancy only and not of liferent proper, and that accordingly the trustee was bound to repay out of the general residue sums expended by her on proprietor’s burdens. *Smart’s Trustee v. Smart’s Trustees*, p. 87.

Destination—Clause of devolution—Mortis causa disposition of heritage —Condition—Validity—Public policy.

7. A clause in a *mortis causa* disposition of heritage provided that each of the heirs, who should succeed to the lands, should be obliged in all time to use the disponent’s name and arms, and that “in case any of the said heirs shall succeed to a peerage, then, when the person so succeeding, or having right to succeed, to my said lands shall also succeed to a peerage, they shall be bound and obliged to denude themselves of all right” in the lands, and the same should devolve on the next heir. *Held* (1) that this clause was not void as against public policy; (2) that it was effectual, although not protected by the fetters of an entail; and (3) that it applied to, and excluded, an heir who, prior to the opening of the succession to the lands, had succeeded to a peerage. *Earl of Caithness v. Sinclair*, p. 79.

Destination—Condition—Use of testator’s name.

8. A testator, by his trust-disposition and settlement, destined his estate of Teaninich in liferent and fee to a series of heirs, under the condition that the heirs taking benefit under the destination should “assume and constantly thereafter use as their surname, arms, and designation the surname, arms, and designation of Munro of Teaninich as their proper surname, arms, and designation in addition to their own surname, arms, and designation”; with a clause of forfeiture in the event of a contravention of the condition. *Held* that, in the absence of express direction that the assumed surname should be the last, a beneficiary was entitled to prefix the surname Munro to his own surname of Spencer, and to design himself “Munro-Spencer of Teaninich.” *Munro’s Trustees v. Spencer*, p. 933.

Accretion—Alimentary annuity—Right of children to share which parent would have taken jure accrescendi.

9. Where an alimentary annuity was settled by a father on his children and the survivor or survivors, *held* that a share of the annuity, set free by the death of one of the children without issue, did not accrete to the issue of another deceased child, there being nothing

SUCCESSION—*Continued.*

in the deed to indicate that the issue of a deceased child were to take the share which would have accrued to their parent if he had survived. *Drybrough's Trustee v. Drybrough's Trustee*, p. 939.

Liferent and fee—Liferenter born after date of deed—Right to fee—Whether annuitant a liferenter—Entail Amendment Act, 1848, secs. 47 and 48—Entail Amendment Act, 1868, sec. 17.

10. The Entail Amendment Act, 1848, secs. 47 and 48, and the Entail Amendment Act, 1868, sec. 17, provide that where, under deeds executed after 1848 and 1868 respectively, a party of full age and born after the date of the deed is in possession of land or estate subject to conditions restricting his enjoyment thereof, or where estate, heritable or moveable, is held in liferent by or for behoof of such a party, he shall be deemed the absolute proprietor thereof. *Held* that these provisions had no application to the case of an annuity. *Drybrough's Trustee v. Drybrough's Trustee*, p. 939.

Faculties and powers—Unrestricted power of Appointment—Validity of exercise—Gift of liferent.

11. A testatrix by her will, after providing for the payment of certain legacies, bequeathed the "residue" of her estate to her sisters in liferent and to her nieces in fee. The testatrix, in addition to her own estate, had a power of appointment over a portion of her father's estate liferented by her, the power being in the form of a direction in her father's will to his trustees "to pay over her portion to such person or persons, and if more than one, in such proportions as she shall by any writing under her hand direct or appoint." *Held* that the testatrix by the bequest of residue in her will had validly exercised the power of appointment conferred on her by her father's testament, notwithstanding that she thereby restricted the right of certain appointees to a liferent. *Observations* on the distinction between unrestricted powers of appointment and powers of apportionment among a prescribed class. *Watt's Trustees v. Jamieson*, p. 1320.

Vesting—Payment at the age of twenty-five after expiry of liferent—Declaration referring vesting to "period of payment"—Accretion—Children "then surviving" and their issue—Issue of predeceasing children.

12. A testator by his settlement directed his trustees to divide his estate into shares and to hold the shares for his children, and their respective spouses, in liferent, and for their respective children in fee. It was declared that the shares of any of his children dying without leaving issue should accresce "to my other children then surviving in liferent and to their respective issue in fee"; that the shares should not be paid to any of the fiars until they attained the age of twenty-five; and that the fee should not vest until "the period of payment" arrived. *Held* (1) that no right in a share of the estate, whether original or accrescing, vested in a grandchild until he attained the age of twenty-five and the liferents of his parents terminated; and (2) that under the clause of accretion the share of one of the testator's children who died without issue passed to the other children alive at her death in liferent, and to their issue in fee, to the exclusion of the issue of children then dead. *Swan's Trustees v. Swan*, p. 273.

See *Fraud*, 1, 2—*Husband and Wife*, 3—*Revenue*, 1.

SUPERIOR AND VASSAL. *Feu-contract — Construction — Composition — "Double" of feu-duty.*

1. A feu-contract, by which certain building lots were conveyed, provided for an annual feu-duty of stated amount in respect of each lot, payable by equal portions at Whitsunday and Martinmas in each

SUPERIOR AND VASSAL—*Continued.*

year. The feu-contract imposed this further obligation on the vassals:—"as also paying to" the superior "a double of the said respective feu-duties before mentioned in name of composition at the expiry of every twenty-two years from the" term of Whitsunday from which the feu-duty in each case commenced to run. *Held* that the sum payable in name of composition was, in each case, a sum equivalent to double of the annual feu-duty, over and above the half-year's feu-duty due at the term at which the composition fell to be paid. *Governors of George Heriot's Trust v. Lawrie's Trustees*, p. 875.

Composition—Mid-superiority—Part redemption of subfeu-duty—Measure of composition due on entry to mid-superiority.

2. In 1817 a vassal subfeued his lands for a feu-duty of £20, which was an adequate return on the value of the lands as at that date. The feu-duty was subsequently redeemed to the extent of £19, 15s., in virtue of a proviso in the feu-disposition, by payment at the rate of twenty years' purchase. On the entry of a singular successor to the mid-superiority in 1908 the superior, on the ground that the existing subfeu-duty of 5s. was illusory, demanded payment of a composition of one year's rent of the lands, amounting to £936. The singular successor tendered £20, either as representing the original subfeu-duty, or as representing the existing subfeu-duty of 5s., plus 5 per cent on the redemption price paid. *Held* that the superior was not entitled to a composition of a year's rent, but was bound to accept the £20 tendered. *Governors of George Heriot's Trust v. Paton's Trustees*, p. 1123.

Casualty—Composition or relief—Entail.

3. In 1849 a vassal, on payment of a composition, obtained from his superior a charter of certain lands in favour of himself and his heirs and assignees whomsoever, under which he was duly entered. In 1851 he entailed the lands. The destination in the deed of entail was to himself and the heirs-male of his body, whom failing, his younger brother and the heirs-male of his body, whom failing, the heirs-female of the body of the entailer's grandfather; and after various other substitutions there followed this clause, "The eldest heir-female and the descendants of her body always excluding heirs-portioners." The deed contained a double manner of holding, and the entailer took infeftment *de me* under it, and held the lands base of himself as mid-superior. In 1860 he propelled the fee of the lands to his only son by disposition in favour of him and the other heirs of entail. The entailer died in 1861 survived by his son, who in 1872, on payment of a casualty of relief, obtained from the superior a writ of confirmation, which confirmed the deed of propulsiion, but also contained a clause of reservation by which the superior reserved to himself and his successors any claim which he or they might have to a composition "whenever the heir of entail to whom the succession shall open shall happen not to be the heir of line of the person who was last entered by me or my foresaids." The son died in 1883 without issue, and was succeeded as heir of entail by his cousin, who would also have been the heir under the investiture of 1849, and who obtained an entry upon payment of relief. On the cousin's death in 1907 without issue, a variance for the first time arose between the line of succession under the deed of entail and that under the deed of 1849; the cousin's sister, Miss R., succeeding to the whole lands as heir of entail, while under the deed of 1849 she would have succeeded merely as an heir-portioner along with her two sisters. The superior having claimed from Miss R. a composition on her entry to the *pro indiviso* two-thirds of the lands which, but for the entail, would have

SUPERIOR AND VASSAL—*Continued.*

fallen to her sisters, *held* that the tailzied destination had not been enfranchised either by the writ of confirmation of 1872, with its clause of reservation, or by the entry of the cousin, and that as Miss R. was not the heir to two-thirds of the lands under the enfranchised investiture of 1849, she was liable in payment of a composition in respect of her entry thereto. *Duke of Argyll v. Riddell*, p. 694.

Casualties—Composition or relief—Conveyance to Trustees—Heir of truster having "ultimate beneficial interest"—Conveyancing (Scotland) Acts (1874 and 1879) Amendment Act, 1887, sec. 1.

4. The testamentary trustees of the last-entered vassal in certain lands were directed to retain the residue of his estate including these lands until his eldest child, if a male, should attain the age of twenty-one, or, if a female, should attain that age or be married, and on the arrival of that period, if the truster then had a son or sons surviving, to hold the lands for behoof of his eldest son, and failing him before attaining the age of twenty-one, for behoof of his next eldest son on his attaining that age, and so on for his sons in the order of seniority. By a codicil the truster gave his widow a liferent of the lands, and postponed until her death the conveyance of the lands to the son who should be entitled to take them. In the event of failure of all the truster's issue under age, there was a bequest of residue, including the lands, to the truster's sister whom failing to her children equally among them. The truster was survived by his widow and by two sons, the elder of whom was over twenty-one at his father's death. The trustees having made up a title to the lands by notarial instrument, duly recorded in the Register of Sasines, the superior called upon them for payment of a composition of a year's rent in respect of their implied entry. In a special case the Court *found* that the trustees were liable in relief-duty only, holding that under the terms of the trust they had no power to introduce a stranger to the investiture, and, accordingly, that the truster's heir (even assuming that vesting was postponed till the widow's death) had the ultimate beneficial interest in the lands, in the sense of section 1 of the Conveyancing Amendment Act, 1887. *Duke of Argyll v. Graham's Trustees*, p. 566.

See *Property*, 4—*Title to Heritage*.

SUPER-TAX. See *Revenue*, 6.

SUSPENSION. See *Title to Sue*, 7.

TENDER. See *Process*, 2.

TESTAMENT. See *Succession—Fraud*, 1, 2.

TITLE TO HERITAGE. *Ward-Holding—Fortress—Possession by vassal as keeper of the castle—Effect of abolition of ward-holding on vassal's title—Superior and Vassal—Property—Parts and Pertinents—Clan Act, 1747.*

From ancient times the lands of Pennycastle of Dunstaffnage with their parts and pertinents were held by a vassal on a ward-holding, the reddendo including (besides a feu-duty) the rendering of military services to the superior and the military guardianship of the castle of Dunstaffnage, as well as the duty of maintaining the castle fit for the residence of the superior and of rendering certain services of fuel whenever he should reside there. The property in the castle admittedly remained with the superior, but the vassal's duties as keeper of the castle involved the occupation and possession of it by him. After the passing of the Clan Act in 1747, by which ward-holding was abolished, the military services were commuted for a money payment, but the other obligations of the vassal still con-

TITLE TO HERITAGE—Continued.

tinued. In 1810 the castle was burned down and was never rebuilt. In an action between the superior and the vassal brought in 1909, the vassal asserted a right of property in the castle, and maintained that, after the passing of the Clan Act, his possession of the castle was no longer that of military keeper for the superior, but was that of proprietor. *Held* that the superior was still the proprietor of the castle, in respect that the Clan Act, though abolishing military services, did not alter the proprietary rights in the subjects, and that after 1747 the vassal had continued in possession of the castle solely as keeper for the superior for the purpose of rendering the civil services enumerated in his charters. *Duke of Argyll v. Campbell*, p. 458.

TITLE AND INTEREST TO SUE AND DEFEND. *Trade union rules—Agreement with member to pay sick benefit to dependants—Revocable agreement—Claim by dependant.*

1. The rules of a trade union, which could be altered at the will of the general council, provided that if a member became insane his wife, family, or parent, if dependent upon him, should be eligible to receive sick benefit for one year. In an action at the instance of the wife of an insane member against the union for recovery of sick benefit, *held* that as the agreement embodied in the rules, though revocable, had not been revoked when the pursuer's claim arose, she had a good title to sue. *Love v. Amalgamated Society of Lithographic Printers of Great Britain and Ireland*, p. 1078.

Patent affecting business of firm—Title and interest of individual partner to sue—Patents and Designs Act, 1907, sec. 94 (3).

2. In an action for revocation of a patent relating to concrete, brought with the concurrence of the Lord Advocate, the pursuer averred that he was a civil engineer, and was a member of a firm doing a large business in reinforced concrete, and that "the pursuer's business" was in danger of being affected by the enforcement of the defender's patent. The action was brought in the name of the pursuer as an individual and not of his firm. *Held* that the pursuer had a title and interest to sue in his own name. *Melville v. Cummings*, p. 1185.

Title of proprietor to interdict nuisance affecting letting value of his property.

3. *Opinion* that the law of Scotland allows "a proprietor to apply for interdict in respect of operations by a third party, complained of by his tenant, and lowering or reasonably calculated to lower, the letting value of his tenement." *M'Ewen v. Steedman & M'Alister*, p. 156.

Debt due to a deceased's estate—Action at instance of a beneficiary.

4. *Circumstances* where *held* by the Lord Ordinary, and approved of by the Court, that a beneficiary on the executry estate of a deceased was not entitled to sue for a debt due to the estate, although he averred that the deceased's executor had an adverse interest and had refused or delayed to take action. *Morrison v. Morrison's Executrix*, p. 892.

Slander of a class—Title of individuals to sue.

5. A newspaper published an article on Ireland stating that in Queens-town instructions were issued by the Roman Catholic religious authorities that all Protestant shop assistants should be discharged, and that a shopkeeper who had refused so to act had had his shop proclaimed and had been forced to close it. An action was brought by the Roman Catholic Bishop at Queenstown and six of his clergy (who averred that they were the Roman Catholic religious authorities referred to), in which they, suing as individuals, sought to recover

TITLE AND INTEREST TO SUE AND DEFEND—*Continued.*

separate sums of damages on account of the accusations in the article. *Held* that the pursuers were entitled to sue for damages as individuals. *Brown v. Thomson & Co.*, p. 359.

Ratepayer—Rates and assessments—Declarator at instance of individual ratepayers that assessments by magistrates illegal.

6. The magistrates of a burgh in fixing the burgh general assessment for the year, included in their estimate a sum for defraying a portion of the expenses incurred by them in the unsuccessful promotion of a provisional order for the extension of the burgh boundaries. The remainder of the expenses they proposed to defray out of the assessments for the following years. *Held* that certain individual ratepayers, who had paid their assessments for the year, had a good title to bring an action against the magistrates for declarator that the defenders had no right to levy or exact rates from the pursuers for the purpose of paying these expenses. *Stirling County Council v. Magistrates of Falkirk*, p. 1281.

Ratepayer—Rates and assessments—Illegal assessments by magistrates—Suspension and interdict at instance of individual ratepayers.

7. The magistrates of a burgh, in fixing the water rates for the current year, included in their estimate of expenditure to be paid out of the rates a sum representing half of the expenses incurred by them in the unsuccessful promotion of a provisional order and private bill. In an action of suspension and interdict brought against them by certain individual ratepayers in the burgh a plea of no title or interest to sue *repelled*. *Farquhar & Gill v. Magistrates of Aberdeen*, p. 1294.

See *Burgh*, 7—*Executor*, 3—*Process*, 1—*Property*, 3.

TRADE INCORPORATION. See *Burgh*, 13, 14.

TRADE PROTECTION SOCIETY. See *Reparation*, 8.

TRADE UNION. *Unregistered trade union—Objects—Legality of objects—Promotion of parliamentary representation—Ultra vires—Trade Union Act, 1871—Trade Union Act Amendment Act, 1876, sec. 16.*

1. The decision of the House of Lords in the case of *Amalgamated Society of Railway Servants v. Osborne*, [1910] A. C. 87, to the effect that a rule which purports to confer on a trade union power to levy contributions from members for the purpose of promoting parliamentary representation is *ultra vires* and illegal, applies equally whether the trade union is or is not registered under the Trade Union Acts of 1871 and 1876. *Wilson v. Scottish Typographical Association*, p. 534.

Agreement to provide benefits—Enforcement—Provision of sick benefits to person dependent on member—Trade Union Act, 1871, sec. 4 (3) (a).

2. The rules of a trade union provided that if a member became insane his wife, family, or parent, if dependent upon him, should be eligible to receive sick benefit for one year. In an action at the instance of the wife of an insane member against the union for recovery of sick benefit, *held* that, as the agreement was not one for the provision of benefits to a member, but to the dependant of a member, the jurisdiction of the Court was not excluded by sec. 4 (3) (a) of the Trade Union Act, 1871. *Love v. Amalgamated Society of Lithographic Printers of Great Britain and Ireland*, p. 1078.

Jurisdiction of Court—Exclusion of actions enforcing agreements to provide benefits—Action to determine validity of proposed alterations in rules—Interdict against misapplication of funds—Trade Union Act, 1871, sec. 4 (3) (a).

3. *Held* that an action at the instance of a member of an unregistered trade union for declarator that certain proposed alterations in the

TRADE UNION—Continued.

rules were *ultra vires*, and for interdict against misapplication of the funds of the union, was not a proceeding instituted with the object of directly enforcing an "agreement to provide benefits to members," in the sense of the Trade Union Act, 1871, sec. 4 (3) (a), and that, accordingly, the Court had jurisdiction to entertain the action. *Wilson v. Scottish Typographical Association*, p. 534.

See *Association*.

TRAMWAY. Tramways Act, 1870, sec. 51—Passenger travelling without paying requisite fare—Proof of fraud.

1. *Held* that a person cannot be convicted of the statutory offence of travelling without paying the requisite fare unless it appears that he acted with fraudulent intention. *Nimmo v. Lanarkshire Tramways Co.*, (J.) p. 23.

Statutory cars for workmen at reduced fares—Right to charge other passengers ordinary fares—Hamilton, Motherwell, and Wishaw Tramways Act, 1900, sec. 75.

2. A tramway company was bound by its private Act to run cars for workmen at reduced fares specified in the Act. *Opinions* that the Act did not warrant the company in discriminating in the matter of fares between workmen and other passengers who were allowed to travel in cars for workmen. *Nimmo v. Lanarkshire Tramways Co.*, (J.) p. 23.

See *Reparation*, 10.

TRUST. Trustee—Conveyance to trustee, whom failing, his heir—Title of heir of deceased trustee to act.

1. A testator disposed his whole estate to J. H., "whom failing, the nearest heir-male who may be resident in Great Britain and *sui juris* at the time" of J. H., "as trustee for the ends, uses, and purposes aftermentioned." The trust purposes included payment of certain annuities and of a liferent. J. H. survived the testator and accepted office as sole trustee, but died before all the trust purposes were fulfilled. *Held* that the trust did not lapse by the death of J. H., but that his heir-male was entitled to act as trustee and to administer the trust. *Brown v. Hastie*, p. 304.

Liability of trustees—Negligence of original trustee—Action by assumed trustees—Alleged delay and contributory negligence of pursuers—Right to maintain action for behoof of beneficiaries.

2. One of the original trustees acting under a trust-disposition and settlement died in 1887, and in the same year two new trustees were assumed, one of whom was also a beneficiary under the trust. In 1909 these new trustees, suing in their capacity as trustees, brought an action against the representatives of the deceased trustee for recovery of funds which they alleged had been lost to the trust-estate through his negligence. The defenders pleaded that the pursuers were barred by *mora*, and by the fact that they had themselves been guilty of negligence which had contributed to the loss. *Held* that, assuming the truth of the allegations against the pursuers, they were still entitled to prosecute the action for behoof of the beneficiaries whom they represented. *Held* further that, although one of the pursuers was a beneficiary under the trust, the question whether her rights as a beneficiary were excluded by her conduct as a trustee could not be decided in an action to which as an individual she was not a party. *Lees' Trustees v. Dun*, p. 50.

Administration—Powers of trustees—Power to expend trust funds on, and grant long lease of, urban tenement—Application to nobile officium of Court.

3. The trustees under a testamentary settlement (the purposes of which

TRUST—*Continued.*

involved separate interests of liferenters and fiars) presented a petition to the *nobile officium* of the Court for authority to expend a portion of the capital of the trust-estate in altering and repairing an urban tenement, and for power thereafter to lease the tenement for twenty-one years, which, in their opinion, would be to the advantage of all the beneficiaries. The Court *dismissed* the petition, *holding* (1) that if the trustees did not already possess the desired powers under the deed, it was incompetent for the Court to grant them; and (2) that if the trustees did possess the powers, the exercise thereof was a matter of administration for their own determination. *Noble's Trustees*, p. 1230.

Administration—Investment—Power to continue business—Conversion of business into private limited company.

4. A testator by his will directed his trustees to realise the business owned and carried on by him, or, alternatively, to "continue" the business if they considered it "desirable to retain the same and conduct it for behoof of" his estate. In the event of realisation the trustees were directed to invest the proceeds in trust investments. The trustees, after carrying on the business for some years, proposed to form it into, and conduct it as, a private limited liability company, with substantially the same capital and under the same control as before. *Held* that, in the circumstances, the trustees' proposal did not amount to a realisation of the old business (which would require the proceeds to be invested in trust investments), or to the starting of a new business, but was in substance a continuation of the old business. *MacKechnie's Trustees v. Macadam*, p. 1059.

Administration—Investment—Foreign investments—Deposit of security writs in foreign country—Duty of trustees to creditor attaching beneficiary's interest.

5. By her trust-disposition and settlement a testatrix directed her trustees, on the death of a liferenter, to convey her whole estate to A, an American citizen, and gave them special powers of investment in American securities, desiring them to act in this matter under the advice of a New York trust company. The trust funds were invested by the trustees in American securities which were deposited with this company. During the subsistence of the liferent an American creditor of A, by means of an arrestment and furthcoming, obtained a decree of the Scottish Courts adjudging to her A's whole interest in the trust-estate. Thereafter the creditor brought an action against the trustees in which she averred that the form in which the securities were taken would, by American law, entitle A to demand delivery of them from the custodiers thereof on the liferenter's death, and maintained that the defenders were bound to invest the funds in such form as would prevent her right under the Scottish decree being thus defeated; and she also sought to interdict the defenders from returning the security writs to America, whence they had been brought for the purpose of the actions. The Court *assolized* the defenders, holding that their administration could not be interfered with, as the acts complained of were not in breach of the trust, in respect (1) that the trustees were entitled under the trust-deed to deposit the securities in New York; and (2) with regard to the investments, that they were under no duty to do anything for the purpose of fortifying the pursuer's position which would not have been required in the ordinary course of the administration of the trust. *Brower's Executor v. Ramsay's Trustees*, p. 1374.

Administration—Payment of debts—Provision for contingent debts—Personal liability of trustees and executors.

6. *Circumstances in which held* that testamentary trustees, as they were

TRUST—Continued.

not trustees for creditors, were entitled after six months to pay the testator's debts *primo venienti* without making provision for a contingent claim arising out of a letter of guarantee granted by the testator. *Observations* on the duties of trustees and executors with regard to payment of debts. *Taylor & Ferguson, Limited, v. Glass's Trustees*, p. 165.

Administration—Severance of interests of beneficiaries—Appropriation of investments to particular legacies—Appreciation in value of investments appropriated.

7. A testator directed his trustee to hold a specified sum for a certain party in liferent, and his issue in fee, and to pay over the residue of his estate "as it accrues and becomes available" to his residuary legatees. On the death of the liferenter it was found that the stocks, in which the legacy had been invested, had considerably increased in value. In a competition between the fiars and the residuary legatees, *held* that the trustee had an implied power under the terms of the trust-deed to set aside and invest the specified sum for the satisfaction of the legacy, and, accordingly, that the fiars were entitled to the benefit of the appreciation in the value of the securities. *Vans Dunlop's Trustees v. Pollok*, p. 10.

Administration—Charges against estate—Annual payment to trustees.

8. By his trust-disposition and settlement a testator directed his trustees to set aside £16,000 and hold it for the alimentary liferent use of certain liferenters and for certain other beneficiaries in fee, and to divide the residue of his estate among his residuary legatees. He also directed his trustees to pay to themselves annually the sum of twenty-five guineas. *Held* that the trustees were not entitled, before distributing the residue, to retain a capital sum to meet the annual payment to themselves, but were entitled to charge that payment against the revenue of the £16,000 which they continued to hold for the liferenters. *Kirkwood v. Kirkwood's Trustees*, p. 613.

Trustee acting as law-agent to trust—Appointment—Remuneration.

9. A law-agent, being one of a body of testamentary trustees who had authority under the testament to appoint a law-agent from among their own number, rendered professional services to the trust with the knowledge of his co-trustees, but without having been formally appointed to be law-agent to the trust. *Circumstances* in which the law-agent was *held* to have been validly employed, and to be entitled to remuneration for his services. *Observed* that when trustees intend to exercise a power to appoint one of their number to be law-agent to the trust, the only proper procedure is to make the appointment and to record it in the minutes of the trust. *Lewis's Trustees v. Pirie*, p. 574.
- See *Alimentary Provision—Expenses*, 12—*Process*, 22.

ULTRA VIRES. See *Police Offences—Trade Union*, 1.

USAGE. See *Custom*.

VALUATION ACTS. *Subjects—Value—Public sewer—Burgh sewer passing through adjacent county.*

1. An underground sewer, belonging to and serving a burgh but yielding no profit, was laid for a portion of its length in the adjoining county. *Held* that the portion so laid fell to be entered in the Valuation-roll of the county at its fair yearly value, fixed, in the circumstances of the case, at a figure representing 5 per cent of the cost of construction plus a sum of £50 payable for wayleave. *Magistrates of Dundee v. Assessor for Forfarshire*, p. 848.

Subjects—Hotel and stables—Cumulo or separate valuation.

2. A property, owned and occupied by an hotel-keeper, consisted of an

VALUATION ACTS—*Continued.*

hotel situated in a main street and, behind the hotel, stables and a stable-yard opening on to a side street. There was no internal communication between the stables and the hotel, but the two back doors of the hotel opened into the stable-yard. Ordinary hiring was done in the stables in addition to business immediately connected with the hotel. *Held* that the hotel and stables were rightly valued by the Assessor as a *unum quid*. *Philip v. Assessor for Elginshire*, p. 774.

Subjects—Cumulo or separate valuation—Cemetery with superintendent's house and greenhouse—Assessment—Exemption of burial ground from assessments and rates—Rating Exemptions (Scotland) Act, 1874, sec. 1.

3. A house and greenhouse were situated within a cemetery, the only access being by the cemetery gate. The house was the residence and office of the superintendant, and the greenhouse was used for storing and forcing plants bedded out in the cemetery. *Held* that the cemetery, the house, and the greenhouse all fell to be entered in the Valuation-roll as a *unum quid*. *Observations* on the bearing of this decision upon the question whether the houses fell under the statutory exemption from assessments and rates conferred on burial grounds by the Rating Exemptions (Scotland) Act, 1874, sec. 1. *Edinburgh Parish Council v. Edinburgh Magistrates*, p. 793.

Subjects—Cumulo or separate valuations—Houses and offices situated in and used in connection with public park.

4. *Held* that houses and offices situated in and used by the officials of a public park belonging to the Corporation of Glasgow did not fall to be separately entered and valued in the Valuation-roll, but that the park, houses, and offices fell to be treated as a *unum quid*. *Glasgow Parish Council v. Assessor for Glasgow*, p. 818.

Value—Public Parks—Parks owned and regulated by Corporation under statutory powers—Lands yielding no profit—Hypothetical tenant.

5. The Corporation of Glasgow were empowered by certain statutes to lay out and maintain, on lands already acquired, or to be acquired, by them under the statutes, parks for the use of the public of Glasgow. The statutes, which contained no express dedication of the lands to the use of the public generally or of the public of Glasgow in particular, empowered the Corporation to make rules and bye-laws regulating the use of the parks, and also to sell, feu, or lease such portions as they considered unnecessary for the purposes of the Acts. *Held* that parks, both within and without the limits of the city, owned and maintained by the Corporation in terms of these statutes and yielding no profit, fell to be entered in the Valuation-roll, not at a merely nominal figure, but at the rent which a hypothetical tenant might be expected to give for them in their actual condition, irrespective of any limitations on their use in the hands of their present proprietors. *Opinion* that the proper entry in the Valuation-roll under the head "Occupier" was "The Corporation" and not "the Public." *Glasgow Parish Council v. Assessor for Glasgow*, p. 818.

Value—Public park—Land leased by burgh authorities for golf course—Lands yielding no profit.

6. The magistrates of a burgh, acting under statutory powers, obtained a forty years' lease of a piece of ground at a rent of £523, and laid out and maintained the ground as a golf course for the use of the inhabitants of the burgh. They levied charges for playing golf, but these did not cover the cost of upkeep. *Held* that the subjects fell to be entered in the Valuation-roll at their fair annual value, and not at a merely nominal figure. *Opinion* that the magistrates and not the general public were the "occupiers." *Edinburgh Parish Council v. Magistrates of Leith*, p. 812.

VALUATION ACTS—*Continued.*

Value—Cemetery owned by public authority for discharge of statutory duty—Subjects not in fact yielding profit—Burial Grounds (Scotland) Act, 1855.

7. A cemetery was owned and carried on by the magistrates of a city in fulfilment of a statutory duty imposed by the Burial Grounds (Scotland) Act, 1855. Under statute they had power to sell lairs and to receive fees in respect of interments, but the expenditure on the cemetery, as a rule, exceeded the income. *Held* that the cemetery had an annual lettable value in respect that the possession of it enabled the magistrates to discharge a statutory duty, and accordingly that it fell to be entered in the roll at that value and not at a merely nominal figure. *Edinburgh Parish Council v. Edinburgh Magistrates*, p. 793.

Value—Statutory gas-works—Non-profit-earning undertaking—Revenue principle—Deductions—Feu-duties—Landlords' taxes.

8. *Held* that, in valuing on the "revenue principle" a gas-works undertaking carried on by statutory commissioners under a prohibition against making profit, although the whole expenses of management fell to be deducted, feu-duties and landlords' taxes could not be deducted. *Edinburgh and Leith Gas Commissioners v. Assessor for Edinburgh*, p. 790.

Value—Croft sold by Congested Districts Board—Payment by annual instalments—Method of valuation—Proprietor or tenant.

9. A crofter prior to 1905 held a croft from the proprietor of the estate of Glendale at a fair rent fixed by the Crofters' Commission. In 1905 the Congested Districts Board purchased the estate and entered into an agreement with the crofter to sell him his holding at a price payable by annual instalments spread over fifty years, possession to be given immediately, but a formal title to be granted only after the price had been paid up in full. *Held* that from the date of the sale the crofter had become proprietor of the holding, and, accordingly, that it fell to be entered in the Valuation-roll at its true letting value and not at the rent that had been fixed for it as a crofter holding by the Crofters' Commission. *Ferguson v. Assessor for Inverness-shire*, p. 768.

Value—Public-house—Principle of Valuation—Percentage of drawings.

10. The magistrates of a burgh fixed the yearly rent or value of a public-house, occupied by the owner, at 7 per cent of the drawings, of which a statement had been voluntarily tendered by the owner. Neither he nor the Assessor adduced any evidence as to the rents paid for leased public-houses in the neighbourhood; but it was proved that the method applied by the Assessor had been adopted by him under agreement with about sixty other publicans in the burgh who owned and occupied their own premises. *Held* that, in the particular circumstances of the case, the magistrates' decision fell to be sustained. *Observations* as to the valuation of public-house premises on a basis of drawings or turnover. *Haggart v. Assessor for Leith*, p. 784.

Value—Public-house—Increased licence-duty—Presumption as to value—Onus of proof—Refusal to produce statement of drawings.

11. *Held* that the presumption, recognised in the case of *Deards v. Assessor for Edinburgh*, 1911 S. C. 918, that the increased licence-duty imposed by the Finance (1909-10) Act, 1910, had reduced the annual letting value of licensed premises could not be pleaded by a publican who refused a request by the Assessor for the production of a comparative statement of his drawings for the three previous years, in respect that the request was a reasonable one to enable the Assessor to prove that the value of the premises had not been diminished. *Scouller v. Assessor for Glasgow*, p. 757.

VALUATION ACTS—*Continued.**Value—Public-house—Principle of valuation.*

12. *Observations* on the valuation of licensed premises by means of comparison with the rentals of similar adjoining premises. *Scouller v. Assessor for Glasgow*, p. 757.

Value—Licensed grocer's premises—Increased licence-duty—Presumption as to value.

13. The principle laid down in *Deards v. Assessor for Edinburgh*, 1911 S. C. 918, in the case of a public-house, viz., that the increased licence-duty imposed by the Finance (1909-1910) Act, 1910, established a *prima facie* case for the reduction of the valuation, *re-affirmed*, and *applied* to a licensed grocer's shop; and the valuation *reduced* by half the amount of the increase of the duty. *Robertson v. Assessor for Perth*, p. 761.

Value—Lease—Bona fide lease—Consideration other than rent—Relationship of lessor and lessee—Conditions favourable to lessor.

14. A deceased farmer's testamentary trustees (consisting of his widow, who was the liferentrix, and her two sons) let the farm and shootings, which for many years had been entered in the roll at £235, to one of the sons at a rent of £175, without advertisement or any attempt to get another tenant. The lease contained, *inter alia*, a clause by which the tenant renounced any claims competent to him at the outgoing under the Agricultural Holdings (Scotland) Act, 1908, or at common law. The Assessor having entered the subjects at £235, the trustees contended that the entry should be £175—the actual rent in the lease. The Court *sustained* the valuation of the Assessor, *holding* that the relationship of the parties (though not in itself conclusive) was, in conjunction with the other facts narrated, sufficient to show that the rent stipulated in the lease was not the true annual value of the subjects. *Assessor for Dumfriesshire v. Kirk's Trustees*, p. 780.

Value—Mineral lease—Mineral field situated in two valuation districts—Apportionment of value as between the two districts.

15. In an appeal against the valuation of a mineral field, situated partly in one valuation district and partly in another, which was let on a lease providing for a fixed rent with the alternative of royalties, *held* that the equitable rule for apportioning the valuation between the two districts was as follows:—(1) *Where the minerals were not being worked*:—On the basis of the fixed rent, apportioned according to the surface area of the minerals in each district. (2) *Where the minerals were being worked*:—On the basis of the royalties actually earned, apportioned according to the amount earned from the minerals won in each district, with the addition of any sum by which the fixed rent might exceed the total royalties, that sum being apportioned according to surface area. *United Collieries, Limited, v. Assessor for Lanarkshire*, p. 800.

Value—Evidence of value—Personal knowledge of Valuation Committees.

16. *Held* that a Valuation Committee are not entitled to proceed upon facts not admitted or proved, but stated by them to be within their personal knowledge, unless these facts are public matters or matters of common knowledge; and that the accommodation of a public-house whose valuation is in question, its condition several years earlier, and the rents and other particulars of similar houses in the neighbourhood with which it is compared, are not matters that fall within that category. *Moyes v. Assessor for Perth*, p. 761.

Procedure—Appeal—Times at which various steps must be taken—Delay in lodging cases on appeal to Lands Valuation Appeal Court—Preparation of stated cases—Duties of Appeal Committee in stating cases.

17. Valuation Committees in counties and burghs must hold their Courts

VALUATION ACTS—*Continued.*

between 10th and 19th September, with continuation of days, and complete their work and dispose of all appeals before 30th September. Parties appealing against any determination of a Committee, and the respondents in such appeal, must hand to the Clerk of the Committee their reasons for appeal and answers respectively within ten days from the determination appealed against, *i.e.*, in no case later than 10th October; and the Clerk of the Valuation Committee must transmit the complete case to the Inland Revenue as soon after that date as is reasonably possible, and at anyrate in time for the sitting of the Lands Valuation Appeal Court. In preparing the case it is the duty of the Committee themselves to state the facts and their determination upon them, and to add the reasons of appeal and the answers furnished by the parties; but it is also proper and convenient that the Committee should submit a draft of the case to the parties for their observations, provided that no undue delay is thereby caused. *Stein v. Assessor for Falkirk*, p. 853.

Procedure—Appeal—Competency—Entries in Roll other than yearly value.

18. While no appeal to the Valuation Appeal Court is competent in regard to any entry in the Valuation-roll other than that of yearly value, the Court is not thereby debarred from incidentally determining questions which may affect other entries in the Roll (such as the question whether an appellant is proprietor or tenant) where these questions require to be decided in order to reach the question of yearly value. *Fergusson v. Assessor for Inverness-shire*, p. 768.

See *Revenue*, 8.

WARRANTY. See *Sale*, 2.

WORKMEN'S COMPENSATION ACT, 1906. *Appeal by stated case—Order for transmission of process—A. S., 26th June 1907, sec. 17 (f).*

1. In an appeal by stated case the Court remitted to the arbitrator for a statement of the facts on which he had based his judgment. The arbitrator having reported, the appellant stated that the evidence in the arbitration had been recorded in shorthand, and moved the Court, in respect of the unsatisfactory nature of the arbitrator's report, to order the process to be transmitted to the Court of Session. The respondent made no objection, and the Court *ordered* the process to be transmitted. *Millar v. Refuge Assurance Co., Limited*, p. 37.

Appeal by stated case—Appellant allowed to lodge a condescence—Expenses.

2. In an appeal by stated case from the decision of an arbitrator dismissing an application for compensation in respect that the workman had failed relevantly to aver the happening of an accident, the Court permitted the workman to submit a condescence of the specific facts on which he relied, and thereafter *allowed* it to be received, and remitted to the arbitrator to proceed; but, in a question as to the taxation of the parties' accounts, *refused* to allow the appellant (who had been awarded the expenses of the appeal) the expenses of preparing and lodging the condescence. *M'Laughlin v. Wemyss Coal Co., Limited*, p. 250.

Appeal by stated case—Expenses.

3. In a stated case under the Workmen's Compensation Act, 1906, the Court found the appellant entitled to the "expenses of the appeal." Upon a note of objections to the report of the Auditor, who had disallowed the expenses of obtaining the stated case from the Sheriff, the Court *allowed* a modified fee of three guineas for these expenses, and *observed* that in future a modified fee of three guineas and a half would be allowed. *Observed* that there is no distinction between an

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award of "expenses of the appeal" and an award of "expenses of the stated case." *M'Laughlin v. Wemyss Coal Co., Limited*, p. 250.

Sec. 1 (1)—Injury by "accident"—Incapacity due to heart disease.

4. In an arbitration under the Workmen's Compensation Act, 1906, it was proved that a workman, while engaged in lifting a weight, felt a pain in the breast followed by palpitation of the heart; that he was found to be suffering from heart disease of long standing, which was bound to manifest itself sooner or later and probably in the way described; and that from that time his condition became gradually worse until he became permanently incapacitated for work as a result of the diseased state of his heart. It was not proved that the lifting of the weight had accelerated the progress of the disease. *Held* that on the facts stated the arbitrator was entitled to find, as he did, that the workman had failed to prove that his incapacity was due to an "accident" within the meaning of the Workmen's Compensation Act, 1906. *Spence v. William Baird & Co., Limited*, p. 343.

Sec. 1 (1)—"Out of and in the course of the employment"—Injury to knee—Incapacity alleged to be due to similar injury in previous employment—Onus of proof.

5. In December 1908 a workman in the course of his employment felt a severe pain in his right knee on rising from a kneeling position, and on examination it was found that the cartilage was torn. Three years before, while in another employment, he had sustained a "wrench" to the same knee, which had incapacitated him for some weeks, after which he was able to resume his ordinary work. It was not clear on the evidence whether the later injury was connected with the former, or, if so, to what extent it was so connected. In answer to a claim by the workman for compensation against the firm in whose employment he was in December 1908, they maintained that the incapacity was due to the original injury. *Held* that, as the injury in December 1908 was apparently sustained in the employment of his then employers, the onus was on them to show that it was due to the former accident; that they had failed to discharge this onus, and were accordingly liable to pay compensation. *Borland v. Watson, Gow, & Co.*, p. 15.

Sec. 1 (1)—"Out of and in the course of the employment"—Collector falling on stair.

6. A collector for an assurance company, whose duty it was to make a door-to-door collection of premiums, fell upon a stair which he had occasion to use while seeking to collect a premium, and was injured. *Held* that the accident arose "out of and in the course of" the employment. *Millar v. Refuge Assurance Co., Limited*, p. 37.

Sec. 1 (1)—"Out of and in the course of the employment"—School janitor injured by falling on the street.

7. A school janitor, conveying a message on school business through the streets of Paisley about noon on a hot July day, was overcome by giddiness or faintness brought on by the heat, and fell, struck his head against the pavement, and sustained injuries of which he died. *Held* that the accident did not arise out of his employment. *Rodger v. Paisley School Board*, p. 584.

Sec. 1 (1)—"Out of and in the course of the employment"—Message clerk injured while boarding a tramway car in motion.

8. A boy, employed as a message clerk, was sent on an errand and given money to pay for his tramway fare. While attempting unnecessarily to board a tramway car in motion—which, as he knew, was forbidden—he fell, and was injured. *Held* that the accident did not arise out

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of the boy's employment. *Symon v. Wemyss Coal Co., Limited*, p. 1239.

Sec. 1 (1)—“Out of and in the course of the employment”—Heat apoplexy.

9. A plumber, who was engaged in laying and jointing iron pipes in the open air on a day of unusual heat and who had to stoop at his work, was taken ill while so employed and died some days afterwards from heat apoplexy. *Held* that, even assuming that there had been an “accident,” it did not arise “out of” the deceased's employment, as there was no peculiar danger to which he had been exposed by the nature of his employment beyond that to which other persons who had to stoop at outdoor labour on the day in question were exposed. *Blakey v. Robson, Eckford, & Co., Limited*, p. 334.

Sec. 1 (1)—“Out of and in the course of the employment”—Seaman attempting to reach ship in a boat without oars.

10. A ship's engineer who had been ashore in the course of his employment attempted to reach his vessel, which was moored 100 yards from the shore, alone and without oars in a 27-foot lifeboat, trusting that the boat would be carried in the direction of the vessel by the force of wind and tide, his only means of directing its course being by paddling with the rudder. He was blown out to sea and was drowned. *Held* that the accident did not arise out of the employment. *Halvorsen v. Salvesen*, p. 99.

Sec. 1 (3)—Arbitration—Competency—Compensation being paid—“Question” arising under the Act.

11. A workman, who was receiving full compensation for total incapacity under the Workmen's Compensation Act, 1906, applied for the registration of a memorandum of agreement for payment of compensation at that rate until ended, diminished, &c., in terms of the Act. The genuineness of this memorandum was objected to by the employers, on the ground that the workman had signed a receipt bearing that he had agreed that compensation should be paid only while his employers were of opinion that his incapacity continued. The workman accordingly abandoned the application. He then presented an application for arbitration to fix the amount of compensation, to the competency of which the employers objected on the ground that, as full compensation was being paid, there was no “question” arising in any proceedings under the Act within the meaning of sec. 1 (3) thereof. *Held*, in the circumstances, that there was a “question” in the sense of the Act, and that the workman was entitled to apply for and to obtain an award of compensation. *Hunter v. John Brown & Co., Limited*, p. 996.

Sec. 1 (3)—Arbitration—Competency—“Question” as to duration of compensation—Act of Sederunt, 26th June 1907, (2).

12. The employers of a workman who had been totally incapacitated by an accident admitted liability under the Workmen's Compensation Act, tendered the amount of compensation due (as to which there was no dispute), and requested the workman to sign a receipt which contained this clause:—“At the first or any subsequent payment liability is admitted only for the compensation to date of payment. Further liability, if any, will be determined week by week when application for payment is made.” The workman objected to this clause on the ground that he was entitled to have an unqualified admission of liability, refused to sign the receipt, and initiated arbitration proceedings. *Held* that there was a “question” between the parties as to the duration of the compensation which had not been settled by agreement, and, accordingly, that the arbitration was competent. *Freeland v. Summerlee Iron Co., Limited*, p. 1145.

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Sec. 1 (4)—Assessment of compensation—Unsuccessful action of damages against employer—Application for assessment of compensation—Time for making application—Procedure to follow on application—Expenses of application.

13. *Held* that where a workman, who has been unsuccessful before a jury in the Court of Session in an action of damages for personal injuries directed against his employer, desires to move the Court to assess compensation under the Workmen's Compensation Act, the motion must be made before the verdict of the jury is applied, and if not so made it will be too late. *Observations* on the character of the proceedings and the scope of the inquiry that will follow on the granting of such a motion. *Circumstances* in which *held* that a workman, who had been unsuccessful in an action of damages for personal injuries against his employers, but had thereafter applied for, and been awarded, compensation under sec. 1 (4) of the Workmen's Compensation Act, was entitled to the expense of obtaining the award of compensation. *Slavin v. Train & Taylor*, p. 754.

Sec. 2 (1) (a)—Notice of accident—Want of notice—"Mistake or other reasonable cause."

14. On 9th May 1910 a collector for an assurance company fell, in the course of his employment, on a stair and sustained injuries. A day or two after the accident, and again on 8th June, while he still believed that his injuries were temporary, he gave verbal notice of the accident, but made no claim for compensation. On 29th June he left the service of the company, and from that date onwards he was incapacitated. On 12th September, when he had ascertained from medical advice that his condition was much more serious than he had at first supposed, he gave formal notice of the accident. *Circumstances* in which *held* that the delay in giving notice was due to "mistake . . . or other reasonable cause" within the meaning of section 2 (1) (a) of the Workmen's Compensation Act, and so was not a bar to the maintenance of proceedings for compensation. *Millar v. Refuge Assurance Co., Limited*, p. 37.

Sec. 6—Remedies against employer and stranger—"Recovery" of both damages and compensation—Acceptance of compensation under reservation of claims against third parties.

15. An injured workman obtained compensation from his employers, for which he granted receipts which bore that he had "elected to take compensation under the Workmen's Compensation Act." They further bore to be granted "under reservation of my claims against third parties," and he agreed with his employers to repay the sums received from them if he recovered damages from the third parties whom he alleged to be responsible for the accident. In an action of damages by the workman against these third parties *held* that he had not "recovered" compensation in the sense of sec. 6 of the Workmen's Compensation Act, 1906, so as to be barred from pursuing the action. *Wright v. Lindsay*, p. 189.

Sec. 7 (2)—Workman—Fisherman partly remunerated by share in earnings.

16. A fisherman was employed as a member of the crew of a steam trawler upon a contract of service with the master, representing the owner, under which he received wages at the rate of 30s. a week, and a commission of 2d. per £1 on the gross value of the fish landed under deduction of the cost of carriage. During the only week of his employment his commission amounted to 7s. *Held* that he was not "remunerated" by a share in the profits or the gross earnings of the working of the vessel, and accordingly was not excluded by sec.

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7 (2) of the Workmen's Compensation Act, 1906, from claiming compensation under the Act. *Colquhoun v. Woolfe*, p. 1190.

Sec. 8, subsecs. (1), (2), and Third Schedule—Industrial disease—Certificates of certifying surgeon and of medical referee—Claimant certified to be suffering from scheduled disease—Finding that disease not due to employment—Claimant's right to prove contrary—Onus.

17. A miner, claiming compensation under the Workmen's Compensation Act, 1906, in respect of an industrial disease, obtained from a certifying surgeon a certificate that he was suffering from, and disabled by, "nystagmus," one of the scheduled diseases applicable to the employment of "mining." A medical referee, to whom the matter was referred on the application of the employers, found that the claimant suffered from nystagmus, but that it was not miner's nystagmus but one of the other forms of that disease. The arbitrator dismissed the claim on the ground that, in view of the referee's finding, the claimant had not obtained the certificate, required by sec. 8 of the Act, that he was suffering from a scheduled disease. In an appeal *held* (1) that the claimant had obtained the necessary certificate that he was suffering from a scheduled disease, (2) that the decision of the medical referee was not final as to whether that disease was or was not due to the claimant's employment, and (3) that the effect of the finding that it was not due to his employment was to displace the presumption in his favour, and to throw on him the onus of proving affirmatively that it was; and case *remitted* to the arbitrator to allow a proof. *Opinion* that it is competent for a medical referee, while affirming the certificate of a certifying surgeon that a claimant is suffering from a scheduled disease, to vary that certificate by finding that the disease is, or is not, due to his employment. *McGinn v. Udston Coal Co., Limited*, p. 668.

Sec. 13—"Dependants"—Children deserted by their father and maintained chiefly by their brothers.

18. A workman deserted his wife and his four children in March 1907. Up to 1909, besides a few shillings given directly to the children, occasional small payments, amounting in all to £2, were made to the wife by her husband for the children's support. In September 1909 she obtained a decree against him for aliment of the two younger children who were in pupillarity, and recovered 17s. from his employers by arrestment used on the decree. The workman then disappeared and was not traced until his death, by an accident in the course of his employment, in April 1911. From the date of his desertion his wife and family were supported partly from small sums earned by the wife but mainly from the earnings of the two elder sons. After the workman's death the wages then due to him were paid to his wife. *Held* that the children were neither wholly nor partially dependent on their father's earnings at the time of his death, and were, therefore, not entitled to compensation under the Act. *Young v. Niddrie and Benhar Coal Co., Limited*, p. 644.

Sec. 16—Accident happening before commencement of Act—Application of Act—Right of appeal to House of Lords—"Proceedings consequential" on medical reference.

19. *The Workmen's Compensation Act, 1906 (which provides for an appeal to the House of Lords that did not exist under the Act of 1897), enacts, sec. 16, that the Act shall not apply to cases where the accident happened before its commencement, "except so far as it relates to references to medical referees and proceedings consequential thereon." In an arbitration with regard to an accident which had happened before the commencement of the Act of 1906, the arbitrator made a remit, under*

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paragraph (15) of the Second Schedule to that Act, to a medical referee to examine and report, and thereafter pronounced an interlocutor which was appealed to the Court of Session. An appeal having been taken from the judgment of the Court of Session to the House of Lords, held that the judgment of the Court of Session was not a "proceeding consequential" on the medical reference and accordingly that the provisions of the Act of 1897, and not those of the Act of 1906, applied, and excluded the appeal. Rosie v. Mackay, (H. L.) p. 7.

First Sched. (1) (b), (3), and (16)—Incapacity for work—Inability to get work—Review—Competency—Change of circumstances.

20. Held (1) that a workman's inability to obtain work owing to his injured condition is "incapacity for work" within the meaning of the Act, even though he may be physically capable of doing work; (2) that supervening inability to obtain work is a relevant ground for reviewing a weekly payment, even though there may have been no change in the workman's physical condition. *Duris v. Wilsons and Clyde Coal Co., Limited*, (H. L.) p. 74.

First Sched. (1) (b) and (3)—Incapacity for work—Physical capacity—Wage-earning capacity.

21. A miner, who had lost one eye by an accident and who had been given work above ground and was receiving partial compensation, was examined by a medical referee, who reported that he was "as fit as any other one-eyed man to resume his work underground." The employers having applied to have the compensation ended, the arbitrator, after a proof, found that the miner had made various applications for work underground without success, and that he "is presently working on the surface and is only able on account of his injuries to earn 18s. a week," and dismissed the application. In an appeal the Court refused to disturb the arbitrator's finding. *Arnott v. Fife Coal Co., Limited*, p. 1262.

First Sched. (1) (b), (3), and (15)—Incapacity for work—Wage-earning capacity—Report by medical referee of fitness for work—Finality of medical referee's report—Competency of further inquiry into wage-earning capacity.

22. By agreement between a coal miner, who had received an injury to his thumb and was receiving compensation, and his employers the question of the workman's capacity to resume his former employment was referred to a medical referee under paragraph 15 of the First Schedule to the Workmen's Compensation Act. The medical referee reported that the workman was "quite fit to resume his ordinary employment as a coal miner, having recovered from" the injury. The employers thereupon applied to have the compensation ended, when the workman lodged answers in which he averred that having returned to work he had ascertained "that his earning ability has been considerably reduced from the effects of his injury," and maintained that he was still entitled to partial compensation. The arbitrator having ended the compensation, the workman appealed and craved leave to lead evidence in support of his averments. The Court dismissed the appeal, holding that, as the medical referee's report was final, and was from its terms conclusive as to the question raised by the workman's averments, proof of these averments was inadmissible. Observed that where a medical referee's report is not from its terms conclusive a proof may be admissible. Question whether a proof might not have been admissible if the workman had averred that, owing to the consequences of the accident, he had been unable to obtain employment. *Gray v. Shotts Iron Co., Limited*, p. 1267.

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First Sched. (1) (b) and (16)—Cessation of incapacity—Review—Ending of compensation—Loss of eye—Diseased condition of other eye—Risk of future incapacity—Concurrent causes of incapacity.

23. A miner lost his right eye through an accident arising out of his employment, and for a time received from his employers compensation for total incapacity. Subsequently, in proceedings for review, the arbitrator ended the compensation, on the ground that the miner's incapacity had ceased, and that he was fit to resume his former work as a miner. He however also found that there was incipient cataract in the remaining eye which would gradually produce incapacity for work, but that the cataract was not due to the accident. Held that the arbitrator was right in ending the compensation. *Hargreave v. Haughhead Coal Co., Limited*, (H. L.) p. 70.

First Sched. (1) (b) and (16)—Possibility of supervening incapacity—Review—Nominal award—Suspensory order.

24. Decision in *Rosie v. Mackay*, 1910 S. C. 714, to the effect that it is incompetent to keep open a claim to compensation by means of a nominal award or similar device, doubted in view of the opinions delivered in the House of Lords in the subsequent English case of *Taylor v. London and North-Western Railway*, [1912] A. C. 242. *Weir v. North British Railway Co.*, p. 1073.

First Sched. (3)—Amount of weekly payment—"Benefit" received from Employer—Payment of hospital charges.

25. Held that the payment by employers of an account rendered to them for the maintenance of an injured man in hospital was a "benefit" received by the workman in the sense of paragraph 3 of the First Schedule to the Workmen's Compensation Act, 1906, which fell to be taken into account in fixing the amount of his compensation. *Sorensen v. John Gaff & Co.*, p. 1163.

First Sched. (4)—Medical examination of workman on behalf of employer—Workman's demand for presence of his own doctor.

26. Held that a workman has not an absolute right to insist on his own doctor being present when he is being examined, in terms of paragraph (4) of the First Schedule to the Workmen's Compensation Act, 1906, by a medical practitioner on behalf of the employers; the question whether such a demand is reasonable or unreasonable, and, accordingly, whether the workman's insistence on it does or does not amount to a refusal to submit himself to examination, being a question of fact for the decision of the arbitrator in each particular case. *Morgan v. William Dixon, Limited*, (H. L.) p. 1.

Second Sched. (9)—Recording of memorandum—Written agreement between parties—Terms of memorandum differing from terms of agreement.

27. Where an agreement in writing has been entered into between an employer and a workman with regard to compensation, it is the duty of the Sheriff (if objection is taken) to refuse to record a memorandum which is not in the precise terms of the written agreement. It is not part of his duty to construe the written agreement and then to determine whether the memorandum gives effect to it as so construed. *M'Lean v. Allan Line Steamship Co., Limited*, p. 256.

Second Sched. (17) (b)—A. S., 26th June 1907, sec. (17) (h)—Stated case—Refusal of arbitrator to state a case—Accident arising out of and in the course of the employment—Form of question of law.

28. In arbitration proceedings under the Workmen's Compensation Act, 1906, the arbitrator found that a workman's death resulted from injuries sustained by him owing to a fall from a ladder, and awarded compensation. A medical certificate which was produced stated the cause of death to have been appendicitis-peritonitis. The arbitrator refused a minute for the employers craving him to state a case for

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the opinion of the Court on the question whether the death of the deceased "was the result of an accident arising out of and in the course of his employment," on the ground that the question was one of fact and not of law. *Held* that the proper question was "whether there was evidence upon which it could competently be found that the death of the workman was the result of an accident arising out of and in the course of his employment"; and case *remitted* to the arbitrator to state a case on this question. *Euman v. Dalziel & Co.*, p. 966.

Second Sched. (17) (b)—Act of Sederunt, 26th June 1907, sec. 17 (g)—Stated case—Procedure—Remit to arbitrator to reconsider his award.

29. In an appeal by way of stated case in an arbitration under the Workmen's Compensation Act, the Court, without answering the questions put, *remitted* the case to the arbitrator to reconsider his award in light of the opinions expressed by the House of Lords in a judgment pronounced after the date of his decision. *Weir v. North British Railway Co.*, p. 1073.

Second Sched. (17) (b)—Appeal—Stage at which appeal competent—Appeal against allowance of proof.

30. *Observations* on the circumstances in which the Court will consider an appeal under the Workmen's Compensation Act before proof has been taken. *Colquhoun v. Woolfe*, p. 1190.

WRIT. *Holograph writing—Documents of debt pinned together with holograph writing importing legatum liberationis.*

In the repositories of a deceased four I O U's and a letter from the borrower, acknowledging the sum for which one of them had been granted, were found pinned together and folded so that the back of the letter was outermost; and on the back of the letter there was a holograph note signed by the truster, "I don't want this money paid up." *Held* that the writing constituted a valid bequest in cancellation of the debts contained in the I O U's. *Mitchell's Trustees v. Pride*, p. 600.

See *Sheriff*, 2.

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